



6-1-2016

## She Works Hard for the Money Wherever She Is: The Need to Abandon the Physical Presence Presumption in Telecommunication Cases Following EEOC v. Ford

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### Recommended Citation

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 (2016). Available at: <https://digitalcommons.law.villanova.edu/vlr/vol61/iss2/2>

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2016]

SHE WORKS HARD FOR THE MONEY WHEREVER SHE IS:  
THE NEED TO ABANDON THE PHYSICAL PRESENCE  
PRESUMPTION IN TELECOMMUNICATION  
CASES FOLLOWING *EEOC v. FORD*

SEAN CAULFIELD\*

“[T]he law must respond to the advance of technology in the employment context, as it has in other areas of modern life, and recognize that the ‘workplace’ is anywhere that an employee can perform her job duties.”<sup>1</sup>

I. HEIGH-HO, HEIGH-HO, IT’S OFF TO SKYPE WE GO: AN INTRODUCTION  
TO TELECOMMUNICATION AND ITS IMPACT ON THE AMERICANS  
WITH DISABILITIES ACT’S REASONABLE  
ACCOMMODATION REQUIREMENT

Society’s reliance on electronic devices has left many wondering whether technology can replace human interaction, particularly in the workplace.<sup>2</sup> Advancements such as the Internet have provided employees with the option to “telecommute,” or work from home, instead of commuting to an office.<sup>3</sup> Telecommunication has many benefits for both em-

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\* J.D. Candidate, 2017, Villanova University Charles Widger School of Law; B.A., 2014, Saint Joseph’s University. This Note is dedicated to my wife, Kelly, who has supported me throughout my law school career and with this publication. I would also like to thank the editors of the *Villanova Law Review* for their assistance with the writing of this Note. The inspiration for this title comes from the song *She Works Hard for the Money*, by Donna Summer. See DONNA SUMMER, *She Works Hard for the Money*, on SHE WORKS HARD FOR THE MONEY (Mercury Records 1983).

1. See *EEOC v. Ford Motor Co.*, 752 F.3d 634, 641 (6th Cir. 2014) (footnote omitted) (recognizing advancements in technology have invalidated presumption that physical presence is essential to most jobs), *vacated*, 782 F.3d 753 (6th Cir. 2015) (en banc).

2. See, e.g., Shana Lebowitz, *Why Working from Home Won’t Become the Norm Anytime Soon*, BUS. INSIDER (June 9, 2015, 12:38 PM), <http://www.businessinsider.com/working-from-home-wont-become-the-norm-2015-6> [<https://perma.cc/RET3-6UAN>] (theorizing physical workplaces will not be eradicated because employees desire face-to-face interaction).

3. See Joan T.A. Gabel & Nancy Mansfield, *On the Increasing Presence of Remote Employees: An Analysis of the Internet’s Impact on Employment Law as It Relates to Teleworkers*, 2001 U. ILL. J.L. TECH. & POL’Y 233, 233 (reporting internet technologies have allowed more workers to telecommute); Dawn R. Swink, *Telecommuter Law: A New Frontier in Legal Liability*, 38 AM. BUS. L.J. 857, 857–58 (2001) (noting advanced information technology is allowing Americans to work from home); Brianne M. Sullenger, Comment, *Telecommuting: A Reasonable Accommodation Under the Americans with Disabilities Act as Technology Advances*, 19 REGENT U. L. REV. 537, 537 (2007) (“Countless innovations, such as closed captioning, screen readers, and speech recognition technology, have directly improved the lives of disabled per-

ployees and employers.<sup>4</sup> In particular, telecommunication offers persons who suffer from disabilities that inhibit workplace performance more employment opportunities.<sup>5</sup>

Telecommuters often experience more job satisfaction and an improved work–life balance.<sup>6</sup> Between 1997 and 2010, the number of telecommuters in the United States increased by 4.2 million.<sup>7</sup> Although some courts have presumed employee productivity decreases when an employee works at home, studies have shown that working remotely can potentially increase employee productivity.<sup>8</sup>

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sons. Telecommuting is yet another way persons with disabilities can benefit from this great age of technology.”).

4. Tony Bradley, *Telecommuting Is Good for Employees and Employers*, ENTREPRENEUR (Jan. 21, 2011), <http://www.entrepreneur.com/article/217919> [<https://perma.cc/S8V3-4BMJ>] (recognizing telecommunication lowers employee stress and reduces employer costs). Telecommuters enjoy fewer expenses for work attire and travel, as well as more flexibility to attend to personal needs, such as family obligations. See Swink, *supra* note 3, at 861–62 (listing some benefits of telecommunication for employees). As a result of allowing telecommunication, employers benefit from fewer costs, improved employee productivity, and higher employee morale. See *id.* at 862 (describing various benefits employers receive by allowing telecommunication). One example of how telecommunication lowers costs is that employees pay for their own electricity and utilities if they work from home. See Sarah White, *Working from Home Can Benefit Employers as Much as Employees*, MONSTER (Nov. 3, 2014), <http://www.monster.com/technology/a/The-Benefits-of-Working-From-Home> [<https://perma.cc/F3HV-JMK3>] (providing quote from employer who stated telecommunication saves money because employees pay for their own electricity and utilities).

Telecommunication also has benefits for society as a whole. See Swink, *supra* note 3, at 862 (“Telecommuting also provides significant benefits to society including reduced air pollution, traffic congestion, and energy consumption. Taxpayer benefits include reduced costs of road maintenance and repair and diminished need for public transportation.” (footnotes omitted)).

5. See Sullenger, *supra* note 3, at 537 (discussing how ability to work remotely increases employment opportunities for persons with disabilities).

6. See *id.* at 547 (reporting telecommuters generally have “greater job satisfaction and improved balance between work and family life”). Studies have found evidence of increased productivity and satisfaction when employees work from home. See, e.g., Nicholas Bloom, James Liang, John Roberts & Zhichun Jenny Ying, *Does Working from Home Work? Evidence from a Chinese Experiment*, 130 Q.J. ECON. 165, 165–66 (2014), available at <https://web.stanford.edu/~nbloom/WFH.pdf> [<https://perma.cc/Y68W-4BVJ>] (reporting employers with same equipment at home had higher levels of productivity and satisfaction than those working in office).

7. PETER J. MATEYKA, MELANIE A. RAPINO & LIANA CHRISTIN LANDIVAR, U.S. DEP’T OF COMMERCE, HOUSEHOLD ECONOMIC STUDIES, P70-132, HOME-BASED WORKERS IN THE UNITED STATES: 2010, at 3 (2012), available at <https://www.census.gov/prod/2012pubs/p70-132.pdf> [<https://perma.cc/FN43-M6RU>] (“From 1997 to 2010, the number of people who worked at least 1 day a week at home increased by about 4.2 million, or from 7.0 percent of all employed people to 9.5 percent.”).

