The Future of Teleworking Accommodations Under the ADA Post-COVID-19

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I. INTRODUCTION

Janet Pearce was thriving in her dream job.[1] Starting as a researcher for NBC in 1967, she ascended through the network to eventually become a senior producer, receiving numerous awards along the way.[2] However, amid her success at work, Pearce was also battling multiple sclerosis—the symptoms and treatments for which eventually prevented her from working full-time in the newsroom.[3] Yet, Pearce's successful tenure at NBC did not waiver.[4] This is because she had the option to telework.[5]

Pearce's teleworking success story represents the Americans with Disabilities Act's ("ADA") primary goal to guarantee "that people with disabilities have the same opportunities as everyone else to participate in the mainstream of American life."[6] To further this goal, the ADA prohibits employers from discriminating on the basis of disability[7]—including not making reasonable accommodations for their employees'

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1. Maggie Gram, *For Many Caregivers and People with Disabilities, WFH Was Never Just a Perk*, N.Y. TIMES (July 13, 2021), https://www.nytimes.com/2020/05/27/at-home/work-from-home-history.html [https://perma.cc/33DW-QXBK].

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Information and Technical Assistance on the Americans with Disabilities Act*, U.S. DEP'T JUST. C.R. DIV., ada.gov/ada_intro.htm [https://perma.cc/2FT5-DSEU] (last visited Aug. 26, 2021).

7. 42 U.S.C. § 12112(a).

disabilities.[8] Since the 1990s, employees with disabilities have requested telework accommodations when their physical or mental limitations hinder their ability to work in-person at their places of employment.[9]

However, when employers reject accommodation requests and litigation under the ADA ensues, the courts have largely deferred to employers.[10] The courts do so by emphasizing the "in-person" attendance function of employees' positions.[11] In determining that the in-person function of most employees' jobs is essential, the courts by and large hold the employees are not qualified individuals, thereby barring their failure-to-accommodate claims under the ADA.[12]

The courts' reliance on this in-person attendance function is misguided. COVID-19 forced many traditionally in-person jobs online, demonstrating employees are more capable of performing their jobs through telework than previously understood.[13] With this understanding, under the ADA—and the Rehabilitation Act, which mirrors the ADA for the public sector—courts should extend greater deference to employees when evaluating if telework is a reasonable accommodation. Additionally, courts should place the full burden of proof on employers to demonstrate telework as an accommodation truly poses an undue burden.[14]

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8. *Id.* § 12112(b)(5)(A).

9. *See, e.g.*, Vande Zande v. Wis. Dep't of Admin., 44 F.3d 538, 544 (7th Cir. 1995).

10. *See* Robert Iafolla, *Work at Home Gets Skeptical Eye From Courts as Disability Issue*, BLOOMBERG L. (Feb. 21, 2019, 5:15 AM), https://news.bloomberglaw.com/daily-labor-report/work-at-home-gets-skeptical-eye-from-courts-as-disability-issue ("Employers won 70 percent of the rulings over the past two years on whether they could reject workers' bids for telework as an accommodation for a disability.").

11. EEOC v. Ford Motor Co., 782 F.3d 753, 762–63 (6th Cir. 2015) (en banc) (concluding that "[r]egular, in-person attendance is an essential function—and a prerequisite to essential functions—of most jobs, especially the interactive ones.").

12. *See* Iafolla, *supra* note 10.

13. Christopher Mims, *The Work-From-Home Shift Shocked Companies—Now They're Learning Its Lessons*, WALL ST. J. (July 25, 2020, 12:00 AM), https://www.wsj.com/articles/the-work-from-home-shift-shocked-companiesnow-theyre-learning-its-lessons-11595649628 [https://perma.cc/3ZZN-WGGS].

14. Before the pandemic, telework as a reasonable accommodation under the ADA received little attention in scholarly literature. Brianne Sullenger first addressed the issue in 2007, arguing that "[a]s technology continues to make workplaces increasingly virtual, the telecommuting trend will continue to increase. As working from home becomes more prevalent in society, it is essential that telecommuting is properly evaluated as a reasonable accommodation under the ADA." Brianne M. Sullenger, *Telecommuting: A Reasonable Accommodation under the Americans with Disabilities Act as Technology Advances*, 19 REGENT U. L. REV. 533, 556 (2007). In 2015, Benjamin Johnson similarly maintained that "technology has dramatically reduced the extent to which these accommodations are unreasonable." Benjamin D. Johnson, *There's No Place Like Work: How Modern Technology is Changing the Judiciary's Approach to Work-at-Home Arrangements as an ADA Accommodation*, 49 U. RICH. L. REV. 1229, 1263 (2015). Likewise, in 2016, Sean Caulfield

Section II of this Comment will provide background for this argument—detailing the ADA's mandate, the EEOC's guidance for its enforcement, and the courts' decisions on telework accommodation claims. Section III.A. of this Comment further explains why the courts' emphasis on jobs' "in-person" aspect is out-of-date post-COVID-19, given the low-cost technology available today and the uptake in telework since the pandemic. Section III.B. explains the need for a congressional amendment distinguishing between the ADA's "reasonable accommodation" provision and its "undue hardship" defense to end courts' conflation of the two. Section III.C. proposes a new test for courts to evaluate telework as an accommodation that is aligned with modern-day understanding of teleworking's feasibility. Finally, Section III.D. considers the unequal availability of telework and responds to concerns about its impact on productivity.

II. BACKGROUND

Section II.A. of this background details the ADA and the Rehabilitation Act's mandate in terms of their statutory language. Section II.B. explains the EEOC's (rarely followed) ADA enforcement guidance for telework accommodations. Section II.C. then provides an overview of telework accommodation cases since the 1990s.

A. ADA and the Rehabilitation Act

Enacted in 1990, the ADA broadly prohibits disability discrimination in employment, providing that "[n]o covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms,

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argued that "[m]ore circuits should . . . abandon the physical presence presumption in favor of a fact-intensive, case-by-case analysis." Sean Caulfield, *She Works Hard for the Money Wherever She Is: The Need to Abandon the Physical Presence Presumption in Telecommunication Cases Following* EEOC v. Ford, 61 VILL. L. REV. 261, 286 (2016). Amid the COVID-19 pandemic in 2020, Professors Stacy Hickox and Chenwei Liao proposed a theoretical framework for analyzing telework accommodations requests, through which "employers and courts should consider the efficiency, productivity, and satisfaction of remote workers with disabilities . . . at the organizational, team/supervisor, and individual (employees with disabilities and coworkers) levels." Stacy A. Hickox & Chenwei Liao, *Remote Work as an Accommodation for Employees with Disabilities*, 38 HOFSTRA LAB. & EMP. L.J. 25, 84 (2020). Through the pandemic and beyond, I expect a significant increase in the scholarly literature—and litigation—on this topic.

conditions, and privileges of employment."[15] Additionally, the ADA mandates employers to "'make reasonable accommodations to the known physical or mental limitations of a qualified individual' unless doing so 'would impose an undue hardship on the operation of the business of the covered entity.'"[16] "A 'qualified individual' is defined as 'an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.'"[17]

The Rehabilitation Act, while enacted seventeen years before the ADA in 1973, imposes upon employers the same duty the ADA requires––to provide reasonable accommodations to qualified individuals with disabilities.[18] However, whereas the ADA covers entities in the private sector, the Rehabilitation Act covers all departments and agencies of the federal government, in addition to entities that contract with the federal government.[19] While this Comment focuses on the ADA, the statutory language and legislative history of both the ADA and the Rehabilitation Act's 1992 amendments clearly indicate that the legal standard for unlawful disability discrimination is the same under both statutes.[20] Thus, this Comment's discussion of telework as a reasonable accommodation under the ADA is also directly applicable to the Rehabilitation Act.

B. EEOC Enforcement Guidance for Telework Accommodations

Following the ADA's enactment, Congress directed the EEOC to issue regulations to carry out its mandate.[21] In response, the EEOC issued regulations, interpretive directives, and guidelines.[22] In 2003, the EEOC issued specific guidelines regarding telework as an accommodation under the ADA.[23] While this guidance can be helpful for courts when determining if telework is a reasonable accommodation, unless codified,

15. 42 U.S.C. § 12112(a).

16. *Id.* (quoting 42 U.S.C. § 12112(5)(A)).

17. *Id.* (quoting 42 U.S.C. § 12111(8)).

18. 29 U.S.C. § 794(a).

19. *Id.* §§ 791, 793.

20. MARIA L. ONTIVEROS, ROBERTO L. CORRADO, MICHAEL SELMI & MELISSA HART, EMPLOYMENT DISCRIMINATION LAW 813 (9th ed. 2016).

21. *Id.* (citing 42 U.S.C. § 12116).

22. *Id.* at 813–14.

