

# TELECOMMUTING: A REASONABLE ACCOMMODATION UNDER THE AMERICANS WITH DISABILITIES ACT AS TECHNOLOGY ADVANCES

## I. INTRODUCTION

There have been substantial technological advancements since Congress enacted the Americans with Disabilities Act (ADA) over fifteen years ago. Developments in technology over the last few decades, including computer enhancements and widespread Internet use, have changed the way society communicates and conducts business. Technological developments continue to infiltrate and better society as a whole, but one group in particular, individuals with disabilities, has been and will continue to be one of the most advantaged recipients of the information age.<sup>1</sup> Countless innovations, such as closed captioning, screen readers, and speech recognition technology, have directly improved the lives of disabled persons. Telecommuting is yet another way persons with disabilities can benefit from this great age of technology.<sup>2</sup> The ability to work from home holds great promise of employment opportunities for persons who would not otherwise be able to access or perform in the traditional workplace environment due to a disability.

Over the last decade, problems have arisen in determining how the provisions of the ADA should be construed in light of technological advancements. Courts have struggled with the role of telecommuting in accommodating disabled employees. When analyzing whether working at home should constitute a reasonable accommodation, the courts have taken different positions. Specifically, decisions have varied from a strong presumption against telecommuting to a fact-specific, case-by-case approach.

This note addresses the role of telecommuting as a reasonable accommodation under the ADA. Part II explains the history and purpose of the ADA. Part III details the protections given under Title I as it relates to telecommuting. Part IV demonstrates the growing trend of people who work from home. Part V outlines the opposing views that courts have taken in determining the availability of telecommuting as a

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<sup>1</sup> U.S. Dep't of Justice, Section 508 of the Rehabilitation Act: Accessibility for People with Disabilities in the Information Age (Results of 2001 Survey) § I.A.1., <http://www.usdoj.gov/crt/508/report2/summary.htm> (last visited Feb. 22, 2007) ("People with disabilities are among the greatest beneficiaries of this information technology revolution.").

<sup>2</sup> Telecommuting is employment at home while communicating with the workplace generally by phone or the Internet. Dawn R. Swink, *Telecommuter Law: A New Frontier in Legal Liability*, 38 AM. BUS. L.J. 857, 858 (2001).

reasonable accommodation. Part VI recommends that courts perform fact-specific analysis and interpret the ADA broadly. And finally, Part VII demonstrates various problems associated with telecommuting.

## II. THE HISTORY AND PURPOSE OF THE ADA

### A. *Historical Framework of the ADA*

The Civil Rights Act of 1964 brought much needed legislative reform. It addressed discrimination based on race, religion, and national origin.<sup>3</sup> Although this Act did not cover persons with disabilities, it paved the way for the enactment of section 504 of the Rehabilitation Act of 1973.<sup>4</sup> This section, often referred to as the “civil rights bill of the disabled,” provided that persons with disabilities who were otherwise qualified should not be denied access to or be subject to discrimination under “any program or activity receiving Federal financial assistance.”<sup>5</sup> In the areas where section 504 was applicable, its statutory language was generally applied broadly.<sup>6</sup> Although section 504 was a step in the right direction, it had many deficiencies. The Act did not have a great effect in reducing the difficulties disabled persons faced in employment, transportation, and public accommodations.<sup>7</sup> Section 504 did not apply to private employers, public accommodations in the private sector, or publicly funded programs that were not recipients of federal financial assistance.<sup>8</sup> As one legal scholar noted, section 504 displayed weakness due to its “statutory language, the limited extent of [its] coverage, inadequate enforcement mechanisms, and erratic judicial interpretations.”<sup>9</sup> Following the enactment of section 504, activism increased. Legal scholars and activist groups, such as the National Council on the Handicapped, saw the deficiencies in the current law and promoted the ratification of a comprehensive law obligating equal opportunity for disabled persons.<sup>10</sup> Congress recognized the need for action, and the ADA passed both Houses by overwhelming majorities.<sup>11</sup>

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<sup>3</sup> ADA & IT Technical Assistance Ctrs., Historical Context of the Americans with Disabilities Act, <http://www.adata.org/whatsada-history.aspx> (last visited Feb. 22, 2007).

<sup>4</sup> *Id.*

<sup>5</sup> *Ams. Disabled for Accessible Pub. Transp. v. Skinner*, 881 F.2d 1184, 1187 (3d Cir. 1988).

<sup>6</sup> See Janet A. Flaccus, *Discrimination Legislation for the Handicapped: Much Ferment and the Erosion of Coverage*, 55 U. CIN. L. REV. 81 (1986).

<sup>7</sup> *Helen L. v. DiDario*, 46 F.3d 325, 331 (3d Cir. 1995).

<sup>8</sup> ADA & IT Technical Assistance Ctrs., *supra* note 3.

<sup>9</sup> Robert L. Burgdorf, Jr., *The Americans with Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Statute*, 26 HARV. C.R.-C.L. L. REV. 413, 430–31 (1991).

<sup>10</sup> *Id.* at 432–33.

<sup>11</sup> ADA & IT Technical Assistance Ctrs., *supra* note 3.

President George H. W. Bush signed the ADA into law on July 26, 1990.<sup>12</sup>

### *B. Purposes of the ADA*

The goal of the ADA is to prevent discrimination against disabled persons through better enforcement of standards, and to incorporate persons with disabilities into the workings of society.<sup>13</sup> The Act provides a “national mandate for the elimination of discrimination against individuals with disabilities.”<sup>14</sup> It prohibits discrimination based on disability in the areas of employment, public services, places of public accommodations, telecommunication services, and transportation.<sup>15</sup> The ADA promotes an attitude of acceptance and fairness toward individuals with disabilities. The ADA purports to “extend to people with disabilities civil rights similar to those now available on the basis of race, color, national origin, sex and religion through the Civil Rights Act of 1964.”<sup>16</sup>

The ADA serves to empower persons with disabilities and promote equality throughout various facets of society including employment and places of public accommodation. This is accomplished through the legislative enactment of five separate titles within the ADA. Title I addresses discrimination against disabled individuals within the employment context.<sup>17</sup> Title II gives disabled individuals the right to access public services offered by both state and local governments.<sup>18</sup> This title provides that a qualified disabled individual should not be excluded “from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.”<sup>19</sup> Title III mandates nondiscrimination in the area of public accommodations.<sup>20</sup> Disabled persons are entitled to the full and equal use and enjoyment of services and accommodations of “any place of public accommodation.”<sup>21</sup> This includes privately owned public accommodations.<sup>22</sup> For example, private schools are subject to Title III.<sup>23</sup> Title IV addresses telecommunications, which include services for

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<sup>12</sup> *Id.*

<sup>13</sup> *See* 42 U.S.C. § 12101 (2000).

<sup>14</sup> *Id.* § 12101(b)(1).

<sup>15</sup> *Id.* § 12101(a)(3).

<sup>16</sup> PEO7.com, ADA’s Purpose, <http://peo7.com/htmFiles/ADAs53.htm> (last visited Feb. 22, 2007).

<sup>17</sup> 42 U.S.C. § 12111.

<sup>18</sup> *Id.* § 12132.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* § 12182.

<sup>21</sup> *Id.* § 12182(a).