8. See Sullenger, *supra* note 3, at 557 (“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.”). But see *Vande v. Wis. Dep’t of Admin.*, 44 F.3d 538, 545 (7th Cir. 1995) (“An employer is not required to allow disabled workers to work at home, where their

Telecommunication raises several legal and non-legal employment issues.<sup>9</sup> Specifically, under Title I of the Americans with Disabilities Act (ADA), employers are required to provide reasonable accommodations to employees who are classified as qualified individuals with disabilities.<sup>10</sup> Currently, circuit courts are split over how to apply the reasonable accommodation requirement to telecommunication requests.<sup>11</sup> Most circuits rely on a general presumption that working from home cannot be a reasonable accommodation because physical presence in the workplace is an essential function of most jobs.<sup>12</sup> Courts are reluctant to stray from precedent and continue to honor this presumption that most jobs require face-to-face interaction, which cannot be replaced by technology.<sup>13</sup> Yet, the

productivity inevitably would be greatly reduced.”). Studies have actually shown telecommunication increases employee productivity. *See, e.g.*, Nicholas Bloom, *To Raise Productivity, Let More Employees Work from Home*, HARV. BUS. REV. (Jan.–Feb. 2014), <https://hbr.org/2014/01/to-raise-productivity-let-more-employees-work-from-home> [<https://perma.cc/7UZM-4YTD>] (recognizing data showed employee productivity was higher for employees who worked from home compared with employees who commuted to workplace with same equipment).

9. *See* Sullenger, *supra* note 3, at 547–48 (discussing how working from home creates questions about employment law in various areas, such as workers’ compensation); *see also* Swink, *supra* note 3, at 858 (recognizing telecommunication will create issues for interpretation of statutes written before telecommunication became widespread).

Some of the legal issues posed by the rise of telecommunication include how it will impact workers’ compensation, taxes, and compliance with federal statutes, like the ADA. *See* KEN WINTER, VA. DEP’T OF TRANSP., LEGAL ISSUES AROUND IN WORLD OF TELECOMMUTING INCLUDING: WORKERS’ COMPENSATION, TAX ISSUES, AND COMPLIANCE WITH ADA AND OSHA REGULATIONS (2007), *available at* <http://vtrc.virginia.gov/rsb/rsb12.pdf> [<https://perma.cc/E4K4-6JRK>] (describing legal issues resulting from telecommunication). Further, there is a question as to whether remote employees should be treated as independent contractors, which could have legal implications. *See* Joan T.A. Gabel & Nancy R. Mansfield, *The Information Revolution and Its Impact on the Employment Relationship: An Analysis of the Cyberspace Workplace*, 40 AM. BUS. L.J. 301, 307 (2003) (“The question of whether a remote worker is an employee or an independent contractor has direct legal implications for employers who seek to avoid penalties and liability.”).

10. *See* 42 U.S.C. § 12112(b)(5)(A) (2012) (stating discrimination includes “not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee”).

11. *Compare Vande Zande*, 44 F.3d at 544 (creating presumption that physical presence at work is essential function of most jobs), *and* *Samper v. Providence St. Vincent Med. Ctr.*, 675 F.3d 1233, 1237–38 (9th Cir. 2012) (finding attendance as essential function to be “common-sense” notion), *and* *Smith v. Ameritech*, 129 F.3d 857, 867 (6th Cir. 1997) (adopting physical presence presumption), *and* *EEOC v. Ford Motor Co.*, 782 F.3d 753, 763 (6th Cir. 2015) (en banc) (applying physical presence presumption), *with* *McMillan v. City of New York*, 711 F.3d 120, 126 (2d Cir. 2013) (disregarding presumption of physical presence and highlighting importance of true fact-specific, case-by-case analysis). For a further discussion of the circuit split, *see infra* notes 74–91 and accompanying text.

12. *See, e.g.*, *Ford Motor*, 782 F.3d at 762 (applying general rule that most jobs require face-to-face interaction).

13. For a further discussion of the circuit split, *see infra* notes 74–91 and accompanying text.

United States Court of Appeals for the Second Circuit rejected the physical presence presumption in favor of a fact-specific, case-by-case analysis in 2013.<sup>14</sup>

Recently, United States Court of Appeals for the Sixth Circuit in *EEOC v. Ford Motor Co.*<sup>15</sup> adopted the physical presence presumption and granted summary judgment in favor of Ford, the employer.<sup>16</sup> This 2015 decision illustrates how entrenched this presumption is in the current body of ADA case law.<sup>17</sup> Unfortunately for employees with disabilities, it becomes increasingly difficult to survive summary judgment in telecommunication cases as more courts adopt this “general rule.”<sup>18</sup> In addition, many courts do not seriously consider the employee’s credibility during this crucial summary judgment stage because of the tendency to defer to the employer’s business decisions.<sup>19</sup>

This Note disagrees with the presumption that physical presence is required for job performance because recent technological advancements have made telecommunication a suitable accommodation for many different positions.<sup>20</sup> This Note urges the Equal Employment Opportunity Commission (EEOC) to update its regulations to emphasize telecommunication requests and urges the Supreme Court to settle this circuit split.<sup>21</sup> Part II outlines the relevant ADA provisions, EEOC guidelines, and case law regarding reasonable accommodations for telecommunication leading

14. See *McMillan*, 711 F.3d at 126 (finding proper analysis was fact-specific without presumption of physical presence).

15. 782 F.3d 753 (6th Cir. 2015) (en banc).

16. See *id.* at 762 (applying general rule that “in most jobs, especially those involving teamwork and a high level of interaction, the employer will require regular and predictable on-site attendance from all employees”).

17. See *id.* at 761 (acknowledging many courts have agreed with general rule that physical presence is necessary for most jobs).

18. See, e.g., *id.* at 762 (beginning with presumption that telecommunication is only reasonable accommodation in extraordinary situations). But see Jeffrey A. Van Detta & Dan R. Gallipeau, *Judges and Juries: Why Are So Many ADA Plaintiffs Losing Summary Judgment Motions, and Would They Fare Better Before a Jury? A Response to Professor Colker*, 19 REV. LITIG. 505, 574 (2000) (claiming reason many ADA plaintiffs fail summary judgment is because of bad lawyering, not faulty court interpretation). For a further discussion of the circuit split and physical presence presumption, see *infra* notes 74–91 and accompanying text.

19. For a further discussion of the problems associated with courts’ deference to the employer’s business judgment in these cases, see *infra* notes 60–62 and accompanying text.

20. See Laura Shin, *The 20 Most Common Work-from-Home Job Opportunities*, FORBES (Apr. 7, 2014), <http://www.forbes.com/sites/laurashin/2014/04/07/the-20-most-common-work-from-home-job-opportunities/> [https://perma.cc/S8TQ-SBWK] (listing twenty most common telecommuter jobs, including writers and software developers). For a further discussion of the physical presence presumption, see *infra* notes 74–91 and accompanying text.