23. *Work at Home/Telework as a Reasonable Accommodation*, U.S. EQUAL EMP. OPPORTUNITY COMM'N (Feb. 3, 2003) [hereinafter *Work at Home*], https://www.eeoc.gov/laws/guidance/work-hometelework-reasonable-accommodation [https://perma.cc/Y9LK-JGPQ].

it is not binding on any court.[24] The EEOC's 2003 guidance specifically notes this, stating: "The contents of this document *do not have the force and effect of law* and are *not* meant to bind the public in any way. This document is intended only to provide clarity to the public regarding existing requirements under the law or agency policies."[25] It is perhaps unsurprising then that the courts' decisions regarding telework accommodations rarely reflect the EEOC's ADA enforcement guidance.[26]

1. Factors and Considerations in 2003 Guidance

The EEOC's 2003 guidance discusses several factors and critical considerations to evaluate if telework is a reasonable accommodation.[27] These factors include "the employer's ability to supervise the employee adequately and whether any duties require use of certain equipment or tools that cannot be replicated at home."[28] Along with these factors, the EEOC provided other critical considerations to evaluate.[29] These considerations include:

> 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.[30]

The guidance goes on to state that "[a]n employer should not, however, deny a request to work at home as a reasonable accommodation solely because a job involves some contact and coordination with other employees."[31] This is because, "[f]requently, meetings can be conducted effectively by telephone and information can be exchanged quickly through e-mail."[32] Notably, the EEOC issued this guidance before widespread videoconferencing was available and has not revised it to reflect the development and common use of this technology.

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24. *See* Johnson, *supra* note 14, at 1254.
25. *Work at Home*, *supra* note 23 (emphasis added).
26. *See generally infra* Section II.C.
27. *Work at Home*, *supra* note 23.
28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.*

2. EEOC Guidance Regarding "Essential Job Functions"

To determine whether a particular job *can* be performed at home, the EEOC provides that "[a]n employer and employee first need to identify and review all of the essential job functions. The essential functions or duties are those tasks that are fundamental to performing a specific job."[33] In separate ADA regulations promulgated by the EEOC in 2009, "essential functions" do "not include the marginal functions of the position."[34] Aligning with this exclusion, the agency's 2003 guidelines regarding telework states:

> [a]n employer does not have to remove any essential job duties to permit an employee to work at home . . . it may *need* to reassign some minor job duties or marginal functions (i.e., those that are not essential to the successful performance of a job) if they cannot be performed outside the workplace and they are the only obstacle to permitting an employee to work at home.[35]

If this is the case, "an employer may substitute another minor task that the employee with a disability could perform at home in order to keep employee workloads evenly distributed."[36]

3. COVID-Specific 2020 Guidance

In September 2020, in the midst of COVID-19, the EEOC provided further guidance for determining whether accommodations—such as teleworking—are reasonable for employees with disabilities.[37] This modern guidance emphasizes the need for workplace flexibility to ensure employee safety during the pandemic.[38] Specifically, this 2020 guidance notes that:

> Flexibility by employers and employees is important in determining if some accommodation is possible in the circumstances. Temporary job restructuring of marginal job duties, temporary transfers to a different

33. *Id.*

34. 29 C.F.R. § 1630.2(n)(1) (2020).

35. *Work at Home*, *supra* note 23 (emphasis added).

36. *Id.*

37. *What You Should Know about COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws [https://perma.cc/JH6N-KQS8] (last updated May 28, 2021).

38. *Id.*

> position, or modifying a work schedule or shift assignment may also permit an individual with a disability to perform safely the essential functions of the job while reducing exposure to others in the workplace or while commuting.[39]

While this COVID-specific EEOC guidance discusses reasonable accommodations broadly for at-risk individuals during the pandemic, it fails to provide any specific updates to the agency's 17-year-old guidance for teleworking accommodations.[40]

C. Overview of Telework Accommodation Cases

1. Widespread Emphasis on In-Person Attendance Across Circuit Courts

Contrary to what the EEOC's guidance suggests, the courts rarely support the idea that telework can often be a reasonable accommodation.[41] This is because, from the 1990s to present-day, courts have continually emphasized the in-person function of employees' job duties when evaluating whether their requests for telework accommodations are reasonable under the ADA.[42]

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39. *Id.*

40. *Id.*

41. JONATHAN R. MOOK, AMERICANS WITH DISABILITIES ACT: EMPLOYEE RIGHTS AND EMPLOYER OBLIGATIONS § 6.04(2)(a)(ii) (2021).

42. *See* Vande Zande v. Wis. Dep't of Admin., 44 F.3d 538, 544 (7th Cir. 1995) (affirming summary judgment for the employer emphasizing that "team work under supervision generally cannot be performed at home without a substantial reduction in the quality of the employee's performance"); Bilinsky v. Am. Airlines, Inc., 928 F.3d 565, 573 (7th Cir. 2019) (affirming summary judgment for the employer concluding that "regular work-site attendance is an essential function of most jobs" because "position[s'] nature will often require face-to-face collaboration"); EEOC v. Ford Motor Co., 782 F.3d 753, 762–63 (6th Cir. 2015) (en banc) (affirming summary judgment for the employer holding that "[r]egular, in-person attendance is an essential function—and a prerequisite to essential functions—of most jobs, especially the interactive ones"); Mason v. Avaya Commc'ns, Inc., 357 F.3d 1114, 1124 (10th Cir. 2004) (affirming summary judgment for the employer holding that "a request to work at home is unreasonable if it eliminates an essential function of the job"); Heaser v. Toro Co., 247 F.3d 826, 829, 832 (8th Cir. 2001) (affirming summary judgment for the employer concluding plaintiff failed to make a prima facie showing that the use of a computer at her home was a reasonable accommodation for her position as a marketing services coordinator); Credeur v. Louisiana, 860 F.3d 785, 788–89 (5th Cir. 2017) (affirming summary judgment for the employer after concluding the employee, an attorney suffering complications from a kidney transplant, needed to be on-site to perform the interactive aspects of her litigation-specific job). *But see* Mosby-Meachem v. Memphis Light, Gas & Water Div., 883 F.3d 595, 599 (6th Cir. 2018) (affirming denial of the employer's motion for judgment as a matter of law because the employee, an in-house attorney, presented sufficient evidence that she could perform all the essential functions of her job remotely for 10 weeks while on bed rest for pregnancy complications).

In 1995, with *Vande Zande v. Wisconsin Department of Administration*, the Seventh Circuit was the first circuit court to decide whether telework is a reasonable accommodation under the ADA.[43] The plaintiff in *Vande Zande*—a clerical employee in Wisconsin's housing division—was paralyzed from the waist down.[44] This paralysis made her prone to ulcers, the treatment of which often required her to stay at home for several weeks.[45] To accommodate this disability, the plaintiff requested to work full time from home, believing she would be able to do so if her employer provided her with a desktop computer.[46] In siding with the employer, the Seventh Circuit concluded that no jury could "be permitted to stretch the concept of 'reasonable accommodation' so far."[47] The court came to this conclusion after emphasizing that "[m]ost jobs . . . involve team work under supervision rather than solitary unsupervised work, and team work under supervision generally cannot be performed at home without a substantial reduction in the quality of the employee's performance."[48] Further, in noting there could be exceptions in which telework *would* be reasonable, the court cautioned that such an exception would "take a very extraordinary case."[49]

The Seventh Circuit affirmed this view again in 2003, noting that "a home office is rarely a reasonable accommodation" because "most jobs require the kind of teamwork, personal interaction, and supervision that simply cannot be had in a home office situation."[50] Again, in 2019, the Seventh Circuit stuck by this conclusion in *Bilinsky v. American Airlines, Inc.*,[51] noting "[t]here is a general consensus among courts . . . that regular work-site attendance is an essential function of most jobs"[52] because "position[s'] nature will often require face-to-face collaboration."[53] Yet, while the Seventh Circuit in *Bilinsky* ultimately held for the employer, the court also acknowledged that "[t]echnological development and the

43. *See generally* 44 F.3d 538.

44. *Id.* at 543–44.

45. *Id.* at 543.

46. *Id.* at 544.

47. *Id.*

48. *Id.*

49. *Id.* at 545.

50. Rauen v. U.S. Tobacco Mfg. Ltd. P'ship, 319 F.3d 891, 896 (7th Cir. 2003) (citing *Vande Zande*, 44 F.3d at 544–45).

51. *See* 928 F.3d 565, 574 (7th Cir. 2019); *see also* Yochim v. Carson, 935 F.3d 586, 591–92 (7th Cir. 2019) (holding the employee's request for a telework accommodation unreasonable citing the "'general consensus . . . among courts' that jobs 'often require face-to-face collaboration'").

52. *Bilinsky*, 928 F.3d at 573 (quoting Credeur v. Louisiana, 860 F.3d 785, 793 (5th Cir. 2017)).