<sup>22</sup> *Id.*

<sup>23</sup> *DeBord v. Bd. of Educ.*, 126 F.3d 1106 (8th Cir. 1997).

hearing-impaired and speech-impaired individuals.<sup>24</sup> Lastly, Title V contains miscellaneous provisions that are applicable to all previous titles.<sup>25</sup>

Since its inception, the ADA has empowered disabled individuals and has effected a societal change with regard to the treatment of persons with disabilities.<sup>26</sup> Although the ADA has been the subject of great praise by some, others have raised questions as to how effective the ADA has actually been.<sup>27</sup> Some scholars feel that it has not lived up to the expectations of its establishers. "The ADA has been less effective than many had hoped in part because it is viewed as a social welfare statute, rather than an antidiscrimination law."<sup>28</sup> Additionally, many feel that its provisions are frequently construed too narrowly, causing a hardship on the disabled individual. This resulting hardship is reflected in specific decisions regarding the use of telecommuting as a reasonable accommodation and will be discussed more fully in subsequent sections.

### III. PROTECTIONS AWARDED UNDER TITLE I OF THE ADA

#### *A. Combating Discrimination in the Workforce*

Title I, as touched on earlier, is intended to prevent discrimination in the workplace. This title provides as a general rule that "[n]o covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment."<sup>29</sup> A qualified disabled individual, by definition, is a person who has a disability and can also perform the essential functions of a particular job with or without reasonable accommodation.<sup>30</sup> Under Title I, employers are required to provide qualified disabled persons an equal opportunity to benefit from the employment opportunities available to others.<sup>31</sup> However, Title I does not apply to employers having fewer than fifteen employees.<sup>32</sup> Nearly every aspect of employment is covered under the ADA: working conditions, the

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<sup>24</sup> 47 U.S.C. § 225 (2000).

<sup>25</sup> 42 U.S.C. §§ 12201–12213.

<sup>26</sup> Dep't of Justice, *supra* note 1.

<sup>27</sup> Michelle A. Travis, *Equality in the Virtual Workplace*, 24 BERKELEY J. EMP. & LAB. L. 283, 326 (2003).

<sup>28</sup> *Id.*

<sup>29</sup> 42 U.S.C. § 12112(a).

<sup>30</sup> *Id.* § 12111(8).

<sup>31</sup> WorkWorld.org, Americans with Disabilities Act (ADA), [http://www.workworld.org/wwwwebhelp/americans\\_with\\_disabilities\\_act\\_ada.htm](http://www.workworld.org/wwwwebhelp/americans_with_disabilities_act_ada.htm) (follow the "ADA Title I—Employment" hyperlink) (last visited Feb. 22, 2007).

<sup>32</sup> 42 U.S.C. § 12111.

job application process, hiring, compensation, training, and employee termination.<sup>33</sup> Additionally, the ADA covers non-work facilities, which are related to employment, such as employee lounges and cafeterias.<sup>34</sup>

### *B. Establishing a Case of Discrimination Under the ADA*

In order to establish a discrimination case under Title I of the ADA, an employee must show that he is a qualified disabled individual and that he was discriminated against because of his disability.<sup>35</sup> This requires the employee to show that he is disabled within the meaning of the ADA, that he can perform the essential functions of the job with or without reasonable accommodation, and that his employer terminated or failed to hire him due to the disability.<sup>36</sup> Even if the employee has established a prima facie case, the employer can prevail by showing that the proposed accommodation poses an undue hardship to the employer.<sup>37</sup>

#### 1. Establishing a Qualified Disability

A disabled individual is defined by the ADA as a person “(A) [with] a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) [with] a record of such an impairment; or (C) being regarded as having such an impairment.”<sup>38</sup> Part A specifies that a disabled person includes persons with both physical and mental disabilities. A physical impairment is defined under the Equal Employment Opportunity Commission (EEOC) regulations as “[a]ny physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine.”<sup>39</sup> A mental impairment is defined as “[a]ny mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.”<sup>40</sup> Major life activities are those activities that are performed by an average person without difficulty.<sup>41</sup>

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<sup>33</sup> Joe Marrone, *ADA Overview: Title I Employment*, TOOLS FOR INCLUSION (Inst. for Cmty. Inclusion, Boston, Mass.), June 1998, [http://www.communityinclusion.org/article.php?article\\_id=60&staff\\_id=27](http://www.communityinclusion.org/article.php?article_id=60&staff_id=27).

<sup>34</sup> *Id.*

<sup>35</sup> *Cooper v. Neiman Marcus Group*, 125 F.3d 786, 790 (9th Cir. 1997).

<sup>36</sup> *Id.*

<sup>37</sup> *D'Angelo v. ConAgra Foods, Inc.*, 422 F.3d 1220, 1226 (11th Cir. 2005).

<sup>38</sup> 42 U.S.C. § 12102(2) (2000).

<sup>39</sup> 29 C.F.R. § 1630.2(h)(1) (2006).

<sup>40</sup> *Id.* § 1630.2(h)(2).

<sup>41</sup> DISABILITY AND COMM'N ACCESS BD., STATE OF HAW., AMERICANS WITH DISABILITIES ACT—TITLE 1: DEFINITION OF AN INDIVIDUAL WITH A DISABILITY 2 (2005),

Courts have been restrictive in interpreting the definition of a major life activity. The United States Supreme Court has held that major life activities are limited to “those activities that are of central importance to daily life.”<sup>42</sup> Working is generally considered to be a major life activity.<sup>43</sup>

To qualify as a disabled person, the definition indicates that an individual can have a record of the disability or be regarded as having the disability.<sup>44</sup> Under the explicit text of the ADA, employers must accommodate both those who are defined as actually disabled and those who are merely regarded as disabled.<sup>45</sup> Although on its face it may not seem like a difficult test for an individual to overcome, many individuals have a difficult time establishing a disability under the ADA. Establishing the existence of a disability under the ADA is only the first step in the process of accessing ADA coverage.

## 2. Ability to Perform Essential Job Functions

For Title I protection, it is not enough for a person to establish a disability; the individual must also be qualified for the position.<sup>46</sup> In other words, an employee must show that he or she can perform the essential functions of the job with or without reasonable accommodation.<sup>47</sup> By definition, the essential functions are the fundamental parts of a job.<sup>48</sup> Such functions are determined by reviewing written job descriptions, which must have been in existence before the discrimination action ensued, and by deferring to the employer’s judgment.<sup>49</sup> In the context of telecommuting, disabled workers who request to work from home may be unable to prove that they can perform essential functions of the job if an employer insists that workplace presence is essential. In establishing the parameters of essential job functions, the court can also look to the consequences of the employee’s hypothetical inability to perform the function, the work experience of past persons employed in the same position, and the amount of time that would be spent on the particular function.<sup>50</sup> The

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[http://www.hawaii.gov/health/dcab/docs/fact\\_sheets/definition.pdf](http://www.hawaii.gov/health/dcab/docs/fact_sheets/definition.pdf) (“[Major life activities] include walking, speaking, breathing, performing manual tasks, speaking [sic], hearing, learning, caring for one’s self, working, sitting, standing, lifting, and reading.”).

<sup>42</sup> *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 197 (2002).

<sup>43</sup> *D’Angelo v. ConAgra Foods, Inc.*, 422 F.3d 1220, 1227 (11th Cir. 2005).