21. For a further discussion of how the judicial approach to these cases can progress in the future, see *infra* notes 152–89 and accompanying text.

up to *EEOC v. Ford Motor Co.*<sup>22</sup> Part III details the facts, procedural history, and holding of the Sixth Circuit's decision.<sup>23</sup> Part IV analyzes the court's reasoning and disagrees with the Sixth Circuit's application of the outdated physical presence presumption.<sup>24</sup> Finally, Part V concludes with the impact of the Sixth Circuit's decision.<sup>25</sup>

## II. IT'S BEEN A LONG DAY: MAKING THE COMMUTE FROM THE ADA TO THE CIRCUIT COURTS

The ADA requires all employers with more than fifteen employees to provide reasonable accommodations to qualified employees with disabilities.<sup>26</sup> The EEOC has promulgated regulations and published guidelines regarding employer liability under the reasonable accommodation requirement.<sup>27</sup> Working at home is a possible solution for many employees with disabilities.<sup>28</sup> Yet, courts' reliance on the physical presence presumption makes it difficult for employees to survive summary judgment in discrimination claims against employers who do not allow employees to telecommute as a reasonable accommodation.<sup>29</sup>

### A. *Managing Needs: The ADA Requires Employers to Make Reasonable Accommodations*

In 1990, Congress enacted the ADA with the goal of reducing societal discrimination against persons with disabilities.<sup>30</sup> Title I of the ADA ad-

22. For a further discussion of the development of the law regarding telecommunication as a reasonable accommodation, see *infra* notes 26–53 and accompanying text.

23. For a further discussion of the facts of *EEOC v. Ford Motor Co.* and the Sixth Circuit's reasoning, see *infra* notes 92–145 and accompanying text.

24. For a further discussion of a critical analysis of the Sixth Circuit's reasoning in *EEOC v. Ford Motor Co.*, see *infra* notes 146–82 and accompanying text.

25. For a further discussion of the impact of *EEOC v. Ford Motor Co.*, see *infra* notes 183–89 and accompanying text.

26. See 42 U.S.C. § 12111(5)(A) (2012) (defining *covered entities* as employers with “15 or more employees”).

27. For a further discussion of EEOC guidelines, see *infra* notes 54–73 and accompanying text.

28. See Sullenger, *supra* note 3, at 537 (recognizing ability to work from home increases opportunities for employees with disabilities).

29. See, e.g., *EEOC v. Ford Motor Co.*, 782 F.3d 753, 762 (6th Cir. 2015) (en banc) (beginning with general presumption that most jobs require face-to-face interaction).

30. See Sullenger, *supra* note 3, at 539 (describing ADA's purpose to limit discrimination against persons with disabilities). Congress signed the ADA into law on July 26, 1990. *Id.* The ADA also benefits American citizens without disabilities. See Elizabeth F. Emens, *Integrating Accommodation*, 156 U. PA. L. REV. 839, 845–47 (2008) (detailing benefits of ADA to third parties); Michelle A. Travis, *Lashing Back at the ADA Backlash: How the Americans with Disabilities Act Benefits Americans Without Disabilities*, 76 TENN. L. REV. 311, 331 (2009) (“There is also evidence that the ADA has produced public savings by reducing disability-related public assistance costs, thereby reducing taxpayers' general tax burdens.”).

dresses employment discrimination, stating employers may not discriminate “against a qualified individual on the basis of disability” regarding employment.<sup>31</sup> Under the ADA, discrimination includes denial of a reasonable accommodation.<sup>32</sup> However, an employer’s practices are not discriminatory so long as the employer can prove supplying the reasonable accommodation would impose an undue hardship.<sup>33</sup>

### 1. *Qualified Individual*

Once a plaintiff is established as “disabled” under the ADA, the plaintiff has the burden of proving he or she is a qualified individual.<sup>34</sup> Individuals are “qualified” if they can perform the essential functions of their jobs with or without a reasonable accommodation.<sup>35</sup> If the employee cannot perform the functions without a reasonable accommodation, many courts will consider whether a reasonable accommodation from the employer would enable the employee to perform those functions.<sup>36</sup>

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31. See 42 U.S.C. § 12112(a) (“No 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, conditions, and privileges of employment.”).

32. See *id.* § 12112(b)(5)(A) (stating discrimination includes “not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee”). For a further discussion of the reasonable accommodation requirement, see *infra* notes 40–48 and accompanying text. The EEOC has provided some guidance as to what type of reasonable accommodations an employer might be required to make for an employee, such as making facilities more accessible and job restructuring. See 29 C.F.R. § 1630.2(o) (2016) (listing potential reasonable accommodations employers might be required to make).

33. See 42 U.S.C. § 12112(a) (declaring employer is guilty of discrimination unless employer “can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity”). For a further discussion of the reasonable accommodation requirement, see *infra* notes 40–48 and accompanying text.

34. See, e.g., *Hedrick v. W. Reserve Care Sys.*, 355 F.3d 444, 452 (6th Cir. 2004) (citing *Monette v. Elec. Data Sys. Corp.*, 90 F.3d 1173, 1178 (6th Cir. 1996), *abrogated by* *Lewis v. Humboldt Acquisition Corp.*, 681 F.3d 312 (6th Cir. 2012)) (acknowledging plaintiff must prove prima facie case of ADA disability discrimination). Disability, as defined by the ADA, includes having (1) “a physical or mental impairment that substantially limits one or more major life activities of such individual”; (2) “a record of such an impairment”; or (3) “being regarded as having such an impairment . . .” 42 U.S.C. § 12102(1)(A)–(C).

35. See 42 U.S.C. § 12111(8) (“The term ‘qualified individual’ means an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.”).

36. See, e.g., *Mason v. Avaya Commc’ns, Inc.*, 357 F.3d 1114, 1118 (10th Cir. 2004) (citing *Davidson v. Am. Online, Inc.*, 337 F.3d 1179, 1188 (10th Cir. 2003)) (noting employee who could not perform essential functions of position without reasonable accommodation could be found qualified if reasonable accommodation by employer would mean employee could perform essential functions).

The EEOC requires courts to apply a fact-intensive, case-by-case analysis when evaluating whether a function is essential to an employee's job.<sup>37</sup> According to EEOC regulations, courts can look to factors such as the employer's judgment, consequences of the employee's inability to perform the function, work experience of past employees in that position, and the amount of time that would be spent on the function.<sup>38</sup> Nevertheless, courts generally defer to the business judgment of employers to determine the essential functions of an employee's job.<sup>39</sup>

## 2. Reasonable Accommodation

Employers are required to provide "reasonable accommodations" to qualified employees to ensure there are equal opportunities in the workplace.<sup>40</sup> If an employer fails to reasonably accommodate an employee's disability, the employer may be held liable for discrimination.<sup>41</sup> The plaintiff has the burden of showing the employer failed to make a reasonable accommodation that would have been effective in the plaintiff's situation.<sup>42</sup> In *Humphrey v. Memorial Hospitals Ass'n*,<sup>43</sup> the United States Court of Appeals for the Ninth Circuit decided that employers cannot deny rea-

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37. See 29 C.F.R. § 1630.2(n) app. ("[W]hether a particular function is essential is a factual determination that must be made on a case by case basis.").

38. See *id.* § 1630.2(n)(3) (suggesting factors courts can consider when determining if function of employee's job is essential). For a further discussion of the factors the EEOC requires courts to consider when determining whether a job function is essential, see *infra* notes 54–62 and accompanying text.