53. *Id.* (quoting EEOC v. Yellow Freight Sys., Inc., 253 F.3d 943, 948 (7th Cir. 2001) (en banc)).

expansion of telecommuting in the twenty-four years since *Vande Zande* likely mean that such an accommodation is not quite as extraordinary as it was then."[54]

In 2015, with *EEOC v. Ford Motor Co.*, the Sixth Circuit, sitting en banc, concluded that the plaintiff, a Ford resale buyer with irritable bowel syndrome, was not entitled to telework as a reasonable accommodation.[55] In siding with Ford's denial of this employee's telework accommodation request, the court held that "[r]egular, in-person attendance is an essential function—and a prerequisite to essential functions—of most jobs, especially the interactive ones."[56] Notably within this holding, the Sixth Circuit also found that technologies such as "email, computers, telephone, and limited video conferencing—were *equally* available when courts around the country uniformly held that on-site attendance is essential for interactive jobs."[57] Thus, the Sixth Circuit concluded that, as of 2015, "technology has not changed so as to make regular in-person attendance marginal for [the] job."[58] In 2020, the Sixth Circuit affirmed this holding in *Tchankpa v. Ascena Retail Group, Inc.* by concluding that the employer in question had no duty to grant an employee's request to work from home, stating, "[a]fter all, we presume on-site attendance is an essential job requirement."[59]

Along with these two circuits, nearly every other circuit court has emphasized the importance of the in-person attendance function when holding for employers who have denied their employees' requests to telework as an ADA accommodation.[60] This widely held belief among the circuits—namely, that "physical attendance in the workplace is itself an essential function"—has rendered nearly all telework accommodation requests unreasonable.[61] This is because, to be eligible for an accommodation under the ADA, an employee must first show that they are a "qualified individual."[62] To be a "qualified individual," the employee must demonstrate they "can perform the essential functions of

54. *Id*.

55. 782 F.3d 753, 757–58, 763 (6th Cir. 2015) (en banc).

56. *Id.* at 762–63.

57. *Id.* at 765 (emphasis added).

58. *Id.* (emphasis omitted).

59. 951 F.3d 805, 813 (6th Cir. 2020) (citing *Ford Motor Co.*, 782 F.3d at 761–62).

60. *See* cases cited *supra* note 42.

61. Valdez v. McGill, 462 F. App'x 814, 817 (10th Cir. 2012) (quoting Mason v. Avaya Commc'ns, Inc., 357 F.3d 1114, 1119 (10th Cir. 2004)); *see also* Cisneros v. Wilson, 226 F.3d 1113, 1129 (10th Cir. 2000).

62. 42 U.S.C. § 12112(a).

the employment position" with the accommodation.[63] In this way, if a court finds the employee *cannot* perform the essential functions of the job with the accommodation, they will not be a "qualified individual."[64] Thus, the employee will be ineligible for the accommodation.[65] For this reason, if in-person attendance is deemed an essential function of an employee's job, the employee's telework accommodation request will be barred under the ADA. As teleworking failure-to-accommodate complaints are filed through the pandemic and beyond, courts will have ample opportunity to reevaluate the weight placed on the in-person attendance function of employees' job duties.[66]

2. Courts Conflate "Reasonable Accommodation" and the "Undue Hardship" Defense Impacting Who Bears the Burden of Proof

As stated above, the ADA defines "discriminate" to include:

> [N]ot 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 . . . .[67]

The undue hardship defense is an affirmative defense that the employer has the obligation to assert.[68] The ADA defines "undue hardship" as "an action requiring significant difficulty or expense, when considered in light of the factors set forth in subparagraph (B)."[69] Subparagraph (B) of the Act provides these factors to be considered:

> (i) the nature and cost of the accommodation needed under this chapter;
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> (ii) the overall financial resources of the facility or facilities involved in

63. *Id.* § 12111(8).

64. *Id.*

65. *Id.* § 12112(a).

66. On September 7, 2021, the EEOC filed its first ADA complaint based on an employer's failure to accommodate an employee's request to telework during the pandemic. *See* EEOC v. ISS Facility Servs., Inc., No. 1:21-CV-3708-SCJ-RDC (N.D. Ga. filed Sept. 7, 2021).

67. § 12112(b)(5)(A) (emphasis added).

68. Rodal v. Anesthesia Grp. of Onondaga, P.C., 369 F.3d 113, 121–22 (2d Cir. 2004) ("'Undue hardship' is an employer's affirmative defense, proof of which requires a detailed showing that the proposed accommodation would 'requir[e] significant difficulty or expense' in light of specific enumerated statutory factors.") (quoting Lovejoy-Wilson v. NOCO Motor Fuel, Inc., 263 F.3d 208, 221 (2d Cir. 2001)).

69. § 12111(10)(A).

> the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility;
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> (iii) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and
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> (iv) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.[70]

Yet, as Professor Nicole Buonocore Porter explains, the courts often "[hold] that some accommodations cause[] undue hardship even when they [do] not meet the traditional undue hardship factors but rather seem[] unreasonable for some factor other than cost."[71]

While the ADA's "reasonable accommodation" provision and its "undue hardship" defense appear to be separate inquiries, courts often conflate the two.[72] In doing so, courts frequently hold that an unreasonable accommodation is one that causes an undue hardship.[73]Along with the courts, scholars have debated whether the "reasonable accommodation" provision and the "undue hardship" defense are simply "two sides of the same coin" (i.e., an unreasonable accommodation is also an undue hardship) or whether they are separate inquiries (i.e., an accommodation can be unreasonable even if it does not cause an undue hardship).[74]

The distinction between the two positions has a significant impact on who ultimately bears the burden of proof in accommodations litigation. For example, if the "reasonable accommodation" provision is conflated with the "undue hardship" defense, the employer will be off the hook for

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70. § 12111(10)(B).

71. Nicole Buonocore Porter, *A New Look at the ADA's Undue Hardship Defense*, 84 MO. L. REV. 121, 156 (2019).

72. *See id.*

73. *See, e.g.*, Arneson v. Sullivan, 946 F.2d 90, 92 (8th Cir. 1991) (noting that "[a]n unreasonable accommodation is one which 'would impose undue hardship on the operation of its program.'") (quoting Arneson v. Heckler, 879 F.2d 393, 397 (8th Cir. 1989)).

74. *See* Porter, *supra* note 71, at 156 n.317 ("*Compare* Mark C. Weber, *Unreasonable Accommodation and Due Hardship*, 62 FLA. L. REV. 1119, 1148 (2010) (arguing that reasonable accommodations and undue hardship are flip sides of the same coin)" *with* Nicole Buonocore Porter, *Martinizing Title I of the Americans with Disabilities Act*, 47 GA. L. REV. 527, 545–46 (2013) "(arguing that 'reasonable accommodation' has meaning and substance aside from whether or not it causes an undue hardship)").

actually proving the "undue hardship" affirmative defense. Because the determination of who bears the burden of proof is often outcome-determinative, it may affect employees' and employers' "perceptions of the potential risks and rewards of litigation."[75] In this way, as Professor Jeannette Cox notes, who bears the burden of proof may "influence whether an employer chooses to deny an employee's accommodation request in the first place."[76]

In 2002, with *US Airways, Inc. v. Barnett*—the Supreme Court's only decision to address the ADA's "reasonable accommodation" provision—the Court had the opportunity to clarify this confusion.[77] In *Barnett*, the Court was asked to resolve a conflict between an "employee's right to reassignment to a vacant position as an accommodation and the superior seniority rights of other employees who also sought reassignment to the vacant position."[78] The plaintiff in *Barnett* argued "the seniority system had nothing to do with whether the accommodation was reasonable," and that, instead, the question should be analyzed under the undue hardship defense—where the employer bears the full burden of proof.[79] The plaintiff maintained that "any other view would make the words 'reasonable accommodation' and 'undue hardship' virtual mirror images––creating redundancy in the statute."[80] The Court disagreed with the plaintiff, stating that "undue hardship" refers to the "undue hardship on the operation of the business."[81] The Court held the *employee* must show the accommodation seems "reasonable on its face" ("i.e., ordinarily or in the run of cases"), and then the *employer* must show the case-specific circumstances to "demonstrate an undue hardship [under] the particular circumstances."[82]

While the Court's holding in *Barnett* arguably should have resolved whether "reasonable accommodation" and "undue hardship" are separate inquiries, scholars still debate the issue.[83] More importantly, the courts

75. Jeannette Cox, *Reasonable Accommodations and the ADA Amendments' Overlooked Potential*, 24 GEO. MASON L. REV. 147, 175 (2016).

76. *Id.*

77. 535 U.S. 391 (2002).

78. *See* Porter, *supra* note 71, at 162 (citing *Barnett*, 535 U.S. at 393–94).

79. *Id.*; *Barnett*, 535 U.S. at 399.

80. *Barnett*, 535 U.S. at 400.

81. *Id.* at 400–01.

82. *Id.* at 401–02.

83. *Compare* Porter, *supra* note 71, at 163 ("[M]y reading of this case is that the [*Barnett*] Court disagreed with the idea that reasonable accommodation and undue hardship are simply two sides of the same coin."), *with* Weber, *supra* note 74, at 1162–63 ("One may fault the [*Barnett*] Court for

still conflate "reasonable accommodation" and "undue hardship"—effectively putting the full burden of proof on employees to show why an accommodation is reasonable *and* why it does not impose an undue burden.[84] This conflation can be seen in many telework accommodation cases. For example, in *Theilig v. United Tech Corp.*—decided in 2011 (just one year after *Barnett*)—the Second Circuit dismissed a failure-to-accommodate claim by an employee who requested to work from home for two months after receiving treatment for severe depression.[85] With this dismissal, the court concluded that the employee had "not carried his burden of identifying an accommodation the costs of which, facially, do not clearly exceed its benefits."[86] This language—which mirrors the "undue hardship" defense's cost benefit analysis—effectively conflates the "reasonableness" inquiry with the "undue hardship" defense.[87] In this way, courts' denial of teleworking accommodation requests as "unreasonable" presupposes the question of whether teleworking actually imposes an "undue hardship" on employers.