<sup>44</sup> 42 U.S.C. § 12102(2) (2000).

<sup>45</sup> *D’Angelo*, 422 F.3d at 1236 (“The text of this statute simply offers no basis for differentiating among the three types of disabilities in determining which are entitled to a reasonable accommodation and which are not.”).

<sup>46</sup> DISABILITY AND COMM’N ACCESS BD., *supra* note 41, at 2.

<sup>47</sup> *Cooper v. Neiman Marcus Group*, 125 F.3d 786, 790 (9th Cir. 1997).

<sup>48</sup> 29 C.F.R. § 1630.2(n) (2006).

<sup>49</sup> *Mason v. Avaya Commc’ns, Inc.*, 357 F.3d 1114, 1119 (10th Cir. 2004).

<sup>50</sup> *Id.*

determination of the essential functions is a fact-specific inquiry performed on a case-by-case basis by the court.<sup>51</sup>

The disabled individual must be able to perform the functions of the position that are deemed essential with or without reasonable accommodation. A reasonable accommodation requires the employer to alter workplace facilities to make them accessible to disabled individuals.<sup>52</sup> Among other things, reasonable accommodations may include obtaining or modifying equipment, job restructuring, and adjusting work schedules.<sup>53</sup> Generally, a reasonable accommodation is a modification “to the way that work is structured that enables the [disabled] employee to perform.”<sup>54</sup> Requiring employers to provide a reasonable accommodation is considered to be one of the vaguest provisions within the ADA because the statute does not explicitly define what constitutes a reasonable accommodation.<sup>55</sup> Because of its vagueness, there is much room for differing judicial opinions as to what should constitute a reasonable accommodation. This is reflected in the differing approaches courts have taken with regard to whether working from home constitutes a reasonable accommodation.

### 3. Undue Hardship

Even after an individual has established a disability and a proposed accommodation that would allow the individual to perform the essential functions of the employment position, an employer may be able to avoid the requested accommodation on the basis of undue hardship.<sup>56</sup> Generally, an accommodation produces an undue hardship if it would cause “significant difficulty or expense” to the employer.<sup>57</sup> Factors that are considered in determining whether a particular accommodation constitutes an undue hardship to the employer include: (1) the nature of the accommodation while considering the tax consequences and outside funding; (2) the financial resources of the facility involved; (3) the overall size of the employer’s business, including employees and location; (4) the type and structure of the business; and (5) the impact that the accommodation will have on the entire business, including the other employees.<sup>58</sup> Although employers are required to make a good faith effort

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<sup>51</sup> *Hernandez v. City of Hartford*, 959 F. Supp. 125, 131 (D. Conn. 1997).

<sup>52</sup> 42 U.S.C. § 12111(9) (2000).

<sup>53</sup> *Id.*

<sup>54</sup> Travis, *supra* note 27, at 324.

<sup>55</sup> Joan T.A. Gabel & Nancy Mansfield, *The Information Revolution and Its Impact on the Employment Relationship: An Analysis of the Cyberspace Workplace*, 40 AM. BUS. L.J. 301, 339 (2003).

<sup>56</sup> 42 U.S.C. § 12112(b)(5)(A).

<sup>57</sup> 29 C.F.R. § 1630.2(p)(1) (2006).

<sup>58</sup> *Id.* § 1630.2(p)(2).

in evaluating the feasibility of a proposed accommodation, they are not obligated to offer accommodations that would eradicate the essential functions of the job position or offer accommodations which do not enable the employee to properly perform the necessary functions of the employment position.<sup>59</sup> For example, an employer would not be required to implement an accommodation that was excessively costly, disruptive, or one that would “fundamentally alter” the nature of the business.<sup>60</sup>

The issue of undue hardship plays a major role in determining the future of telecommuting as a reasonable accommodation for purposes of the ADA. Employers can avoid accommodating a disabled individual’s request to work at home on the basis of undue hardship to the company. Further scrutiny of undue hardship as it relates to telecommuting options will be addressed in subsequent sections.

#### IV. SOCIETAL SHIFT TOWARD WORKING AT HOME

##### A. *Telecommuting: A Growing Trend*

Telecommuting occurs when an employee utilizes telecommunications technology in order to work at home instead of at the conventional workplace.<sup>61</sup> The use of telecommuting in the workplace has been steadily increasing over the past few years. Approximately twenty million Americans telecommuted in 2001.<sup>62</sup> A recent study conducted by the Dieringer Research Group for the International Telework Association and Council (ITAC) found that approximately 34 million Americans telecommuted in some capacity in 2006, and approximately 22 million Americans telecommuted at least once per week.<sup>63</sup> The same survey showed a twenty-five percent increase of non-self-employed persons working from home in 2006 compared to the previous year. More and more employers are offering telecommuting as a viable option. Even federal and state agencies have implemented the practice of telecommuting. For example, the federal government has implemented a website, [telework.gov](http://telework.gov), dedicated to telecommuting.<sup>64</sup>

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<sup>59</sup> Swink, *supra* note 2, at 892.

<sup>60</sup> U.S. Equal Employment Opportunity Comm’n, *The ADA: Your Responsibilities as an Employer—When Does a Reasonable Accommodation Become an Undue Hardship?*, <http://www.eeoc.gov/facts/ada17.html> (last visited Feb. 22, 2007) [hereinafter EEOC].

<sup>61</sup> Swink, *supra* note 2, at 858.

<sup>62</sup> *Id.* at 857.

<sup>63</sup> WORLDATWORK, *TELEWORK TRENDLINES FOR 2006: 2007 SURVEY BRIEF 3* (2007), [http://www.workingfromanywhere.org/news/Trendlines\\_2006.pdf](http://www.workingfromanywhere.org/news/Trendlines_2006.pdf) (presenting results by ITAC based on 2006 data collected by the Dieringer Research Group).

<sup>64</sup> U.S. Office of Pers. Mgmt., Gen. Servs. Admin., *Featured Telework Questions—What is Teleworking?*, <http://www.telework.gov/definition.asp> (last visited Feb. 22, 2007).



Both Congress and the Executive Branch have been promoters of telecommuting over the last few years.<sup>65</sup>

Telecommuting can occur either on a full-time basis or may be done on a schedule ranging from a few days per week to as little as one day each month.<sup>66</sup> When teleworking, an employee, even though at home, is still on “official duty” and is expected to “have the resources necessary to do [the] job, and be able to concentrate on that job without interruptions from other family members.”<sup>67</sup> Numerous jobs exist where all or the majority of the work can effectively be performed outside the traditional workplace.<sup>68</sup> Some positions, however, due to the nature of the essential job functions, cannot be performed in any capacity from home.<sup>69</sup> Telecommuting is often appropriate for positions involving computer related tasks, such as programming, web design, word processing, and data entry.<sup>70</sup> It is also practical for positions that involve analysis and writing skills, such as research, reviewing cases, writing reports, and data analysis.<sup>71</sup> Telephone-intensive positions are also appropriate.<sup>72</sup> “Writers, salespersons, accountants, programmers, graphic artists, researchers, engineers, architects, public relations professionals—all are prime candidates for telecommuting.”<sup>73</sup> The prevalence of telecommuting is likely to flourish because of ever-changing technology and the benefits gained by employers, employees, and society.