39. See 42 U.S.C. § 12111(8) ("[C]onsideration shall be given to the employer's judgment as to what functions of a job are essential . . ."); see also *Mason*, 357 F.3d at 1119 ("We will not second guess the employer's judgment when its description is job-related, uniformly enforced, and consistent with business necessity." (citing *Davidson*, 337 F.3d at 1191)). But see Michael Edward Olsen, Jr., Note, *Disabled but Unqualified: The Essential Functions Requirement as a Proxy for the Ideal Worker Norm*, 66 HASTINGS L.J. 1485, 1503 (2015) (arguing Congress intended for employer's business judgment to be considered, but not dispositive).

40. See 42 U.S.C. § 12112(b)(5)(A) (stating employers may be liable for discrimination if they fail to reasonably accommodate employees). The EEOC defines a *reasonable accommodation* as an alteration in the workplace that provides equal job opportunity to an employee with a disability. See *Work at Home/Telework as a Reasonable Accommodation*, EEOC, <http://www.eeoc.gov/facts/telework.html> [<https://perma.cc/WX7M-7T7H>] (last modified Oct. 27, 2005) [hereinafter EEOC Telework Facts] ("Reasonable accommodation is any change in the work environment or in the way things are customarily done that enables an individual with a disability to apply for a job, perform a job, or gain equal access to the benefits and privileges of a job.").

41. See 42 U.S.C. § 12112(b)(5)(A) (stating discrimination includes "not making reasonable accommodations").

42. See, e.g., *Smith v. Ameritech*, 129 F.3d 857, 866 (6th Cir. 1997) (stating individual with disability has to suggest accommodation and demonstrate its reasonableness).

43. 239 F.3d 1128 (9th Cir. 2001).



sonable accommodations based on past issues resulting from the employee's disability.<sup>44</sup>

The reasonable accommodation requirement is considered one of the most ambiguous provisions of the ADA.<sup>45</sup> In *Vande Zande v. Wisconsin Dep't of Administration*,<sup>46</sup> the United States Court of Appeals for the Seventh Circuit found the biggest challenge was defining "reasonable."<sup>47</sup> The vagueness of this provision has forced the circuit courts to develop their own interpretations, resulting in a patchwork of judicial approaches.<sup>48</sup>

### 3. *Undue Hardship*

The reasonable accommodation requirement is waived if the employer can show that providing the accommodation would constitute an undue hardship.<sup>49</sup> According to the EEOC, an accommodation poses an undue hardship if the measure would cause the employer excessive difficulty or expense.<sup>50</sup> The EEOC also provides factors for courts to consider in applying the undue hardship analysis, which include the cost of the accommodation and the employer's financial resources.<sup>51</sup> In *Vande Zande*, the court described the undue hardship test as a cost-benefit analysis.<sup>52</sup>

44. *See id.* at 1137 ("It would be inconsistent with the purposes of the ADA to permit an employer to deny an otherwise reasonable accommodation because of past disciplinary action taken due to the disability sought to be accommodated.").

45. *See Sullenger, supra* note 3, at 543 (acknowledging reasonable accommodation requirement is considered "one of the vaguest provisions within the ADA" because reasonable accommodation is not "explicitly define[d]" (citing Gabel & Mansfield, *supra* note 9, at 339)); *see also Developments in the Law—Employment Discrimination*, 109 HARV. L. REV. 1602, 1613 (1996) ("[T]he precise nature of a reasonable accommodation is an open issue that is not resolved by the text of the statute."). For a list of potential reasonable accommodations employers might be required to make, *see* 29 C.F.R. § 1630.2(o)(2) (2016).

46. 44 F.3d 538 (7th Cir. 1995).

47. *See id.* at 542 ("The difficult term is 'reasonable.'").

48. *See Sullenger, supra* note 3, at 543 (discussing how reasonable accommodation provision has left room for judicial interpretation, which is reflected in differing opinions on whether telecommunication can be reasonable accommodation); *see also* Kristen M. Ludgate, Note, *Telecommuting and the Americans with Disabilities Act: Is Working at Home a Reasonable Accommodation?*, 81 MINN. L. REV. 1309, 1315 (1997) ("The ADA does not even provide an explicit definition of the term 'reasonable accommodation' but, instead, lists the kinds of modifications that may be required.").

49. *See* 42 U.S.C. § 12112(b)(5)(A) (2012) (stating undue hardship exception).

50. *See* 29 C.F.R. § 1630.2(p)(1) ("Undue hardship means . . . significant difficulty or expense incurred by a covered entity . . .").

51. *See id.* § 1630.2(p)(2)(i)–(v) (providing factors to determine whether accommodation would pose undue hardship on employer). The factors are (1) the nature and cost of making the accommodation, (2) the facility's financial situation, (3) the employment entity's financial situation, (4) the entity's operations, and (5) the impact accommodation would have upon the entity. *See id.*

52. *See* Benjamin D. Johnson, Comment, *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, 1236 (2015) (citing *Vande Zande v.*

Even if a qualified employee would benefit from a certain accommodation, if the employer cannot afford it, the court will not hold the employer liable for discrimination.<sup>53</sup>

B. *Working Overtime: EEOC Creates Guidelines for the  
Essential Function Analysis*

The EEOC requires courts to apply a fact-intensive, case-by-case analysis to evaluate whether certain functions are essential to an employee's position.<sup>54</sup> The EEOC has provided regulations and other non-binding materials to assist courts in making this inquiry.<sup>55</sup> These non-binding materials include enforcement guidance for the ADA's reasonable accommodation and undue burden provisions and a fact sheet focusing specifically on working at home as a reasonable accommodation.<sup>56</sup>

1. *Regulations*

In 1991, the EEOC promulgated regulations to instruct courts in analyzing employment discrimination cases for individuals with disabilities in the *Code of Federal Regulations*.<sup>57</sup> When determining whether physical presence is an essential function of the position, courts must consider the seven factors in Section 1630.2(n) of Title 29, including the employer's business judgments, written job descriptions, the consequences of the em-

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Wis. Dep't of Admin., 44 F.3d 538, 543 (7th Cir. 1995)) (describing reasonable accommodation and undue hardship as balancing costs and benefits).

53. See *id.* (citing *Vande Zande*, 44 F.3d at 543)) (acknowledging "courts might excuse [ ] employer from compliance with . . . reasonable accommodation" requirement if employer cannot afford accommodation).

54. See 29 C.F.R. § 1630.2(n) app. ("Whether a particular function is essential is a factual determination that must be made on a case by case basis."); see also 42 U.S.C. 12201(a) ("Except as otherwise provided in this chapter, nothing in this chapter shall be construed to apply a lesser standard than . . . the regulations issued by Federal agencies pursuant to such title.").