III. ANALYSIS

The COVID-19 pandemic forced many traditionally in-person jobs online.[88] While this widespread workplace shift was largely temporary, the shift highlights that the circuit courts' reliance on the "in-person" attendance function of employees' jobs to uphold employers' denials of teleworking accommodations is misguided. COVID-19 demonstrated that employees are far more capable of performing their jobs through telework than previously understood.[89] This newfound understanding should

failing to recognize that reasonable accommodation and undue hardship are two sides of the same coin, but its reading of reasonable accommodation as an easy burden to surmount (apparently in all cases but those involving seniority) may practically be not too far off the mark.") (footnotes omitted).

84. *See* Porter, *supra* note 71, at 163.

85. 415 F. App'x 331, 333 (2d Cir. 2011).

86. *Id.* (quoting Kennedy v. Dresser Rand Co., 193 F.3d 120, 123 (2d Cir. 1999)) (internal quotations omitted).

87. Under the Second Circuit's burden shifting approach, if the employee *had* identified such an accommodation, the employer would then have had the burden of proving that the accommodation entailed an undue hardship, based on a cost benefit analysis. *See* Borkowski v. Valley Cent. Sch. Dist., 63 F.3d 131, 138–39 (2d Cir. 1995). Yet, here, the court's language in requiring the plaintiff to show a reasonable accommodation—"the costs of which, facially, do not clearly exceed its benefits"—mirrors the undue hardship's cost benefit analysis, thus creating the redundancy the plaintiff in *Barnett* argued against. *Theilig*, 415 F. App'x at 333 (quoting *Kennedy*, 193 F.3d at 123).

88. Mims, *supra* note 13.

89. Katherine Guyot & Isabel V. Sawhill, *Telecommuting Will Likely Continue Long after the Pandemic*, BROOKINGS INST. (Apr. 6, 2020), https://www.brookings.edu/blog/up-front/2020/04/06/telecommuting-will-likely-continue-long-after-the-pandemic/ [https://perma.cc/6NWH-EWCJ].

extend past the COVID-19 pandemic, serving as evidence for courts that employees with disabilities can be qualified to telework as a reasonable accommodation.

Accordingly, under the ADA—and the Rehabilitation Act, which mirrors the ADA for the public sector—courts should extend greater deference to employees when evaluating if telework is a reasonable accommodation. Additionally, courts should place the full burden of proof on employers to demonstrate telework accommodations truly impose an undue burden.

Section III.A. of this analysis further explains why the courts' emphasis on jobs' "in-person" aspect is out-of-date post-COVID-19, given today's available low-cost technology and the uptake in telework since the pandemic. Section III.B. explains the need for a congressional amendment distinguishing between the ADA's "reasonable accommodation" provision and its "undue hardship" defense to end courts' conflation of the two. Section III.C. proposes a new test for courts to evaluate telework as an accommodation that is aligned with modern-day understanding of teleworking's feasibility. Finally, Section III.D. considers the unequal availability of telework and responds to concerns about its impact on productivity.

A. Emphasis on In-Person Attendance Out-of-Date Post-COVID-19

After COVID-19, the emphasis on the in-person attendance function of employees' jobs will be out-of-date. This is because the increases in technological capabilities enabling successful telework, coupled with evidence of positive outcomes from teleworking during COVID-19, reveal many in-person employees are capable of performing their essential job duties from home.

The wide-scale advances in technological development that enable successful telework particularly support the Seventh Circuit's 2019 acknowledgment in *Bilinksy* that telework accommodations are "not quite as extraordinary" as they were when the circuit courts first took up the issue in 1995.[90] Accordingly, the Sixth Circuit's 2015 determination in *EEOC v. Ford Motor Co.* that "technology has not changed so [much] as to make regular in-person attendance marginal for . . . job[s]" is misguided.[91] The Sixth Circuit made this assertion arguing that,

90. Bilinsky v. Am. Airlines, Inc., 928 F.3d 565, 573 (7th Cir. 2019).

91. 782 F.3d 753, 765 (6th Cir. 2015) (en banc) (emphasis omitted).

"technology changing *in the abstract* is not technology changing *on this record*."[92] With this reasoning, the court concluded there was no evidence on the record in *EEOC v. Ford Motor Co.* showing that a great technological shift occurred to enable the plaintiff to effectively perform her "highly interactive job" at home.[93] In dismissing the plaintiff's use of her computer, email, and video/audio conferencing to perform the majority her job duties, the Sixth Circuit stated "[t]hese technologies . . . were *equally* available when courts around the country uniformly held that on-site attendance is essential for interactive jobs."[94] For this reason, the court concluded that the extra-record, abstract changes in technology did "not create a genuine issue of fact as to the essential nature of regularly and predictably attending work on-site."[95]

Particularly in the wake of COVID-19, this reasoning cannot stand. While technologies like computers, email, and video/audio conferencing *were* available when the courts were first confronted with telework accommodation cases in 1995, such technologies were not as *equally* available within the workforce. Moreover, these technologies were not as commonly utilized as functional, valuable tools to conduct business in the late 1990s and early 2000s.

In today's workforce, however, the widespread availability and common use of computer, email, and video/audio conferencing is necessary to maintain and preserve team interaction and productivity. COVID-19 has certainly demonstrated this. With this understanding, post-COVID-19, the courts must follow the dissent's view in *EEOC v. Ford Motor Co.*: Because "[t]echnology has undoubtedly advanced since 1995 in facilitating teamwork through fast and effective electronic communication . . . it should no longer be assumed that teamwork must be done in-person."[96] In other words, the courts' persistent emphasis on the in-person function of jobs to justify telework being an unreasonable accommodation must be abandoned.

1. Technologies Enabling Telework

Despite the courts' reluctance to deem telework a reasonable accommodation under the ADA since 1995, advances in technology have

92. *Id.*
93. *Id.*
94. *Id.* (emphasis added).
95. *Id.*
96. *Id.* at 776 (Moore, J., dissenting).

made telework more widely adopted, feasible, and beneficial for both employers and employees. Modern-day telework would not be possible without the widespread adoption of broadband internet in only the past ten to fifteen years.[97] Prior to this widespread adoption, working from home was largely impossible because—according to Pew estimates—in 2000, only 1% of U.S. adults had high-speed broadband internet service at home.[98] As of February 2021, however, 77% of U.S. adults have home broadband internet.[99] Additionally, for adults without home broadband internet, mobile hotspots can be utilized to access the internet anywhere with cellular data.[100] Hotspots have become so common, even public libraries are beginning to offer mobile hotspots to be checked out to further community internet accessibility.[101] Further, advances in technologies such as videoconferencing have allowed out-of-office workers to communicate with each other in real time anywhere with an internet connection.[102] Such advancements have enabled many employers to transition into largely remote workforces, moving away from the traditional in-office workspace altogether.[103] Accordingly, amid the outbreak of COVID-19, many traditional in-office workplaces had the technical capabilities to shift to a remote work model to limit the spread of the coronavirus.[104] For example, amid the pandemic, workplaces utilized videoconferencing platforms such as Zoom, Microsoft Teams, and Google Meet to replicate in-person meetings from home.[105]

2. Cost of Available Technology

In addition to the widespread availability and use of modern technologies like broadband internet, hotspots, and videoconferencing

97. Sean Peek, *Communication Technology and Inclusion Will Shape the Future of Remote Work*, BUS. NEWS DAILY (March 18, 2020), https://www.businessnewsdaily.com/8156-future-of-remote-work.html [https://perma.cc/Y77T-B7AY].

98. *Internet/Broadband Fact Sheet*, PEW RSCH. CTR. (Apr. 7, 2021), https://www.pewresearch.org/internet/fact-sheet/internet-broadband/ [https://perma.cc/4CPL-6NKX].

99. *Id.*

100. Emily McNamara, *Marion County Public Library Has Mobile Hotspots Available to Be Checked Out*, WBOY (Jan. 5, 2021, 6:10 PM), https://www.wboy.com/top-stories/marion-county-public-library-has-mobile-hotspots-available-to-be-checked-out/ [https://perma.cc/NR4U-SCTB].

101. *Id.*

102. Peek, *supra* note 97.

103. *Id*.

104. *Id*.