### *B. Employer Telecommuting Benefits*

Although an employer may experience some costs from allowing an employee to work from home, the employer will see a savings in other areas of its business.<sup>74</sup> Costs to employers may include equipment for

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<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> JUNE LANGHOFF, *THE TELECOMMUTER'S ADVISOR: REAL WORLD SOLUTIONS FOR REMOTE WORKERS* 19–20 (2000). June Langhoff maintains a website and has published various books and articles promoting telecommuting.

<sup>69</sup> U.S. Equal Employment Opportunity Comm'n, *Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act—Other Reasonable Accommodation Issues* § 34, <http://www.eeoc.gov/policy/docs/accommodation.html> (last visited Feb. 22, 2007) [hereinafter EEOC].

<sup>70</sup> U.S. Office of Pers. Mgmt., Gen. Servs. Admin., *Featured Telework Questions—Am I a Good Candidate to Be a Teleworker?*, <http://www.telework.gov/candidate.asp> (last visited Feb. 22, 2007).

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> Urban Ecology Australia, *Telecommuting—FAQs About Telecommuting*, <http://www.urbanecology.org.au/topics/telecommuting.html> (last visited Feb. 22, 2007).

<sup>74</sup> Alvin L. Goldman, *A Comparative Study of the Impact of Electronic Technology on Workplace Disputes*, 24 *COMP. LAB. L. & POL'Y J.* 1, 9 (2002).

teleworkers as well as expenses associated with the supervision and security of these out-of-office employees. However, working from home allows employers to attract new employees, retain current workers, and increase company loyalty and enthusiasm.<sup>75</sup> Telecommuting has been shown to enhance productivity.<sup>76</sup> For example, the Telecommuting Pilot Program carried out by the State of California found that productivity increased anywhere from ten to thirty percent after implementing the program.<sup>77</sup> Approximately 150 employees from state agencies participated in this telework program.<sup>78</sup> Numerous positions were involved in the project, including analysts and attorneys.<sup>79</sup> The pilot program returned favorable results.<sup>80</sup> Reaching a similar conclusion to the California program, the 1999 Telework America National Telework Survey found that nearly one-half of telecommuters showed increased productivity at home compared to the office.<sup>81</sup> Companies that have implemented telecommuting have also seen a reduction in employee absenteeism rates because of fewer sick leave requests.<sup>82</sup> Also, companies with intact telework programs benefit from business continuity when bad weather or a natural disaster strikes.<sup>83</sup> Reduced office space, resulting in reduced real estate costs, is another valuable benefit.<sup>84</sup> Companies generally see an overall savings in office overhead costs upon implementing telecommuting programs.<sup>85</sup>

### C. Employee Benefits from Telecommuting

Employees experience great benefits from being able to work from home. Individuals who telecommute experience higher productivity due to efficient structuring of work time, the reduction in commute time, and decreased absenteeism from sickness or bad weather.<sup>86</sup> Increased

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<sup>75</sup> OFFICE OF TRANSP. & AIR QUALITY, U.S. ENVTL. PROT. AGENCY, TELECOMMUTING/TELEWORK PROGRAMS: IMPLEMENTING COMMUTER BENEFITS UNDER THE COMMUTER CHOICE LEADERSHIP INITIATIVE 2 (2001).

<sup>76</sup> *Id.* at 2–3.

<sup>77</sup> CAL. DEP'T OF GEN. SERVS., THE STATE OF CALIFORNIA TELECOMMUTING PILOT PROJECT FINAL REPORT 75–76 (1990).

<sup>78</sup> *Id.* at 2.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> OFFICE OF TRANSP. & AIR QUALITY, *supra* note 75, at 2–3.

<sup>82</sup> Swink, *supra* note 2, at 862.

<sup>83</sup> JuneLanghoff.com, FAQs about Telework, <http://www.junelanghoff.com/telework.html> (last visited Feb. 22, 2007).

<sup>84</sup> Swink, *supra* note 2, at 862.

<sup>85</sup> *Id.*

<sup>86</sup> William N. Washington, *Telecommuting Program—Is “Flexplace” Suited to Your Organization?*, PROGRAM MANAGER, Jan.-Feb. 2001, at 46, 46, available at <http://www.dau.mil/pubs/pm/pmpdf01/washj-f.pdf>.

productivity can lead to improved performance reviews for the employee, which may ultimately lead to greater compensation. Employees who telecommute often experience non-monetary benefits as well. Less work-related stress is an important benefit of being able to work from home.<sup>87</sup> Employees who telecommute often experience greater job satisfaction and improved balance between work and family life. Additionally, telecommuting allows individuals who would not otherwise be able to work at a traditional workplace to experience the fulfillment of an employment position. This includes mothers with young children who may be capable of working from home as well as individuals with disabilities who cannot easily work outside of the home.

#### *D. Societal Benefits Resulting from Telecommuting*

There is a sound public policy reason for the use of telecommuting: the increased use of telecommuting holds benefits for society as a whole. Telecommuting serves to reduce air pollution through the reduction of nitrous oxides, carbon dioxide, and other particles emitted by vehicles.<sup>88</sup> According to one EPA estimate, "If 10% of the nation's workforce telecommuted one day a week, [we] would avoid the frustration of driving 24.4 million miles, breathe air with 12,963 tons less air pollution, and conserve more than 1.2 million gallons of fuel each week."<sup>89</sup> A decreased amount of traffic congestion will also result from the use of telecommuting.<sup>90</sup> The reduction in the amount of commuters on the highways will inevitably improve road conditions and reduce the need for repair and maintenance, which indirectly affects all citizens in reduced taxes.<sup>91</sup> Other expected advantages of telework include reduced crime rates as a result of homes being occupied during the workday and fewer commuting automobile accidents. It is evident that an increase in individuals working from home would have a positive effect on the general public.

#### *E. Legal Issues Arising from Telecommuting*

Telecommuting, with its growing popularity, raises legal liability issues in otherwise settled areas of employment law. Telecommuting

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<sup>87</sup> Swink, *supra* note 2, at 862.

<sup>88</sup> See Dennis Henderson & Patricia Mohktarian, *Impacts of Center-Based Telecommuting on Travel and Emissions: Analysis of the Puget Sound Demonstration Project*, 1 TRANSP. RES. PART D: TRANSPORT & ENV'T 29, 29 (1996), available at <http://repositories.cdlib.org/cgi/viewcontent.cgi?article=1053&context=itsdavis>.

<sup>89</sup> Fairfaxcounty.gov, Board of Supervisors' 4-Year Transportation Plan—Telework, [http://www.fairfaxcounty.gov/chairman/transportation\\_plan.htm](http://www.fairfaxcounty.gov/chairman/transportation_plan.htm) (last visited Feb. 22, 2007).

<sup>90</sup> Swink, *supra* note 2, at 862.