55. See generally 29 C.F.R. § 1630.1 (providing guidelines for application of ADA to employment issues). For a further discussion of EEOC guidelines, see *infra* notes 57–73 and accompanying text. In 1991, the EEOC promulgated regulations to direct courts in their analysis of whether a job function is essential. See generally *id.* § 1630.2(n)(3) (listing factors for determining whether job function is essential). For a further discussion of the EEOC regulations, see *infra* notes 57–62 and accompanying text. In addition, the EEOC has published non-binding materials to assist courts and employers in this area. See generally U.S. Equal Emp't Opportunity Comm'n, Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act (last modified Oct. 22, 2002) [hereinafter EEOC Enforcement Guidance], available at <http://www.eeoc.gov/policy/docs/accommodation.html> [<https://perma.cc/ZR8W-KLCU>] (providing guiding principles for courts and employers). For a further discussion of the EEOC's non-binding guidance, see *infra* notes 63–68 and accompanying text.

56. See *id.* (listing principles, policies, and resources for reasonable accommodation and undue hardship compliance). For a further discussion of the EEOC regulations and fact sheet, see *infra* notes 57–73 and accompanying text.

57. See generally 29 C.F.R. § 1630.1 (guiding courts in how to apply ADA to employment issues).

ployee not performing the function, and the experience of employees in similar positions.<sup>58</sup> Courts have interpreted these factors to mean they should generally defer to the employer's business judgment.<sup>59</sup>

This deference is problematic for employees with disabilities because they may not be able to prove that they can perform the essential functions of their position from home if an employer convinces a court that workplace presence is essential.<sup>60</sup> While the EEOC has provided seven factors to consider, the court may also look to additional evidence presented by the parties.<sup>61</sup> Further, these regulations are not fully applicable to telecommunication cases because they were published long before telecommunication became an issue under the ADA.<sup>62</sup>

## 2. *Enforcement Guidance*

The EEOC published enforcement guidance (the Guidance) to clarify employers' legal obligations under the reasonable accommodation and undue burden provisions of the ADA.<sup>63</sup> After a qualified employee requests an accommodation, the Guidance instructs the employer to engage in an informal collaboration with the employee to find a satisfactory ac-

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58. *See id.* § 1630.2(n)(3) (providing factors for determining whether job function is essential). The factors are (1) the employer's business judgment, (2) written job descriptions, (3) how long a job function takes to perform, (4) consequences of eliminating the function, (5) collective bargaining agreement terms, (6) experience of past employees in the same job, and (7) current experience of employees in similar jobs. *See id.*

59. *See, e.g.,* *Mason v. Avaya Commc'ns, Inc.*, 357 F.3d 1114, 1119 (10th Cir. 2004) (citing *Davidson v. Am. Online, Inc.*, 337 F.3d 1179, 1191 (10th Cir. 2003)) (reasoning court should not question employer's properly enforced business judgment).

60. *See Sullenger, supra* note 3, at 542 (acknowledging workers "may be unable to prove [ ] they can perform" jobs successfully from home if employers can convince court attendance is necessary); *see also* *EEOC v. Ford Motor Co.*, 782 F.3d 753, 773 (6th Cir. 2015) (en banc) (Moore, J., dissenting) (citing *Rorrer v. City of Stow*, 743 F.3d 1025, 1039 (6th Cir. 2014)) (finding employers can easily avoid reasonable accommodation requirement if courts defer to employers' business judgments).

61. *See* 29 C.F.R. § 1630.2(n)(2) ("A job function may be considered essential for any of several reasons, *including but not limited to . . .*" (emphasis added)). *See* Sullenger, *supra* note 3, at 542 (stating courts not limited to listed factors); *see also* *Ford Motor*, 782 F.3d at 773 (Moore, J., dissenting) ("The EEOC regulations make explicit that we can consider relevant evidence to define the essential functions of a job, even if the evidence is not explicitly articulated in the regulations."). One commentator has described the EEOC regulations as "open-ended." *See* Ludgate, *supra* note 48, at 1316.

62. *See* Johnson, *supra* note 52, at 1253 (noting factors were published before "first major ADA telecommuting case" reached circuit courts).

63. *See* EEOC Enforcement Guidance, *supra* note 55 (providing guidance for employer liability regarding ADA's reasonable accommodation and undue hardship provisions).

accommodation.<sup>64</sup> The employer does not have to implement the specific accommodation requested by the employee and may suggest alternate accommodations.<sup>65</sup>

In the Guidance, essential job functions are defined as duties to be performed.<sup>66</sup> Despite certain court holdings to the contrary, the EEOC stated physical presence is not an “essential function” under the ADA because physical presence is not a duty that must be performed by the employee.<sup>67</sup> Nonetheless, the EEOC also acknowledged that employers do not necessarily have to approve every modified schedule request.<sup>68</sup>

### 3. *Fact Sheet*

In 2005, the EEOC published a fact sheet that provides information about how to analyze whether working at home should be a reasonable accommodation.<sup>69</sup> The fact sheet states the ADA does not require employers to offer all employees the option to telecommute.<sup>70</sup> If a job requires face-to-face interaction, telecommunication is not a reasonable accommodation.<sup>71</sup> However, if an employer allows *some* employees to telecommute, the option must also be available to employees with disabilities.<sup>72</sup> Further, even if an employer does not have a telecommunication policy, the employer may be required to provide telecommunication as a reasonable accommodation for qualified employees.<sup>73</sup>

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64. *See id.* (acknowledging next step after reasonable accommodation request is interactive process between employees and employers to find suitable accommodation).

65. *See id.* (recognizing employer does not have to accept employee’s proposed accommodation and can suggest alternative accommodations).

66. *See id.* n.65 (“As the regulations make clear, essential functions are duties to be performed.” (citing 29 C.F.R. § 1630.2(n)(2) (1997))).

67. *See* Johnson, *supra* note 52, at 1249 (“[A]ttendance . . . is not an essential function as defined by the ADA because it is not one of ‘the fundamental job duties of the employment position.’” (second alteration in original) (quoting EEOC Enforcement Guidance, *supra* note 55, n.65)).

68. *See* EEOC Enforcement Guidance, *supra* note 55, n.65 (“[A]ttendance is relevant to job performance and employers need not grant all requests . . . [I]f the time during which an essential function is performed is integral to its successful completion, then an employer may deny a request to modify an employee’s schedule as an undue hardship.”).

69. *See* EEOC Telework Facts, *supra* note 40 (providing information concerning telecommunication as reasonable accommodation).

70. *See id.* (“The ADA does not require an employer to offer a telework program to all employees.”).

71. *See id.*

72. *See id.* (“However, if an employer does offer telework, it must allow employees with disabilities an equal opportunity to participate in such a program.”).

73. *See id.* (stating telecommunication may need to be offered as reasonable accommodation even if employer does not have telecommunication policy).