105. Katherine A. Karl, Joy V. Peluchette & Navid Aghakhani, *Virtual Work Meetings During the COVID-19 Pandemic: The Good, Bad, and Ugly*, SAGE J., May 2021, at 2.

platforms, these technologies are all relatively low-cost. For example, in the U.S., the cost of home broadband internet is around $50–$60 per month.[106] Additionally, mobile hotspots typically cost less than $100 per month.[107] Videoconferencing platforms like Zoom, Microsoft Teams, and Google Meet can all be used for free.[108] The cost for these platforms' paid plans—which offer additional features such as unlimited meeting time—are no more than $300 per year.[109]

Considering these low prices, employers will have a difficult time citing direct costs as a reason for why a telework accommodation will impose an undue burden. In *Vande Zande v. Wisconsin Department of Administration*, the Seventh Circuit held an "undue hardship," given the statutory definition and the legislative history, is "in relation to the benefits of the accommodation to the disabled worker as well as to the employer's resources."[110] Accordingly, courts have held that the costs of accommodations alone are insufficient to establish undue hardship.[111] In fact, as Professor Nicole Buonocore Porter notes, "[w]hen the issue is truly one of direct costs"—which is rare—courts "carefully analyze the undue hardship factors in the [ADA] and require the employer to prove why the accommodation would be costly enough to reach that relatively high bar for proving undue hardship."[112] Given the low-price technology available to make typical telework feasible, courts should reject employers' arguments that rely on the direct costs required to equip an employee to telework as evidence of an undue hardship.

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106. John Dilley, *How Much Should I Be Paying for High-Speed Internet?*, HIGHSPEEDINTERNET.COM (June 18, 2021), https://www.highspeedinternet.com/resources/how-much-should-i-be-paying-for-high-speed-internet-resource [https://perma.cc/Z77Y-BA5L].

107. Josh Patoka, *19 Cheap Mobile WiFi Hotspot Plans*, WELL KEPT WALLET, https://wellkeptwallet.com/cheap-mobile-wifi/#:~:text=A%20hotspot%20typically%20costs%20less,own%20device%20to%20save%20money.&text=Each%20mobile%20WiFi%20hotspot%20plan,%2DMobile%2C%20AT%26T%20or%20Verizon [https://perma.cc/F7U2-JXUS] (last updated Aug. 13, 2021).

108. Charlotte Verbrugghe, *Comparing Zoom, Microsoft Teams and Google Meet*, DEVOTEAM G CLOUD (Apr. 10, 2020, 4:29 PM), https://gcloud.devoteam.com/blog/comparing-zoom-microsoft-teams-and-google-meet [https://perma.cc/A22T-8GXA].

109. *Choose a Plan*, ZOOM, https://zoom.us/pricing [https://perma.cc/K6TQ-VACU] (last visited Sept. 27, 2021); *Find the Right Microsoft Teams for Your Business*, MICROSOFT, https://www.microsoft.com/en-us/microsoft-teams/compare-microsoft-teams-options [https://perma.cc/7Y7Q-9DLA] (last visited Sept. 27, 2021); *Choose a Plan that Works for You*, GOOGLE MEET, https://apps.google.com/intl/en/meet/pricing/ [https://perma.cc/7EWG-EB69] (last visited Sept. 27, 2021).

110. 44 F.3d 538, 543 (7th Cir. 1995).

111. *See* Porter, *supra* note 71, at 140–45.

112. *Id.* at 144.

3. Increase in Telework Post-COVID-19 with Evidence of Productivity Gains

Before the COVID-19 pandemic, the percentage of American workers with occupations in which telework was technologically feasible and who *actually* worked at home was quite low.[113] According to the American Time Use Survey, the telework take-up rate pre-COVID-19 was about 25%.[114] Because of the COVID-19 pandemic, however, the number of Americans working solely from home at least doubled, and possibly tripled.[115] In early May 2020, according to a Gallup survey, 52% of employed Americans reported always working from home, and another 18% reported sometimes working from home, for a total of a 70% telework rate nationwide.[116]

This shift—while prompted by public health necessity—also revealed the benefits that telework can provide. Specifically, amid the pandemic, evidence arose of productivity gains from teleworking.[117] In fact, one poll of U.S. "hiring managers found that managers were more likely to have experienced short-term productivity gains rather than losses due to remote work" in the pandemic.[118] Such evidence suggests that, with telework, "productivity losses . . . are by no means a foregone conclusion."[119] Even the legal profession, which is notoriously allergic to technology, has become "reliant on videoconferencing tools for client connection, court activities," and to facilitate teamwork across law firms' worldwide offices.[120] The widespread use of this technology is likely here to stay post-COVID-19. It is not surprising that, in a New York Law Journal

113. *Ability to Work from Home: Evidence from Two Surveys and Implications for the Labor Market in the COVID-19 Pandemic*, U.S. BUREAU OF LAB. STAT. (June 2020), https://www.bls.gov/opub/mlr/2020/article/ability-to-work-from-home.htm [https://perma.cc/U7BN-TUNM].

114. *Id.*

115. *Id.*

116. Adam Hickman & Lydia Saad, *Reviewing Remote Work in the U.S. Under COVID-19*, GALLUP (May 22, 2020), https://news.gallup.com/poll/311375/reviewing-remote-work-covid.aspx [https://perma.cc/D8LG-WLC3].

117. *Productivity Gains from Teleworking in the Post COVID-19 Era: How Can Public Policies Make It Happen?*, ORG. FOR ECON. COOP. & DEV., http://www.oecd.org/coronavirus/policy-responses/productivity-gains-from-teleworking-in-the-post-covid-19-era-a5d52e99/ [https://perma.cc/V326-AKXQ] (last updated Sept. 7, 2020).

118. *Id*.

119. *Id*.

120. Carol Schiro Greenwald, *Videoconferencing: Love It, Hate It, Need It*, N.Y.L.J. (Jan. 8, 2021, 12:00 PM), https://www.law.com/newyorklawjournal/2021/01/08/videoconferencing-love-it-hate-it-need-it/?slreturn=20210031020350 [https://perma.cc/MS34-8GUU].

panel, two dozen attorneys noted they plan to continue using this technology once the pandemic is behind us.[121]

Thus, after the pandemic, courts—whose own chambers likely had to rely on technologies like videoconferencing during the pandemic—should recognize that teleworking is more feasible than previously understood. In this way, even after the pandemic passes, the newfound ability to develop a factual record of the costs involved to telework, the realized possibilities for remote supervision, and the demonstrated productivity gains from teleworking all alter the factual posture of pre-COVID cases where telework was so-often held to be an unreasonable accommodation.

B. Congressional Amendment Needed Distinguishing "Unreasonable" vs. "Undue Hardship"

When Congress enacted the ADA in 1990, it stated the Act's purpose was "to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities."[122] Yet, given the confusion among the courts regarding the relationship between the ADA's "reasonable accommodation" provision and its "undue hardship" defense––the conflation of which typically places the full burden of proof on employees—the ADA's purpose as set out in 1990 is clearly not being met. Because of this, Congress needs to provide clarity to the courts via an amendment to the ADA. This congressional amendment should clarify that the ADA's "reasonableness" inquiry is distinctly separate from its "undue hardship" defense. Accordingly, in alignment with the Supreme Court's decision in *US Airways, Inc. v. Barnett*, the amendment should also emphasize that employers—*not* employees—bear the burden of proving whether an accommodation imposes an undue hardship.[123]

Such an amendment to clarify congressional intent would not be unusual given that, in 2008, Congress passed the ADA Amendments Act ("ADAAA"), to broaden the ADA's definition of "disability."[124] With Congress' ADAAA mandate for an expanded protected class, cases were much more likely to proceed on the merits, instead of being thrown out at the summary judgment stage.[125] Likewise, if Congress were to pass another much-needed ADA amendment to distinguish the "reasonable accommodation" provision from the "undue hardship" defense—

121. *Id.*
122. 42 U.S.C. § 12101(b)(2).
123. 535 U.S. 391, 401–02 (2002).
124. *See* Porter, *supra* note 71, at 122.
125. *Id.*

including where the burdens of proof falls with each distinct inquiry—teleworking accommodation cases will be more likely to proceed on their merits.

C. Proposed Test to Evaluate Requests for Telework Accommodations

When telework accommodation cases do proceed on their merits, courts need consistent guidance to appropriately evaluate whether telework is a reasonable accommodation under the circumstances. COVID-19 has demonstrated that the courts' previous reliance on jobs' in-person attendance function is out-of-date. As discussed above, this out-of-date reliance leads courts to hold telework is an unreasonable accommodation—and jointly, that it imposes an undue hardship. A new test is needed so that otherwise able employees are not effectively excluded from participating in the workforce.