<sup>91</sup> *Id.*

creates unique questions regarding how it will affect Workers' Compensation, the Fair Labor Standards Act (FLSA), the Occupational Safety and Health Administration (OSHA) standards, and the ADA.<sup>92</sup> "While no legislation specifically addresses the issue, the assumption is that employees working remotely are entitled to workers' compensation benefits so long as the injury arises out of and in the course of employment."<sup>93</sup> Under the FLSA, employers who implement telecommuting programs still need to comply with regulations that require the employer to monitor hours worked and enforce rules limiting such hours.<sup>94</sup> OSHA requires employers to ensure that all employees work in safe conditions regardless of where the work is performed.<sup>95</sup> The ADA is one area of the law "in which there are significant developments respecting the application of U.S. legal standards to the use of electronic technology in the context of at-home work."<sup>96</sup>

#### V. DIFFERING JUDICIAL APPROACHES TO TELECOMMUTING AS A REASONABLE ACCOMMODATION

Courts have taken conflicting approaches regarding whether telecommuting constitutes a reasonable accommodation. Some courts have set forth a presumption that telecommuting is not a reasonable accommodation,<sup>97</sup> while others have held that a more fact-specific approach is appropriate when determining if telecommuting is a reasonable accommodation.<sup>98</sup> Both approaches will be discussed in detail in the subsequent sections.

##### A. A Presumption Against Telecommuting

*Vande Zande v. Wisconsin Department of Administration* is representative of one of the most hostile views regarding whether working at home constitutes a reasonable accommodation. In this case, a paraplegic employee brought a discrimination claim under the ADA against her employer.<sup>99</sup> The employee, who was unable to perform work at the workplace due to pressure ulcers, requested permission to work from home.<sup>100</sup> The ulcers were formed on her skin because she was in the same position too long without proper movement. The employer rejected

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<sup>92</sup> *Id.* at 858.

<sup>93</sup> Gabel & Mansfield, *supra* note 55, at 343.

<sup>94</sup> Swink, *supra* note 2, at 891.

<sup>95</sup> *Id.* at 899.

<sup>96</sup> Goldman, *supra* note 74, at 6.

<sup>97</sup> *See, e.g., Vande Zande v. Wis. Dep't of Admin.*, 44 F.3d 538 (7th Cir. 1995).

<sup>98</sup> *See, e.g., Humphrey v. Mem'l Hosps. Ass'n*, 239 F.3d 1128 (9th Cir. 2001).

<sup>99</sup> *Vande Zande*, 44 F.3d at 543.

<sup>100</sup> *Id.*

her request.<sup>101</sup> Even though the Seventh Circuit Court of Appeals found that the employer did have a duty to accommodate the employee because the ulcers were a part of her disability, it found that working from home was not a reasonable accommodation.<sup>102</sup> Judge Posner, writing for the majority, recognized that “[t]he concept of reasonable accommodation is at the heart of this case.”<sup>103</sup> The court established a presumption against allowing telecommuting as a reasonable accommodation, holding that, in general, “an employer is not required to accommodate a disability by allowing the disabled worker to work, by himself, without supervision, at home.”<sup>104</sup> Although recognizing the possibility of limited exceptions, the court held that it would take an “extraordinary” situation to allow an employee to bring an action based on the employer’s failure to permit the employee to work from home.<sup>105</sup> The position of the court in *Vande Zande* against telecommuting as a reasonable accommodation followed what the court referred to as the “majority view.”<sup>106</sup> This view stemmed from the ideology of earlier cases that attendance at the workplace was a necessary part of employment.<sup>107</sup>

In *Whillock v. Delta Air Lines, Inc.*,<sup>108</sup> a federal district court in the Northern District of Georgia utilized similar reasoning. The employee worked for Delta as an airline reservation sales agent. She suffered from Multiple Chemical Sensitivity Syndrome, which prevented her from being able to perform at the workplace without experiencing severe allergic reactions. The employee brought suit alleging that the employer had denied her disability benefits, and that the denial of her telecommuting request was a violation of the ADA.<sup>109</sup> The court awarded summary judgment to the employer.<sup>110</sup> The court, using the same reasoning as *Vande Zande*, applied a presumption against telecommuting.<sup>111</sup> The court determined that the employee was not a qualified individual under the ADA because she could not perform the essential functions of her job if the only way she could work was from

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<sup>101</sup> *Id.* at 544.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at 543.

<sup>104</sup> *Id.* at 544.

<sup>105</sup> *Id.* at 545 (“[T]here are exceptions, but it would take a very extraordinary case for the employee to be able to create a triable issue of the employer’s failure to allow the employee to work at home.”).

<sup>106</sup> *Id.* at 544.

<sup>107</sup> *See, e.g.,* Tyndall v. Nat’l Educ. Ctrs., 31 F.3d 209, 213 (4th Cir. 1994).

<sup>108</sup> 926 F. Supp. 1555 (N.D. Ga. 1995).

<sup>109</sup> *Id.* at 1560.

<sup>110</sup> *Id.* at 1561.

<sup>111</sup> *Id.* at 1563.

home.<sup>112</sup> The court further held that even if she could perform the essential functions of her job at home, working from home was unreasonable as a matter of law.<sup>113</sup> In short, the court presumed that workplace presence is an essential element of nearly all job positions.

Courts that have followed a presumption-against-telecommuting approach have often done so under the disingenuous label of a fact-specific approach. Although nominally applying a case-by-case analysis, the courts adhere to the view that working from home is unreasonable in all but extraordinary cases. Furthermore, jurisdictions that follow this approach have failed to identify clear situations where telecommuting would be appropriate as an extraordinary case.

### *B. A Fact-Specific Approach*

At least three federal courts have taken a much less restrictive approach when determining whether telecommuting is a reasonable accommodation.<sup>114</sup> In the federal district court case, *Hernandez v. City of Hartford*, an employee filed suit against her employer under the ADA.<sup>115</sup> She alleged that pre-term labor during her pregnancy was a disability, and that she was discriminated against by her employer's refusal to allow her to work from home.<sup>116</sup> The court rejected *Vande Zande* by holding that "[Vande Zande's] nearly *per se* rule regarding 'at home' work flies in the face of the requirement of a case-by-case, fact-specific inquiry."<sup>117</sup> The court denied the employer's motion to dismiss and found that the employee made a prima facie case showing that a reasonable accommodation existed and raised a fact issue as to whether the request was an undue burden to her employer.<sup>118</sup>

In *Langon v. Department of Health and Human Services*, the D.C. Circuit Court of Appeals took a fact-specific approach in determining the use of telecommuting as a reasonable accommodation. In this case, a former employee of the Department of Health and Human Services filed suit alleging failure to accommodate her disability.<sup>119</sup> The employee's complaint survived summary judgment because her employer had an

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<sup>112</sup> *Id.* at 1565 ("If the only accommodation which would allow Plaintiff to perform the essential functions of her job is allowing her to work at home, Plaintiff is not an 'otherwise qualified individual with a disability' under the terms of the ADA.").

<sup>113</sup> *Id.*

<sup>114</sup> See *Humphrey v. Mem'l Hosps. Ass'n*, 239 F.3d 1128 (9th Cir. 2001); *Langon v. Dep't of Health & Human Servs.*, 959 F.2d 1053 (D.C. Cir. 1992); *Hernandez v. City of Hartford*, 959 F. Supp. 125 (D. Conn. 1997).

<sup>115</sup> 959 F. Supp. at 128.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 132.