C. *Let's Take It to Human Resources: Circuit Split over How to Treat Telecommunication Requests*

Circuit courts are divided on the issue of whether an employer may be required to permit individuals with disabilities to telecommute as a reasonable accommodation under the ADA.<sup>74</sup> Although courts are required to apply a case-by-case analysis, most rely on a presumption that physical presence is required in the workplace.<sup>75</sup> However, the United States Court of Appeals for the Second Circuit rejected the physical presence presumption in 2013 and relied solely on the facts of the case to determine whether attendance was an essential function of the employee's position.<sup>76</sup>

1. *The Physical Presence Presumption*

The majority of case law analyzing working from home as a reasonable accommodation relies on a presumption that physical presence is required in the workplace.<sup>77</sup> Courts created this presumption before widespread use of the Internet made telecommunication possible.<sup>78</sup> In 1995, the Seventh Circuit established the physical presence presumption in *Vande Zande*.<sup>79</sup> In *Vande Zande*, a paraplegic employee was unable to work in a physical workplace due to pressure ulcers.<sup>80</sup> After her employer denied her request to work from home, the employee filed a discrimina-

74. See *supra* note 11 and accompanying text (comparing circuit court approaches for evaluating telework as ADA accommodation).

75. See, e.g., *EEOC v. Ford Motor Co.*, 782 F.3d 753, 762 (6th Cir. 2015) (en banc) (applying general rule that most jobs require face-to-face interaction and thus physical presence); see also EEOC Enforcement Guidance, *supra* note 55 (requiring case-by-case analysis).

76. See Mary Hancock, Comment, 'Working from Home' or 'Shirking from Home': *McMillan v. City of New York's Effect on the ADA*, 16 DUQ. BUS. L.J. 151, 161–62 (2013) (recognizing some courts have started moving away from *Vande Zande* approach). In 1997, the United States District Court for the District of Connecticut declined to follow the *per se* rule because it conflicted with the required case-by-case analysis. See *id.* (recognizing *Hernandez* court rejected *Vande Zande's* "nearly *per se* rule" about accommodations to work from home (quoting *Hernandez v. City of Hartford*, 959 F. Supp. 125, 132 (D. Conn. 1997)) (internal quotation marks omitted)); see also *McMillan v. City of New York*, 711 F.3d 120 (2d Cir. 2013) (rejecting physical presence presumption).

77. See Hancock, *supra* note 76, at 161 ("The position the court took in *Vande Zande* . . . now represents the majority view.").

78. See generally *Vande Zande v. Wis. Dep't of Admin.*, 44 F.3d 538, 544 (7th Cir. 1995). In *Vande Zande*, the Seventh Circuit relied upon a Fourth Circuit decision to state that the majority view was attendance was required in most jobs. See *id.* at 544–45 (citing *Tyndall v. Nat'l Educ. Ctrs., Inc.*, 31 F.3d 209, 213–14 (4th Cir. 1994)) (finding generally employee needs to be at work to perform essential job functions). For a further discussion of the *Vande Zande* decision, see *infra* notes 79–86 and accompanying text.

79. See *id.* at 544 ("[A]n employer is not required to accommodate a disability by allowing the disabled worker to work . . . at home.").

80. See *id.* at 543 (describing employee's disability).

tion claim under the ADA.<sup>81</sup> While the Seventh Circuit held the employer had a duty to accommodate, it reasoned that working at home was not a reasonable accommodation in most cases.<sup>82</sup> However, the *Vande Zande* court noted this finding would likely change as technology advances.<sup>83</sup>

Many courts have relied on *Vande Zande* as a general rule that physical presence is a requirement of employment.<sup>84</sup> Yet, since *Vande Zande* was decided in 1995, technology has advanced significantly.<sup>85</sup> Today, many courts claim to apply a case-by-case analysis, as the regulations require, while technically relying on the outdated presumption that working from home is unreasonable in all but extraordinary cases.<sup>86</sup>

## 2. *A Fact-Specific Approach*

In 2013, the Second Circuit rejected the physical presence presumption in *McMillan v. City of New York*.<sup>87</sup> In *McMillan*, an employee who suffered from schizophrenia was permitted to arrive late to work for approximately ten years.<sup>88</sup> Suddenly, the employer began voicing disapproval of the employee's late arrivals.<sup>89</sup> After the employer denied the employee's request to work from home, the employee sued because he believed the accommodation would allow him to complete the essential functions of his position.<sup>90</sup> The *McMillan* court determined the proper

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81. *See id.* at 544 (acknowledging employee filed discrimination claim against employer because employer denied request to work from home as reasonable accommodation).

82. *See id.* (recognizing employer had duty to accommodate employee in this case).

83. *See id.* (acknowledging finding would “no doubt change as communications technology advances”).

84. *See Hancock, supra* note 76, at 161 (“The position the court took in *Vande Zande* . . . now represents the majority view.”); *see also* EEOC v. Ford Motor Co., 782 F.3d 753, 762 (6th Cir. 2015) (en banc) (applying physical presence presumption); *Samper v. Providence St. Vincent Med. Ctr.*, 675 F. 3d 1233, 1238 (9th Cir. 2012) (asserting “common-sense notion” that attendance is essential function); *Smith v. Ameritech*, 129 F.3d 857, 867 (6th Cir. 1997) (following physical presence presumption); *Tyndall v. Nat’l Educ. Ctrs., Inc.*, 31 F.3d 209, 213 (4th Cir. 1994) (finding generally employee needs to be at work to perform essential job functions).

85. *See Ford Motor*, 782 F.3d at 776 (Moore, J., dissenting) (“Technology has undoubtedly advanced since 1995 in facilitating teamwork through fast and effective electronic communication such that it should no longer be assumed that teamwork must be done in-person.”).

86. *See Sullenger, supra* note 3, at 550 (“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.”).

87. *See McMillan v. City of New York*, 711 F.3d 120, 126 (2d Cir. 2013) (refusing to follow physical presence presumption).

88. *See id.* at 123 (noting employer approval of employee's late arrivals for period of approximately ten years).

89. *See id.* at 124 (describing employer's sudden disapproval of employee's schedule).

90. *See id.* (acknowledging employee filed discrimination claim because he believed he could perform all essential job functions while working from home).

analysis was a fact-intensive analysis with no presumption of physical presence.<sup>91</sup>

### III. PROMOTING AN OUTDATED PERSPECTIVE: THE SIXTH CIRCUIT APPLIES THE PHYSICAL PRESENCE PRESUMPTION IN *EEOC v. FORD*

In *EEOC v. Ford Motor Co.*,<sup>92</sup> the Sixth Circuit furthered the circuit split by applying the physical presence presumption, making it easier for employers to prove physical presence is an essential function of their employees' jobs and harder for employees with disabilities to request reasonable accommodations to work from home.<sup>93</sup> Yet, the Internet has made it possible for employees to work from home without any inconvenience to employers.<sup>94</sup> In light of the proliferation of technology, this 2015 decision demonstrates how embedded the physical presence presumption is in the law and the need to overturn it.<sup>95</sup>

#### A. Facts and Procedure

Jane Harris, a woman who suffered from severe irritable bowel syndrome, worked as a resale buyer for Ford Motor Company from April 2003 to September 2009.<sup>96</sup> Ford described Harris's job as highly interactive, consisting mainly of group problem-solving.<sup>97</sup> Early in her career, Harris earned awards for her strong work performance.<sup>98</sup> However, during Har-

91. See *id.* at 126 (emphasizing importance of fact-specific inquiry without any presumptions, like physical presence presumption). The Second Circuit vacated the district court's finding of summary judgment for the employer and remanded for further proceedings. See *id.* at 129.