Commentators have likewise argued for a new test to reflect a more modern-day understanding of teleworking's feasibility. Brianna Sullenger was the first to argue for a new approach in 2007.[126] Sullenger notes that "the only approach that [will] guarantee[] a fair result is a broadly construed case-by-case [one]"—which conforms to the ADA's required fact-specific approach for evaluating if accommodations requests are reasonable.[127] Sullenger suggests that in telecommuting cases:

> [C]ourts should look to the *nature* of the position, the employer's need and ability to *supervise* the employee from home, and the necessity of the employee to use *equipment or resources* that are only available at the workplace and cannot be created at home. . . . [W]here the employee has shown that the essential functions of the position can be performed outside of the workplace, the accommodation should be allowed unless the employer can establish an undue hardship or present an alternate accommodation that would be effective.[128]

Additionally, Sullenger argues that, if an employer currently offers a work-at-home option to other employees for the same or an essentially similar employment position, "the presumption should always be that telecommuting will be a reasonable accommodation for a disabled employee."[129] Similar to Sullenger's proposal, in 2015, Benjamin Johnson

126. Sullenger, *supra* note 14, at 550.
127. *Id.*
128. *Id.* (emphasis added).
129. *Id.* at 550–51.

argued that "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?"[130] Likewise, in 2016, Sean Caulfield argued that, following the Sixth Circuit's flawed decision in *EEOC v. Ford Motor Co.*, courts need to "abandon the physical presence presumption in favor of a fact-intensive, case-by-case analysis."[131] Again, in 2017, Michelle Travis maintained that "[w]hen assessing an employee's qualifications, courts should treat on-site attendance . . . not as job functions but as organizational norms for when and where the actual functions take place."[132]

These calls for a new approach are even more persuasive post-COVID-19. Indeed, in the midst of the pandemic, Professors Stacy A. Hickox and Chenwei Liao considered that "[g]iven the widespread allowance of remote work during the COVID-19 pandemic, employers, coworkers, and the general public may be less inclined to view work from home as undeserved special treatment when provided as an accommodation."[133] With this consideration in mind, Professors Hickox and Liao proposed a theoretical, organizational behavior-based approach for employers and courts reviewing telework accommodation requests focusing on: "(1) the prevalence and success of remote work arrangements for people with disabilities, (2) the effect of remote work arrangements on people with disabilities, and (3) the effect of remote work on observers (coworkers and supervisors)."[134]

This Comment's proposed test echoes these proposals, and details why—especially in the wake of COVID-19—such a new test is needed. This Comment's proposed test argues courts should determine whether or not telework is a reasonable accommodation by evaluating: (1) whether the majority of the employee's essential job duties can be performed

130. *See* Johnson, *supra* note 14, at 1256.

131. Caulfield, *supra* note 14, at 286.

132. Michelle A. Travis, *Gendering Disability to Enable Disability Rights Law*, 105 CALIF. L. REV. 837, 875 (2017) (emphasis omitted).

133. Hickox & Liao, *supra* note 14, at 39.

134. *Id.* at 29. This theoretical approach applies Stone and Colella's 1996 model which "considers factors that operate at multiple levels within organizations (e.g., organizational, team/supervisor, and individual levels)." *Id.* at 66; *see* Dianna L. Stone & Adrienne Colella, *A Model of Factors Affecting the Treatment of Disabled Individuals in Organizations*, 21 ACAD. MGMT. REV. 352, 356–59 (1996). Professors Hickox and Liao argue that, "[u]nless a job absolutely cannot be performed without the employee being present on the work site, these multilevel factors should be considered in determining the reasonableness of remote work for the employees with disabilities." Hickox & Liao, *supra* note 14, at 66.

through telework; (2) whether the employee's minor in-person job duties can be reassigned to other employees; (3) whether the employee has a history of successfully working at home; (4) whether the employer has the technical capabilities necessary for the employee to work from home; and (5) whether the employer allows other employees similarly situated to work from home and/or already has an established telework policy. With this fact-specific test, courts should extend greater deference to employees when evaluating if telework is a reasonable accommodation and should place the full burden of proof on employers to demonstrate telework accommodations impose an undue burden.

1. Whether a Majority of the Employee's Essential Duties Can Be Performed through Telework

If an employee presents evidence that they can complete the majority of their job functions from home, courts should weigh such evidence in favor of determining the employee's telework accommodation request is reasonable under the ADA. Under the ADA, a "qualified" individual to receive a reasonable accommodation is one who "can perform the essential functions of the employment position."[135] The EEOC has provided that *marginal* functions are not included in employees' essential job functions.[136] Unlike essential functions, the EEOC defines marginal as "those that are not essential to the successful performance of [the] job."[137] Further, as the EEOC's 2003 guidance regarding telework accommodations provides, "[a]n employer should not . . . deny a request to work at home as a reasonable accommodation *solely* because a job involves some contact and coordination with other employees."[138] This is because, as the guidance notes, "[f]requently, meetings can be conducted effectively by telephone and information can be exchanged quickly through e-mail."[139]

The courts, however, have ignored this guidance in extending large deference to employers by placing a heavy emphasis on the in-person duties of employees' jobs—even if these duties are marginal.[140] Indeed, in *EEOC v. Ford Motor Co.*, the Sixth Circuit sided with the employer,

135. 42 U.S.C. § 12111(8).
136. 29 C.F.R. § 1630.2(n)(1) (2020).
137. *Work at Home*, *supra* note 23.
138. *Id.* (emphasis added).
139. *Id.*
140. *Id.*; *see supra* Section II.C.

despite the employee's testimony and other evidence supporting the claim that she would be able to complete 95% of her job functions electronically from home.[141] The dissenting opinion argued the majority held the telework accommodation unreasonable based on "an unstated belief that employee testimony is somehow inherently less credible than testimony from an employer."[142]

The courts should not treat an employer's negative judgements about whether an employee can complete the majority of their job duties at home as being dispositive over the employee's evidence of such capabilities. Additionally, if an employee presents evidence demonstrating they are capable of performing the majority of their essential job duties remotely, courts should not overemphasize the small fraction of the employee's in-person duties to render the telework accommodation request unreasonable. Instead, as Sullenger argues, if "the employee has shown that the essential functions of the position can be performed" via telework, "the accommodation should be [granted] unless the employer can establish an undue hardship" defense.[143]

At a minimum, whether such in-person duties are essential should be a jury question. Yet, in *EEOC v. Ford Motor Co.*, the court—by assuming the 5% of Ford's in-person job duties *were* essential—held no reasonable jury could conclude Ford's request to telework was a reasonable accommodation.[144] While an employee should bear the burden of production in making this demonstration, the employer should ultimately bear the burden of persuasion to prove the employee's in-person duties are truly essential.

Nevertheless, it is true that some jobs, despite the technical capabilities today, still clearly require an employee to be physically present.[145] For example, as the dissent in *EEOC v. Ford Motor Co.* points out, an employee who works in a factory and must use large immobile equipment that is located only on-site, will not be able to sufficiently demonstrate

141. *See* Caulfield, *supra* note 14, at 283 n.166 (citing EEOC v. Ford Motor Co., 782 F.3d 753, 772 (6th Cir. 2015) (en banc)) ("acknowledging Harris's declaration contradicted Ford's view of her job" and "noting evidence stating only three of Harris's responsibilities could not be performed from home.").

142. *Ford Motor Co.*, 782 F.3d at 773 (Moore, J., dissenting).

143. *See* Sullenger, *supra* note 14, at 554 ("[W]here the employee has shown that the essential functions of the position can be performed outside of the workplace, the accommodation should be allowed unless the employer can establish an undue hardship or present an alternate accommodation that would be effective.").

144. *See Ford Motor Co*., 782 F.3d at 761; *id.* at 772 (Moore, J., dissenting).

145. *See id.* at 773 (Moore, J., dissenting).

they can perform a majority of the essential functions of their job off-site.[146] Indeed, in cases where it is clearly impracticable for a job to be performed at home, the courts have given no weight to employee testimony arguing they nevertheless can work from home.[147] However, after the widespread shift to remote work during COVID-19, many jobs that courts previously assumed *cannot* be performed remotely, have, in fact, successfully been performed remotely.

Accordingly, if an employee can sufficiently demonstrate they can complete the majority of their essential job functions from home—even if the employer disagrees—the trier of fact should weigh such evidence in favor of determining the employee's telework accommodation request is reasonable under the ADA.

2. Whether the Employee's Minor In-Person Job Duties Can Be Reassigned to Other Employees

Additionally, if an employee has evidence that they can complete the majority of their essential job functions from home, courts should evaluate whether the employer can reassign the employee's minor in-person job duties to other employees. The EEOC's guidance regarding telework as a reasonable accommodation notes, "[a]n employer does not have to remove any essential job duties to permit an employee to work at home."[148] However, an employer "may need to reassign some minor job duties or marginal functions (i.e., those that are not essential to the successful performance of a job) if they cannot be performed outside the workplace and they are the only obstacle to permitting an employee to work at home."[149]

The circuit courts have repeatedly ignored this guidance. Specifically, in *Mason v. Avaya Communications, Inc.*, the Tenth Circuit concluded that "[t]he mere fact that others [can] do [an employee's] work does not show that the work is nonessential."[150] In this case, Mason, a postal service coordinator, was diagnosed with post-traumatic stress disorder (PTSD)

146. *Id*.

147. *See* Robert v. Bd. of Cnty. Comm'rs of Brown Cnty., 691 F.3d 1211, 1217 n.2 (10th Cir. 2012) (holding for the employer in finding that while the employee "argue[d] that working from home was a reasonable accommodation . . . this argument ignore[d] the obvious fact that she could not perform site visits from her house.").

148. *Work at Home*, *supra* note 23.

149. *Id*.