<sup>118</sup> *Id.*

<sup>119</sup> *Langon*, 959 F.2d at 1054.

existing work-at-home policy, and the employee's job description indicated that she did not need to be in the office to adequately perform her duties.<sup>120</sup> Ultimately, the employer failed to offer sufficient evidence that the employee's working from home produced an undue hardship.<sup>121</sup>

In *Humphrey v. Memorial Hospitals Ass'n*, a medical transcriptionist who suffered from obsessive compulsive disorder brought a discrimination suit against her employer under the ADA.<sup>122</sup> The suit alleged that her employer failed to reasonably accommodate her disability by denying her request to work from home.<sup>123</sup> The employer permitted other transcriptionists to work from home, but denied Humphrey's request. The court followed a fact-specific approach and denied the employer's motion for summary judgment. The court held that "working at home is a reasonable accommodation when the essential functions of the position can be performed at home and a work-at-home arrangement would not cause an undue hardship for the employer."<sup>124</sup> In taking this approach, the court refused to follow *Vande Zande*, which would only permit telecommuting as a reasonable accommodation in extraordinary circumstances.<sup>125</sup> The *Humphrey's* court took an approach consistent with the EEOC Enforcement Guidance on Reasonable Accommodation, which indicates that working at home is a reasonable accommodation when the essential job function can be performed at home and no undue hardship would result to the employer.<sup>126</sup> "Undue hardship means that an accommodation would be unduly costly, extensive, substantial or disruptive, or would fundamentally alter the nature or operation of the business."<sup>127</sup>

In *Smith v. Bell Atlantic*, a state appellate court affirmed a jury's finding that allowing a disabled employee to perform much of her work at home was a reasonable accommodation.<sup>128</sup> The employee had a paralyzed leg and had to reduce her amount of driving.<sup>129</sup> Telecommuting was deemed a reasonable accommodation because the essential functions of her job did not require her to be present in the office every day.<sup>130</sup>

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<sup>120</sup> *Id.* at 1053.

<sup>121</sup> *Id.* at 1061.

<sup>122</sup> 239 F.3d 1128, 1129 (9th Cir. 2001).

<sup>123</sup> *See id.* at 1136.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* at 1136 n.15 (citing *Vande Zande v. Wis. Dep't of Admin.*, 44 F.3d 538, 544–45 (7th Cir. 1995)).

<sup>126</sup> OFFICE OF TRANSP. & AIR QUALITY, *supra* note 75, at 2.

<sup>127</sup> EEOC, *supra* note 60.

<sup>128</sup> 829 N.E.2d 228, 241 (Mass. App. Ct. 2005).

<sup>129</sup> *Id.* at 233–34.

<sup>130</sup> *Id.* at 241.

In some instances where courts determine that working from home is unreasonable, they still recognize that working from home is an option that should be considered.<sup>131</sup> For example, in the Tenth Circuit Court of Appeals case, *Mason v. Avaya Communications, Inc.*, a terminated employee who suffered from post traumatic stress disorder brought suit against her employer alleging that it failed to accommodate her disability.<sup>132</sup> The employee worked as a service coordinator in an administration center of a “corporation specializing in communications systems, applications, and services.”<sup>133</sup> The corporation contended that the nature of the position required onsite interaction with other employees because coordinators assisted one another with their tasks.<sup>134</sup> Additionally, the employer argued that regular training could only be properly provided at the workplace.<sup>135</sup> The court found that working at home would be unreasonable in this situation because it would eliminate an essential function of her job.<sup>136</sup> Although the court determined telecommuting was unreasonable in that situation, the majority opinion noted that

a request to work at home is unreasonable if it eliminates an essential function of the job; however, summary adjudication may be improper when the employee has presented evidence she could perform the essential functions of her position at home thereby making the at-home accommodation request at least facially reasonable.<sup>137</sup>

## VI. THE NEED FOR FACT-SPECIFIC ANALYSIS WITH BROAD INTERPRETATION

### A. *The Presumption Against Telecommuting Should be Abandoned*

The ADA requires a fact-specific approach in determining if a proposed accommodation is a reasonable accommodation.<sup>138</sup> Judicial approaches that create a presumption against telecommuting as a reasonable accommodation rely on the assertion that presence in the workplace is required in practically all employment positions.<sup>139</sup>

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<sup>131</sup> See, e.g., *Mason v. Avaya Commc'ns, Inc.*, 357 F.3d 1114, 1124 (10th Cir. 2004); *Carr v. Reno*, 23 F.3d 525, 530 (D.C. Cir. 1994).

<sup>132</sup> *Mason*, 357 F.3d at 1116.

<sup>133</sup> *Id.* at 1117.

<sup>134</sup> *Id.* at 1121.

<sup>135</sup> *Id.* at 1120.

<sup>136</sup> *Id.* at 1124.

<sup>137</sup> *Id.*

<sup>138</sup> See 29 C.F.R. § 1630.2(n) app. (2006) (explaining that “[w]hether a particular function is essential is a factual determination that must be made on a case by case basis”).

<sup>139</sup> Kristen M. Ludgate, Note, *Telecommuting and the Americans with Disabilities Act: Is Working at Home a Reasonable Accommodation?*, 81 MINN. L. REV. 1309, 1331 (1997) (noting that 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).



Workplace presence is seen as essential based on the assertion that “[m]ost jobs . . . involve team work under supervision.”<sup>140</sup> This dependence on traditional excessive absenteeism cases to assert that telecommuting should be presumed unreasonable is erroneous. Absenteeism cases involve fundamentally different issues than telecommuting cases.<sup>141</sup> The concern with absenteeism cases is whether the employer should be required “to accommodate a disabled employee’s repeated, extended, and often unpredictable absences” caused by the disability.<sup>142</sup> The court’s focus in these types of cases is not centered on the employee’s actual physical presence at the workplace, but rather on the employee’s unreliable performance in the employment position.<sup>143</sup> “By importing from the excessive absenteeism cases a presumption that physical presence is per se essential to employment, and that telecommuting is thus by definition an inappropriate accommodation, the presumption cases confuse the need for physical presence at work with the need for predictable job performance.”<sup>144</sup> In a traditional absenteeism case, job performance and attendance are related because the employee is not able to perform the essential functions of the position due to the absences. However, in telecommuting cases, an employee is arguing that all the essential functions of the position can be performed outside of the workplace.<sup>145</sup>

An approach that presumes telecommuting is unreasonable in all but exceptional situations should be abandoned altogether because it is inconsistent with the purposes and goals of the ADA. Although some positions require physical presence at the workplace, other positions can feasibly be performed from an offsite location. Workplace presence is a necessity for service-oriented positions where the employee deals directly with customers in person, such as a retail sales representative at a department store or a waiter at a restaurant. The use of telecommuting has been steadily rising over the last few years, and its prevalence will likely only increase in the future. As more employers allow greater numbers of individuals to work from home, a presumption that workplace presence is essential will become more and more irrational.

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<sup>140</sup> *Vande Zande v. Wis. Dep’t of Admin.*, 44 F.3d 538, 544 (7th Cir. 1995).

<sup>141</sup> *Ludgate*, *supra* note 139, at 1331.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.* at 1332.

<sup>144</sup> *Id.* at 1333.

<sup>145</sup> *Id.* at 1332.

### *B. The Need for a Broader Approach*

#### 1. A Broadly Construed Fact-Specific Analysis Should be the Standard

The only approach that guarantees a fair result is a broadly construed case-by-case approach. The ADA requires the employee to show that he or she is a qualified disabled individual who is able to perform the essential job responsibilities. The employee has the initial burden of proposing reasonable accommodations that would allow the employee to perform the essential job functions. Thus, with a request to work from home, an employee has the initial burden of establishing that he or she can perform all the essential job functions from home and that working from home is reasonable.<sup>146</sup> For example, an attorney requesting to work from home would need to show that the fundamental aspects of his or her position can be performed offsite and that doing so would be reasonable under the circumstances.