92. (*Ford Motor III*), 782 F.3d 753 (6th Cir. 2015) (en banc).

93. See *id.* at 762 (“[I]n most jobs, especially those involving teamwork and a high level of interaction, the employer will require regular and predictable on-site attendance from all employees . . .”). For a further discussion of the Sixth Circuit's reasoning, see *infra* notes 116–36 and accompanying text.

94. See Shin, *supra* note 20 (listing twenty most common telecommuter jobs, including writers and graphic designers).

95. See *Ford Motor III*, 782 F.3d at 776 (Moore, J., dissenting) (arguing technological advances eliminate physical presence presumption for teamwork). For a further discussion of the issues with the physical presence presumption, see *infra* notes 152–62 and accompanying text.

96. See *id.* at 758–59 (majority opinion) (detailing symptoms of Harris's irritable bowel syndrome); see also *EEOC v. Ford Motor Co. (Ford Motor I)*, No. 11–13742, 2012 WL 3945540, \*1 (E.D. Mich. Sept. 10, 2012) (providing Harris's dates of employment and job title), *rev'd*, 752 F.3d 634 (6th Cir. 2014), and *aff'd*, 782 F.3d 753 (6th Cir. 2015) (en banc).

97. See *Ford Motor I*, 2012 WL 3945540, at \*1 (“Ford describes the resale buyer position as ‘highly interactive.’”); see also *EEOC v. Ford Motor Co. (Ford Motor II)*, 752 F.3d at 636 (indicating Ford stated “essence” of resale buyer job was group problem-solving (internal quotation marks omitted)), *vacated*, 782 F.3d 753 (6th Cir. 2015) (en banc).

98. See *Ford Motor III*, 782 F.3d at 758 (acknowledging Ford's recognition of Harris's strong work performance early on in her career).

ris's last few years at Ford, her direct supervisors began rating Harris negatively due to attendance and performance issues.<sup>99</sup>

On two separate occasions, Harris's supervisors permitted Harris to try a more flexible work schedule, which allowed Harris to "work[ ] four 10-hour days . . . and [to] telecommute as needed on her work days."<sup>100</sup> Her supervisors determined both of these trials were unsuccessful.<sup>101</sup> After these two attempts, Harris asked for the flexibility to work from home "up to four days per week" because of her disability.<sup>102</sup> Harris's request was consistent with Ford's telecommunication policy, which stated working up to four days from home was permissible.<sup>103</sup> Although Harris's request aligned with Ford's policy, in reality, Ford's resale buyers only telecommunicated one day per week at the most.<sup>104</sup>

Ford denied Harris's request to work from home based on her job description and past attendance and performance issues.<sup>105</sup> Ford made

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99. *See id.* (explaining Ford believed Harris's work performance declined); *see also* Brief of the Equal Employment Opportunity Commission as Appellant at 7, *EEOC v. Ford Motor Co.*, 782 F.3d 753 (6th Cir. 2015) (No. 12-2484), 2013 WL 1192686, at \*7 [hereinafter Brief of EEOC] ("Notwithstanding Harris's efforts to keep up with her work, her supervisors repeatedly criticized her for her absences."). *But see Ford Motor II*, 752 F.3d at 637, 638 n.1 (acknowledging Ford "did not credit Harris" for time spent working outside of core business hours and recognizing Ford changed performance ranking system in 2009).

100. *See Ford Motor III*, 782 F.3d at 759 (describing Harris's two "Alternative Work Schedule" periods (internal quotation marks omitted)).

101. *See id.*; *see also* Brief of EEOC, *supra* note 99, at \*7 ("In the end, Gontko [Harris's supervisor] pronounced the trial a failure because Harris 'was unable to establish regular and consistent work hours.'). It is unclear whether Harris was able to work from home during business hours. *See Ford Motor III*, 782 F.3d at 778 (Moore, J., dissenting). If Harris was unable to telework during business hours, she may not have been able to access certain information necessary to complete her job. *See id.* (indicating Harris "may not have been able to access information necessary to perform her job or to reach co-workers" outside of core business hours).

102. *See id.* at 759 (majority opinion) (internal quotation marks omitted).

103. *See id.* at 771 (Moore, J., dissenting) ("A comparison to Ford's telecommuting policy makes clear that Harris's initial request drew directly from the language of that policy, which allowed for 'one to four days' of telework each week.').

104. *See id.* at 764 (majority opinion) (acknowledging Ford's resale buyers generally telecommuted one day per week at most).

105. *See id.* at 759 (indicating Ford denied Harris's requested accommodation). The majority noted Harris admitted four of her ten job responsibilities could not be performed from home, but the dissent pointed to another portion of the record that stated only three could not be performed from home. *See id.* (stating Harris admitted four of her job responsibilities could not be performed from home, "including meetings with suppliers, making price quotes to stampers, and attending some required internal meetings"). *But see id.* at 772 n.1 (Moore, J., dissenting) (noting inconsistency with Ford's meeting notes because another meeting lists only three responsibilities could not be performed from home). Further, Harris maintained the responsibilities that had to be performed in the workplace did not arise every day and were not urgent. *See id.* at 772 (acknowledging Harris stated tasks that could not be performed at home did not arise every day or could be postponed).



the business judgment decision that “regular and predictable on-site attendance [was] essential to Harris’s highly interactive job.”<sup>106</sup> Ford suggested two alternative accommodations: (1) moving Harris’s office closer to the restroom and (2) assisting her in finding a new position better suited to telecommunication.<sup>107</sup> Harris declined both suggestions.<sup>108</sup> In 2011, the EEOC sued Ford under the ADA, alleging Ford failed to reasonably accommodate Harris.<sup>109</sup>

The United States District Court for the Eastern District of Michigan granted summary judgment in favor of Ford.<sup>110</sup> On appeal, a three-judge panel of the Sixth Circuit reversed the district court’s judgment and decided to rehear the case en banc.<sup>111</sup> In an 8–5 decision, the Sixth Circuit affirmed the district court’s granting of summary judgment to Ford.<sup>112</sup>

B. *Complying with Precedent: Sixth Circuit Adopts the Physical Presence Presumption in EEOC v. Ford*

On appeal, a majority of the Sixth Circuit held no reasonable jury would find for the EEOC and granted summary judgment in favor of Ford.<sup>113</sup> From the outset, the majority relied on the presumption that attendance at the workplace was an essential function of most jobs.<sup>114</sup> On the contrary, the dissenting judges claimed the majority did not adhere to the summary judgment standard and improperly applied the required case-by-case analysis.<sup>115</sup>

106. *See id.* at 757 (majority opinion) (“Ford denied [Harris’s] request, deeming regular and predictable on-site attendance essential to Harris’s highly interactive job.”).

107. *See id.* at 760 (listing two proposed alternative accommodations).

108. *See id.* (noting Harris declined both proposed accommodations).