150. 357 F.3d 1114, 1121 (10th Cir. 2004) (quoting Basith v. Cook Cnty., 241 F.3d 919, 929 (7th Cir. 2001)).

after witnessing the murder of several of her then co-employees in the "Edmond Post Office Massacre."[151] After this traumatic incident, working in-person at the post office aggravated her PTSD symptoms, and she sought an accommodation to work from home.[152] Mason's job required her to schedule service appointments for technicians through "repair tickets" in Avaya's computer system.[153] Mason contended that—because her job duties consisted of working on the computer through phone and fax lines to coordinate service calls for Avaya's customers—she could "perform all of the essential functions of [her] job [from] home using a computer, telephone, and fax machine."[154] Avaya disagreed, however, arguing that "physical attendance at the center is an essential function of the service coordination position because the low-level hourly position is administrative in nature and requires supervision . . . [and] teamwork."[155] Mason argued that because this "teamwork" only consisted of the coordinators covering each other's duties—such as when a coworker was on break—any marginal in-person job duties could be reassigned to one of her co-workers.[156] The Tenth Circuit disagreed, stating the fact that Mason's co-workers could perform Mason's duties demonstrated that Mason herself considered those duties functions of the job.[157] The court relied on this finding to hold the employer was not required to reassign any of Mason's in-person responsibilities.[158] With these in-person obstacles intact, the court held Mason's telework accommodation request to be unreasonable.[159]

The courts—such as the Tenth Circuit in *Mason v. Avaya*—should place more weight in evidence that shows an employee's minor in-person job duties can be reassigned to other employees. For employees like Mason—who are arguing over truly minor job functions—the courts should not simply defer to the employers' wishes in refusing to reassign these duties. Accordingly, as the EEOC guidance states, if such in-person duties are the employee's only obstacle preventing them from working at home—and if the employer can reassign these in-person duties—such

151. *Id.* at 1117.
152. *Id.*
153. *Id.*
154. *Id.* at 1120.
155. *Id.*
156. *Id.* at 1120–21.
157. *Id.* at 1121.
158. *Id.*
159. *Id.* at 1124.

evidence should weigh in favor of determining the employee's telework accommodation request is reasonable under the ADA.[160] When an employer refuses to redistribute an employee's marginal in-person job duties, and has the capabilities to do so, it denies accommodating the employee's disability, preventing them from being able to fully participate in the workforce. Such inflexibility flies in the face of the ADA's goals. Accordingly, if an employer believes it *cannot* reassign an employee's marginal in-person job duties, it should bear the burden of proof via the undue hardship defense to sufficiently demonstrate as much.

3. Whether the Employee Has a History of Successfully Working from Home

If an employee has demonstrated a history of successfully teleworking, courts should weigh this evidence in favor of determining the employee's telework accommodation request is reasonable under the ADA. In *Mosby-Meachem v. Memphis Light, Gas & Water Division*, the Sixth Circuit relied on such evidence in siding with an employee.[161] Specifically, the court held that because Mosby-Meachem, the employee, had demonstrated she could perform all the essential functions of her job as an attorney remotely while on bed rest for pregnancy complications, telework was a reasonable accommodation.[162] With this holding, the Sixth Circuit distinguished Mosby-Meachem from the employee in *EEOC v. Ford Motor Co.*, noting—unlike the employee in *EEOC v. Ford Motor Co.*—"Mosby-Meachem had performed her duties remotely in the past without any attendance issues or decline in work product."[163] This case is a rarity among the circuit courts because it is one of the only cases in which the court sided with the employee in a telework accommodations case.[164] Such rarity is, in part, because the circuit courts are apt to overlook evidence of employees' history of successfully teleworking in upholding employers' telework accommodation denials.

The dissenting opinion in *Heaser v. Toro Co.*, a 2001 Eighth Circuit case, pointed out this very error when critiquing the majority's pro-

160. *Work at Home*, *supra* note 23.
161. 883 F.3d 595, 605 (6th Cir. 2018).
162. *Id.* at 599, 605.
163. *Id.* at 605.
164. *See supra* Section II.C.

employer opinion.[165] Heaser, a marketing coordinator at Toro, became unable to work in-person at Toro's manufacturing facility given her "petrochemical sensitivity, fibromyalgia, allergies, and multiple chemical sensitivities"—all of which the facility's air quality aggravated.[166] As the dissent notes, Heaser had presented evidence that she had previously worked from home over a period of three months, adequately performing her job while doing so.[167] Despite this evidence, Toro argued that—because Heaser's job functions were computer-related and the computer software could not be used from a remote location—her job could not be completed from home.[168] Yet, there was no evidence to suggest that Toro had a problem with Heaser's performance during the three months in which she *did* work from home.[169] The Eighth Circuit's majority opinion overlooked this fact and held Heaser's telework accommodation request to be unreasonable under the ADA.[170] This factual detail was also overlooked by the District Court when granting Toro's motion for summary judgment.[171] At the very least, Heaser's history of teleworking should have enabled her case to proceed on the merits, allowing a jury to decide whether this fact rendered her request to telework reasonable.

In ignoring evidence of employees' successful telework history, courts fail employees with disabilities and undermine the ADA's mission to make reasonable accommodations for such employees. For this reason, if an employee has demonstrated a history of successfully teleworking, the trier of fact should weigh this evidence in favor of determining the employee's telework accommodation request is reasonable under the ADA. The employer should then bear the full burden of proving that, nevertheless, such an accommodation imposes an undue hardship.

4. Whether the Employer Has the Technical Capabilities Necessary for the Employee to Work from Home

In evaluating whether an employee's telework accommodation request is reasonable under the ADA, courts should evaluate whether the employer has the technical capabilities to allow for such teleworking. The

165. 247 F.3d 826, 835–36 (8th Cir. 2001) (Lay, J., dissenting).

166. *Id.* at 829 (majority opinion).

167. *Id.* at 835–36 (Lay, J., dissenting).

168. Heaser v. Toro Co., No. 98-76 (MJD/AJB), 1999 U.S. Dist. LEXIS 24747, at *18–19 (D. Minn. Dec. 14, 1999), *aff'd*, 247 F.3d 826 (8th Cir. 2001).

169. *Heaser*, 247 F.3d at 836 (Lay, J., dissenting).

170. *Id.* at 837.

171. *Heaser*, 1999 U.S. Dist. LEXIS 24747, at *18–20.

EEOC's factors for determining the feasibility of working from home include "the employer's ability to supervise the employee adequately and whether any duties require use of certain equipment or tools that cannot be replicated at home."[172] For telework to be feasible under these factors, employers need—or need to acquire—the technical capabilities to support a work-from-home arrangement.

However, courts give large deference to employers who claim they are unable to permit an employee with a disability to work remotely because they do not have the necessary technical capabilities. For example, in 2001, with *Theilig v. United Tech. Corp.*, the Second Circuit dismissed a telework accommodation case by an employee who requested to work from home for two months after receiving treatment for severe depression.[173] With this dismissal, the court concluded that the employee had "not carried his burden of identifying an accommodation the costs of which, facially, do not clearly exceed its benefits."[174] With this cost-benefit analysis language, the court conflated the ADA's "reasonable accommodation" provision with its "undue hardship" defense provision.[175] This conflation effectively put the full burden of proof on the employee by presupposing the question of whether teleworking would actually impose an "undue hardship" on his employer.

Under this flawed framework, an employee's initial burden—to demonstrate that the cost of teleworking will not exceed its benefits—is a steep obstacle. In 2011, when *Theilig* was decided, the obstacle was nearly insurmountable because many of today's low-cost technologies enabling widespread supervision via telework were not yet in existence.

Further, because the court's inquiry presupposes the "undue hardship" defense, the burden to prove that technology is not sufficient for remote supervision and/or is too costly never shifted to the employer. Yet the costs associated with equipping an employee to telework should not automatically render their telework accommodation request unreasonable and/or an undue hardship. Indeed, if, in effect, such costs *do* effectively bar employees' accommodation requests, employers may be incentivized to purposely not upgrade their technology so as to say they are unable to support a work-from-home arrangement. For this reason, before assuming telework imposes an undue hardship, courts should place the full burden of proof on employers to prove they (1) truly do not possess the technical

172. *Work at Home*, *supra* note 23.

173. 415 F. App'x 331, 333 (2d Cir. 2011).

174. *Id.* (internal quotations omitted) (quoting Kennedy v. Dresser Rand Co., 193 F.3d 120, 123 (2d Cir. 1999)).

175. *See supra* note 84 and accompanying text.

capabilities to enable an employee to telework, and (2) do not have the financial wherewithal to acquire the necessary technology to become capable. Looking forward, it will be difficult for employers to make this demonstration because COVID-19 demonstrated that employers can quickly implement and effectively use low-cost technology to supervise their workforce.[176]

5. Whether the Employer Allows Other Employees Similarly Situated to Work from Home and/or Already Has an Established Telework Policy

Finally, courts can evaluate whether the employer has the capabilities to allow for teleworking if the employer allows other similarly situated employees to work remotely and/or already has an established teleworking policy for its workforce. If an employer does allow other employees similarly situated to the employee with a disability to work remotely and/or if the employer does have an established telework policy, such evidence should weigh in favor of determining the employee's telework accommodation request is reasonable under the ADA.