Courts should never presume that telecommuting is unreasonable when evaluating an employee's claim. The ADA promotes and requires a fact-specific approach when evaluating reasonable accommodations requests. Courts have the duty to properly and fairly evaluate the reasonableness of the request. In telecommuting cases, courts 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.<sup>147</sup> In circumstances where the essential functions cannot be performed outside the workplace, the request should be deemed unreasonable. But where 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.<sup>148</sup> The process of determining the reasonableness of a proposed accommodation is highly fact-specific and requires balancing the needs of both the employer and the employee.<sup>149</sup>

The prominence of companies offering telework has increased astonishingly over the past decade.<sup>150</sup> 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

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<sup>146</sup> *See id.* at 1319.

<sup>147</sup> *Smith v. Bell Atl.*, 829 N.E.2d 228, 240 n.5 (Mass. App. Ct. 2005).

<sup>148</sup> *Id.* at 241 n.6.

<sup>149</sup> *Rauen v. U.S. Tobacco Mfg.*, 319 F.3d 891, 896 (7th Cir. 2001).

<sup>150</sup> *InnoVisions Canada, U.S. Telework Scene—Stats and Facts*, <http://www.ivic.ca/studies/us.html> (last visited Feb. 22, 2007) (noting that employed telecommuters in the United States have increased from 11.6 million in 1997 to 23.8 million in 2003).

telecommuting will be a reasonable accommodation for a disabled employee.

## 2. Undue Hardship: Overestimating the Costs of Accommodation and Underestimating the Feasibility of Telecommuting

In cases decided over the last few years, a tendency exists for courts to enunciate a case-by-case analysis, but still reject the request as unreasonable based on undue hardship to the employer. In *Kvorjak v. Maine*, where the majority held that an employee's request to work from home was unreasonable,<sup>151</sup> the dissenting judge responded: "[The court] simply rejected the request for the accommodation without further discussion and it did so without pointing to any facts making the accommodation harmful to its business needs."<sup>152</sup> Unfortunately, this is the critical flaw of many judicial opinions that have addressed this issue. Too often the deciding factor is undue hardship on the employer in situations where the actual hardship has not been fully explored.<sup>153</sup> Oftentimes, the hardship is nothing more than inherent distrust of employees. It has been observed that "the degree to which many companies comply with the accommodations provision of Title I has more to do with their corporate cultures and attitudes than with the actual demands of the law."<sup>154</sup> In telecommuting cases, there are two main reasons why courts erroneously accept an employer's undue hardship defense: (1) they assume the cost of accommodation outweighs the benefits, and (2) they underestimate the feasibility of telecommuting.

First, courts often overestimate the actual costs of accommodation and fail to take into account the benefits of compliance with the requested accommodation. This problem is not unique to telecommuting as evidenced in Title 1 discrimination suits. Some argue that Title I's requirement of reasonable accommodations puts a financial burden on companies that outweighs the benefits.<sup>155</sup> Courts often echo this view in decisions that deny a proposed accommodation based on alleged undue hardship to an employee. In *Vande Zande v. Wisconsin Department of Administration*, this sentiment is reflected in the majority opinion: "If the nation's employers have potentially unlimited financial obligations to 43 million disabled persons, the Americans with Disabilities Act will have imposed an indirect tax potentially greater than the national

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<sup>151</sup> 259 F.3d 48, 58 (1st Cir. 2001).

<sup>152</sup> *Id.* at 59 (Schwarzer, J., dissenting) (quoting *Garcia-Ayala v. Lederle Parenterals, Inc.*, 212 F.3d 638, 648 n.12 (1st Cir. 2000)).

<sup>153</sup> See, e.g., *Vande Zande v. Wis. Dep't of Admin.*, 44 F.3d 538 (7th Cir. 1995).

<sup>154</sup> Peter David Blanck & Mollie Weighner Marti, *Attitudes, Behavior and the Employment Provisions of the Americans with Disabilities Act*, 42 VILL. L. REV. 345, 378 (1997).

<sup>155</sup> *Id.* at 375.

debt.”<sup>156</sup> This assumption that costs will outweigh the benefits is often made without reliable data.<sup>157</sup> Studies have shown that companies that effectively follow the law are consistently looking for ways to affordably comply with the provisions of the ADA. These accommodations “have been shown to produce substantial economic benefits to companies, in terms of increased work productivity, injury prevention, reduced workers’ compensation costs and workplace effectiveness and efficiency.”<sup>158</sup> There have been other studies showing that implementing accommodations for disabled persons have led to both direct and indirect benefits to employers, including increased productivity of employees who do not have disabilities.<sup>159</sup>

Second, courts often underestimate the feasibility of telecommuting. Much emphasis has been placed on the physical presence requirement and the need for supervision and teamwork.<sup>160</sup> Although the need for supervision and teamwork is valid, and in some situations can only be accomplished at a physical workplace, oftentimes supervision and teamwork can still be successfully accomplished in a telecommuting setting. The use of communication tools such as email, teleconferencing, and faxing, can meet the needs of interaction among employees. Employers can supervise via production quotas, computer-assisted work monitoring tools, and by maintaining effective communication. Tools that can be used to effectively manage teleworkers include “project schedules, key milestones, regular status reports, and team reviews.”<sup>161</sup>

One example in which the practicability of telecommuting was misjudged is *Kvorjak v. Maine*.<sup>162</sup> In this case, Kvorjak, a claims adjudicator suffering from spinal bifida, had requested to work from home due to complications from his disease.<sup>163</sup> The essential functions of his job included interviewing claimants by telephone; writing and entering decisions related to their claims into a computer; discussing applicable laws and particular claims with the claimants, employers, and others; and assisting claims specialists and employment security aides.<sup>164</sup> The employee contended that he could perform the essential functions by using a telephone and a computer from his home. Instead of

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<sup>156</sup> *Vande Zande*, 44 F.3d at 543.

<sup>157</sup> *Blanck & Marti*, *supra* note 154, at 375.

<sup>158</sup> *Id.* at 377.

<sup>159</sup> *Id.* at 378.

<sup>160</sup> *See supra* notes 104, 113 and accompanying text.

<sup>161</sup> U.S. Office of Pers. Mgmt., Gen. Servs. Admin., Frequently Asked Questions—How Can the Supervisor Monitor Work Performance When the Employee Is Not Physically Present?, <http://www.telework.gov/faqs.asp> (last visited Feb. 22, 2007).

<sup>162</sup> 259 F.3d 48 (1st Cir. 2001).

<sup>163</sup> *Id.* at 50–51.

<sup>164</sup> *Id.* at 55 nn.13–14.

focusing on the actual tasks of the position,<sup>165</sup> the court based its decision on the presumption that working from home is generally not reasonable due to the lack of “personal contact, interaction, and coordination” needed in most employment positions.<sup>166</sup> The fact that the essential elements of his job could be done offsite was overshadowed by the presumption that an employee needs to be in a workplace with other employees. The director of Kvorjak’s division had even stated that “if the law requires it, the [State] could restructure Mr. Kvorjak’s job to enable him to work from home.”<sup>167</sup>

The *Kvorjak* decision is like many others where the court has “fail[ed] to distinguish between actual job tasks and the default organizational norms regarding when, where, and how the actual tasks get performed.”<sup>168</sup> The same line of reasoning was used in the *Vande Zande* decision where the majority opinion stated: “Most jobs in organizations public or private 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.”<sup>169</sup> Courts presume that working from home will result in no supervision and a decrease in the quality of work produced by employees. On the contrary, reports consistently have shown that companies that have implemented telework programs experience increased productivity.<sup>170</sup> There is room for greater leniency in measuring the feasibility of working from home in a number of positions.

## VII. PROBLEMS ASSOCIATED WITH TELECOMMUTING

The future of telecommuting holds great promise for numerous individuals with disabilities as well as for the entire workforce. As telecommuting becomes more prevalent, it will open doors to allow qualified disabled individuals to hold fulfilling employment positions that they would otherwise struggle to hold. Along with the abundant opportunities that telecommuting has and will provide, there are issues that arise in connection with the process of working from home.

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<sup>165</sup> *Id.* at 57 (“[C]laims adjudicators [are] key players on a team whose function is to provide information and assistance to the public in utilizing the unemployment insurance system.”).

<sup>166</sup> *Id.* (quoting EEOC, *supra* note 69, § 34 n.101).

<sup>167</sup> *Id.* (alteration in original).

<sup>168</sup> Michelle A. Travis, *Recapturing the Transformative Potential of Employment Discrimination Law*, 62 WASH. & LEE L. REV. 3, 39 (2005).

<sup>169</sup> 44 F.3d 538, 544 (7th Cir. 1995).

<sup>170</sup> WORLDDATWORK, *supra* note 63, at 3; OFFICE OF TRANSP. & AIR QUALITY, *supra* note 75, at 2.

### A. Supervision Issues

Many employers are reluctant to offer telecommuting because of supervision issues. Employers question how to effectively monitor an employee's time and productivity.<sup>171</sup> The need and ease for monitoring will vary with the characterization of the employment position. Some jobs are task-based rather than time-based and can more easily be monitored by observing work product. Employers may have a more difficult time monitoring employment positions that demand certain time commitments. To combat this problem, computer monitoring programs have been implemented where employees "clock" in and out on their computers and will have their work monitored using a computer tracking program.<sup>172</sup> Some companies fear that permitting employees to work from home will allow employees to slack in their work and put in less hours than if they were in the workplace. However, research suggests that individuals who work from home are actually more productive than their colleagues who work in the office.<sup>173</sup> The federal government's website on telecommuting echoes this finding. It states that an employee's work will not suffer without direct supervision because fewer interruptions and distractions occur when working at home and employees have a strong motive to "demonstrate the value of working at home."<sup>174</sup>

### B. Security Issues

Security issues associated with telecommuting programs may also concern companies. Because a telecommuter often accesses a company's internal network from home via the Internet, a company's network resources may be more susceptible to computer hackers if proper security measures are not taken.<sup>175</sup> Fortunately, there are security measures companies can take to guard against possible attacks on telecommuter systems. Employers can use encryption protection programs such as Virtual Private Network, so that in the event that the system is hacked, any information stolen is encrypted.<sup>176</sup> Employers can also install firewall software in all computers used by telecommuters.

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<sup>171</sup> URSULA HUWS, ET AL., *TELEWORK: TOWARDS THE ELUSIVE OFFICE* 28–29 (1990).

<sup>172</sup> *Id.* at 30–31.

<sup>173</sup> Ludgate, *supra* note 139, at 1322 n.82.

<sup>174</sup> U.S. Office of Pers. Mgmt., Gen. Servs. Admin., *Frequently Asked Questions—Won't the Employee's Work Suffer Without Direct, On-Site Supervision?*, <http://www.telework.gov/faqs.asp> (last visited Feb. 22, 2007).

<sup>175</sup> See Mark Maier, *Backdoor Liability From Internet Telecommuters*, 6 *COMP. L. REV. & TECH J.* 27, 39 (2001).

<sup>176</sup> *Id.* at 45–46.

Firewall programs increase security and are inexpensive.<sup>177</sup> When appropriate security measures are put into practice, the benefits of telecommuting will outweigh any risk posed by hackers.<sup>178</sup>

### C. Social Alienation

Employees that work primarily from home may face social alienation. Personal contact is drastically reduced when an employee telecommutes.<sup>179</sup> Becoming disconnected from society is an important concern for employees that perform a majority of their work from home. "Working from home creates limited interaction with people, places and things, and that might be problematic."<sup>180</sup> Unfortunately, this social alienation is often exemplified when the telecommuter also has a disability. Employers must use care in implementing programs that will prevent social alienation of telecommuting employees.<sup>181</sup> Maintaining strong communication is an important part of preventing social alienation.<sup>182</sup> Social alienation may also play a role in inhibiting an employee's advancement within a company, which will be discussed further in the following section.

### D. Promotions

The problem of social alienation may also affect an employee's opportunity for advancement within a company. Workplace promotions are often rooted in social relationships with other employees and management. Working from home may place an otherwise qualified worker at a disadvantage because of the lack of socialization with the workplace-based staff. This issue can be reduced by implementing appropriate communication practices. Recognition is also an important tool employers can use to validate a telecommuter's performance and increase workplace knowledge of a teleworker's contribution to the office.<sup>183</sup> It is also important for management to discuss telework arrangements with the entire staff.<sup>184</sup> Office awareness will aid in decreasing social alienation issues associated with telecommuting.

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<sup>177</sup> *Id.* at 49.

<sup>178</sup> *Id.* at 43.

<sup>179</sup> Ellen Alcorn, *Is Working from Home the Answer?*, <http://diversity.monster.com/wwd/articles/forced> (last visited Feb. 22, 2007).

<sup>180</sup> *Id.* (quoting Andrew Houtenville, Ph. D.).

<sup>181</sup> *See id.*

<sup>182</sup> *See* U.S. Office of Pers. Mgmt., Gen. Servs. Admin., *Telework: A Management Priority: A Guide for Managers, Supervisors, and Telework Coordinators*, [http://www.telework.gov/documents/tw\\_man03/ch4.asp](http://www.telework.gov/documents/tw_man03/ch4.asp) (last visited Feb. 22, 2007).

<sup>183</sup> *Id.* at [http://www.telework.gov/documents/tw\\_man03/ch5.asp](http://www.telework.gov/documents/tw_man03/ch5.asp).

<sup>184</sup> *Id.* at [http://www.telework.gov/documents/tw\\_man03/ch4.asp](http://www.telework.gov/documents/tw_man03/ch4.asp).

Additionally, at some point, a disabled employee may be prevented from advancing in a company because it is impossible to perform the advanced job at home. As offices become more computerized and management positions become more easily performed offsite, this issue should present less of a problem. The bottom line is that employers and employees must work together to ensure that teleworking employees are given every opportunity they deserve.

#### VIII. CONCLUSION

The ADA is valuable in that it reflects the importance of equality and opportunity throughout our society. It has enriched lives and opened doors for many disabled Americans. As 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. Allowing broad statutory interpretations and assessing telecommuting cases on a case-by-case basis are ways in which the court system can ensure the ADA will continue to open doors for Americans with disabilities.

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