The circuit courts, however, have repeatedly rejected this approach. For example, in *Heaser v. Toro Co.*, the Eighth Circuit—in holding an employer was not required to grant an employee's telework accommodation request—ignored the employee's evidence showing that other similarly situated employees were permitted to work from home.[177] In ignoring this fact, the court concluded that whether the employer could provide the employee with "adequate access to its computer system"—despite having done so for other employees—was merely a "conjecture."[178] Toro's motion for summary judgment was granted at both the District Court level and at the Eighth Circuit.[179] At a minimum, a jury should have had the opportunity to evaluate whether the fact that Toro allowed other similarly situated employees to work from home played a

176. *See, e.g.*, Jeffrey M. Hirsch, *Future Work*, 2020 U. ILL. L. REV. 889, 928 (2020) ("Among today's more accessible monitoring technologies are computer and smart phone programs that allow companies to scrutinize workers' productivity and actions, as well as communicate with workers even when they are off-duty. Additionally, these devices and other types of equipment with GPS capabilities provide employers with cost-effective means to track workers' locations.")

177. 247 F.3d 826, 836 (8th Cir. 2001) (Lay, J., dissenting).

178. *Id*.

179. *Id.* at 834 (majority opinion); Heaser v. Toro Co., No. 98-76 (MJD/AJB), 1999 U.S. Dist. LEXIS 24747, at *21 (D. Minn. Dec. 14, 1999), *aff'd*, 247 F.3d 826 (8th Cir. 2001).

role in the request's reasonableness.[180]

Similarly, in holding an employee's telework accommodation request unreasonable in *Yochim v. Carson*, the Seventh Circuit declined to conclude that an employer's telework policy weighed in favor of the requested telework accommodation being reasonable.[181] In doing so, the Seventh Circuit stated that "the policy, by its terms, is subject to management's discretion" and "does not confer a legally protected entitlement upon an employee."[182]

More pointedly, in *Credeur v. Louisiana*, the Fifth Circuit, while noting that "an increasing number of employers have policies permitting telecommuting under certain circumstances," warned that "[c]onstruing the ADA to require employers to offer the option of unlimited telecommuting to a disabled employee would have a chilling effect."[183] The court went on to argue that if such a requirement were imposed, "[r]ather than offer such benefits, companies would tighten their telecommuting policies to avoid liability."[184]

The reasoning of these courts is misguided. It is sensible to conclude that a telework accommodation request is more reasonable than not if the employer in question already allows certain employees similarly situated to the plaintiff to telework. Further, while an employer's telework policy does not necessarily equate to a legal protected entitlement to telework, it *does* show that the employer is at least somewhat capable of equipping its employees to work remotely. This inference should aid courts and juries in determining whether an employee's telework accommodation request is reasonable.

This inference should *not*, however—as the Fifth Circuit erroneously warned of—lead companies to tighten their telecommuting policies to avoid liability under the ADA.[185] It is a fallacy to assume that an employer offering teleworking benefits will, as the Fifth Circuit alludes, automatically entitle all of their employees with disabilities to "unlimited" telework.[186] Such teleworking policies merely aid the trier of fact in understanding if an employer is generally capable of supporting the option to telework. Evidence of these policies alone will not automatically entitle

180. *Heaser*, 247 F.3d at 834–35 (Lay, J., dissenting).
181. 935 F.3d 586, 592 (7th Cir. 2019).
182. *Id*.
183. 860 F.3d 785, 795 (5th Cir. 2017).
184. *Id.* (citing EEOC v. Ford Motor Co., 782 F.3d 753, 765 (6th Cir. 2015)).
185. *Id*.
186. *Id*.

an employee with a disability the right to a telework accommodation under the ADA. This is because the ADA requires courts to engage in a fact-intensive, case-by-case determination of whether an employer should be required to provide accommodations for an employee.[187] Accordingly, if an employee cannot demonstrate they are able to perform the essential functions of their job remotely, whether or not the employer has a teleworking policy in place will be irrelevant. The existence of such a policy will never predetermine a legal entitlement.

D. Telework's Limitations

It is important to note, however, that many jobs cannot be performed from home. According to the 2019 National Compensation Survey from the Federal Bureau of Labor Statistics, "only 7% of civilian workers in the United States, or roughly 9.8 million of the nation's approximately 140 million civilian workers, have access to a 'flexible workplace' benefit, or telework."[188] The workers who *do* have access to telework options "are largely managers, other white-collar professionals and the highly paid."[189]

Accordingly, in July 2020 of the COVID-19 pandemic, 46% of the U.S. employees that teleworked were in management, business, and financial occupations, and 44% in professional and related occupations.[190] In contrast, only 7% of U.S. employees in the service industry teleworked; 6% in natural resources, construction, and maintenance occupations; and 5% in production, transportation, and material moving occupations.[191] Of these employees that teleworked in July 2020, 47% had a bachelor's degree or higher, whereas only 4% had less than a high school diploma.[192] For these reasons, it is not surprising that in one of the rare cases in which a court *did* side with an employee in a telework accommodation case, the employee was an attorney.[193]

Unlike white-collar employees, an employee in the service industry

187. *Ford Motor Co.*, 782 F.3d at 773 (Moore, J., dissenting).

188. Drew Desilver, *Before the Coronavirus, Telework Was an Optional Benefit, Mostly for the Affluent Few*, PEW RSCH. CTR. (March 20, 2020), https://www.pewresearch.org/fact-tank/2020/03/20/before-the-coronavirus-telework-was-an-optional-benefit-mostly-for-the-affluent-few/ [https://perma.cc/ZM74-LRU4].

189. *Id.*

190. *Supplemental Data Measuring the Effects of the Coronavirus (COVID-19) Pandemic on the Labor Market*, U.S. BUREAU OF LAB. STAT., https://www.bls.gov/cps/effects-of-the-coronavirus-covid-19-pandemic.htm [https://perma.cc/H37Y-2JMM] (last updated Aug. 10, 2021).

191. *Id.*

192. *Id.*

193. *See* Mosby-Meachem v. Memphis Light, Gas & Water Div., 883 F.3d 595, 604-05 (6th Cir. 2018).

will likely not have access to telework as a reasonable accommodation under the ADA. In these situations—where telework as an accommodation is not feasible for an employee because of their job type––employees should be able to turn to other safety nets, such as short-term/long-term disability insurance, workers' compensation, or social security disability insurance. While this Comment does not delve into these specific safety nets, further consideration of their importance is critical in cases where telework accommodations are impractical.

Additionally, while there is evidence of productivity gains during COVID-19 pandemic, there are also competing statistics showing that the widespread shift to remote work during the pandemic caused a decline in worker productivity.[194] However, these negative statistics may be attributed to other stressors linked to the pandemic. Such stressors limiting teleworking productivity include child care concerns,[195] health and safety concerns,[196] and the fact that many employees had no prior experience or training to telework before the pandemic.[197] Consequently, productivity limitations stemming from these COVID-specific stressors do not reflect telework' s feasibility and benefits at large. Moreover, such COVID-specific limitations to remote work should not be used to further emphasize the courts' in-person attendance function of employees' jobs to bolster justifications that telework is an unreasonable accommodation.

IV. CONCLUSION

While it is true that telework is not possible with all jobs, the COVID-19 pandemic has demonstrated that many previously considered in-person jobs *can* be successfully performed through telework. For this reason, courts should extend greater deference to employees when evaluating if telework is a reasonable accommodation. Additionally, courts should

194. *See* Adam Gorlick, *The Productivity Pitfalls of Working from Home in the Age of COVID-19*, STAN. NEWS (March 30, 2020), https://news.stanford.edu/2020/03/30/productivity-pitfalls-working-home-age-covid-19/ [https://perma.cc/Q8XL-7EEP].

195. *See* Suzanne M. Edwards & Larry Snyder, *Yes, Balancing Work and Parenting is Impossible. Here's the Data*, WASH. POST (July 10, 2020), https://www.washingtonpost.com/outlook/interruptions-parenting-pandemic-work-home/2020/07/09/599032e6-b4ca-11ea-aca5-ebb63d27e1ff_story.html.

196. *See* Nader Salari, Amin Hosseinian-Far, Rostam Jalali, Aliakbar Vaisi-Raygani, Shna Rasoulpoor, Masoud Mohammadi, Shabnam Rasoulpoor & Behnam Khaledi-Paveh, *Prevalence of Stress, Anxiety, Depression among the General Population during the COVID-19 Pandemic: A Systematic Review and Meta-Analysis*, 16 GLOB. HEALTH 57 (2020).

197. Sharon K. Parker, Caroline Knight & Anita Keller, *Remote Managers are Having Trust Issues*, HARV. BUS. REV., July 30, 2020 ("They have been forced to make this transition quickly, and for the most part, without training.").

place the full burden of proof on employers to demonstrate telework accommodations truly impose an undue burden—refraining from conflating "reasonableness" with "undue hardship." A congressional amendment to the ADA is needed to ensure this distinction is clear to courts. Finally, when

telework accommodation cases proceed on their merits, courts should approach the two separate inquiries by evaluating: (1) Whether the majority of the employee's essential job duties can be performed through telework; (2) Whether the employee's minor in-person job duties can be reassigned to other employees; (3) Whether the employee has a history of successfully working at home; (4) Whether the employer has the technical capabilities necessary for the employee to work from home; and (5) Whether the employer allows other employees similarly situated to work from home and/or already has an established telework policy.