109. *See id.* (stating EEOC sued Ford regarding failure to accommodate Harris). The EEOC also sued Ford for firing Harris in retaliation against Harris for filing the discrimination claim with the EEOC. *See id.*

110. *See Ford Motor I*, No. 11–13742, 2012 WL 3945540, at \*8 (E.D. Mich. Sept. 10, 2012) (granting Ford’s motion for summary judgment), *rev’d*, 752 F.3d 634 (6th Cir. 2014), *and aff’d*, 782 F.3d 753 (6th Cir. 2015) (en banc).

111. *See Ford Motor II*, 752 F.3d 634, 649 (6th Cir. 2014) (reversing district court’s grant of summary judgment), *vacated*, 782 F.3d 753 (6th Cir. 2015) (en banc). The panel found the EEOC had presented enough evidence to create a genuine dispute of material fact regarding Ford’s alleged failure to accommodate Harris. *See id.* at 647; *see also Ford Motor III*, 782 F.3d at 760 (acknowledging en banc review and vacating panel decision).

112. *See Ford Motor III*, 782 F.3d at 761, 770 (finding summary judgment for Ford); *see also id.* at 757 (listing eight judges representing majority and five representing dissent).

113. *See id.* at 770 (affirming district court’s judgment and finding summary judgment for Ford).

114. *See id.* at 762–63 (concluding rule that attendance is essential function of most jobs is “controlling” in this case).

115. *See id.* at 771 (Moore, J., dissenting) (“[T]he EEOC has presented sufficient evidence to dispute whether Harris is a qualified individual, either because physical presence is not an essential function of her job or because telework is a reasonable accommodation for her.”); *see also id.* (“[T]he majority refuses to en-

1. *The Majority's Outdated Perspective*

Through an analysis of precedent, EEOC regulation and guidance, and a reliance on “commonsense,” the Sixth Circuit decided the physical presence presumption was the controlling rule.<sup>116</sup> The court applied this approach to the facts, affirming the district court’s grant of summary judgment to Ford and determining a reasonable jury would not find for the EEOC.<sup>117</sup>

First, the court determined the general rule was employees who are not present in the workplace cannot perform any of their job functions.<sup>118</sup> The court cited to a previous Sixth Circuit opinion from 1997, *Smith v. Ameritech*,<sup>119</sup> which relied on this presumption.<sup>120</sup> The *Ford* court found the *Ameritech* court had “good reason” to rely on this presumption because most jobs require face-to-face interaction, which cannot occur when employees work from home.<sup>121</sup> Further, the Sixth Circuit reasoned the physical presence presumption aligned with the purpose and statutory text of the ADA.<sup>122</sup> The majority referred to the ADA’s “qualified individual” definition because it emphasizes consideration of the employer’s business judgment in determining which job functions are essential.<sup>123</sup>

Second, the Sixth Circuit decided the EEOC regulations and non-binding guidance aligned with the physical presence presumption.<sup>124</sup> The court concluded all seven of the EEOC regulatory factors pointed

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gage in the fact-intensive, case-by-case determination required by the EEOC regulations and repeatedly refuses to take the facts in the light most favorable to Harris, as summary judgment requires.”).

116. *See id.* at 761–62 (majority opinion) (finding precedent, EEOC regulations, and commonsense support general rule that physical presence is required in most jobs). For a further discussion of the Sixth Circuit’s finding of support for the physical presence presumption, see *infra* notes 116–36.

117. *See id.* at 763 (applying general rule to Harris’s facts); *id.* at 770 (affirming district court’s judgment and finding summary judgment for Ford).

118. *See id.* at 761 (stating many cases have established general rule that attendance is essential job function).

119. 129 F.3d 857 (6th Cir. 1997).

120. *See Ford Motor III*, 782 F.3d at 761 (citing *Smith*, 129 F.3d at 866) (finding *Smith* was not extraordinary situation where working at home was reasonable accommodation).

121. *See id.* (“[M]ost jobs require the kind of teamwork, personal interaction, and supervision that simply cannot be had in a home office situation.” (quoting *Rauen v. U.S. Tobacco Mfg. L.P.*, 319 F.3d 891, 896 (7th Cir. 2003)) (internal quotation marks omitted)).

122. *See id.* at 761–62 (concluding physical presence presumption “aligns with [ ] text of [ ] ADA”).

123. *See id.* at 760–62 (citing 42 U.S.C. § 12111(8)) (referring to ADA’s qualified individual definition, which states essential functions are determined from employer’s business judgments and written job descriptions).

124. *See id.* at 762 (finding EEOC regulations supported physical presence presumption).

toward finding attendance an essential function of most jobs.<sup>125</sup> The court determined most jobs would be “fundamentally altered” without attendance.<sup>126</sup> The court referred to a section of the EEOC regulations that explained the essential functions inquiry was not meant to second-guess an employer’s business judgment or lower an employer’s standards for work quality.<sup>127</sup> Moreover, the court reasoned the EEOC’s non-binding guidance supported the presumption.<sup>128</sup>

Third, the Sixth Circuit reasoned the general approach that attendance is an essential function of most jobs is grounded in commonsense.<sup>129</sup> The court stated non-lawyers and non-judges, as well as judges from other circuits, believe in this “commonsense notion” that attendance is the most fundamental job function.<sup>130</sup> The court reasoned this commonsense notion is buried beneath the “record, standards of review, burdens of proof, and a seven-factor balancing test . . . .”<sup>131</sup>

The Sixth Circuit found the general rule directly applicable to Harris’s case.<sup>132</sup> The court determined Harris’s job required “face-to-face interactions” because Ford purposefully placed resale buyers in the same building as steel stampers and only permitted the resale buyers to telecommute on one set day per week if their schedule allowed.<sup>133</sup> Further, the court reasoned Harris’s failed telecommunication attempts indicated attendance was essential to her position.<sup>134</sup> By applying the physical presence presumption to Harris’s case, the Sixth Circuit determined Harris was not a qualified individual under the ADA and that the district court’s

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125. *See id.* (“[A]ll seven [factors] point toward finding regular and predictable on-site attendance essential.”).

126. *See id.* (“[M]ost jobs would be *fundamentally altered* if regular and predictable on-site attendance is removed.”).

127. *See id.* (“[T]he inquiry into essential functions is not intended to second-guess an employer’s business judgment with regard to production standards. . . . Nor is it meant ‘to require employers to lower such standards.’” (citation omitted) (quoting 29 C.F.R. § 1630.2(n) app.)).

128. *See id.* (“The EEOC’s informal guidance on the matter cuts in the same direction.”). The court also cited the EEOC’s 2005 fact sheet, which stated an employer may deny an employee’s request to work from home if the employee’s position requires face-to-face interaction. *See id.* (citing EEOC Telework Facts, *supra* note 40).

129. *See id.* at 762–63 (acknowledging belief that attendance is an essential job function is commonsense).

130. *See id.* (declaring non-lawyers, non-judges, and other circuit judges believe commonsense notion that attendance is essential function of most jobs).

131. *See id.* at 762 (concluding commonsense notion is that attendance is essential to most jobs “[b]ut equipped with a 1400-or-so page record, standards of review, burdens of proof, and a seven-factor balancing test, the answer may seem more difficult”).

132. *See id.* at 763 (“That rule has straightforward application here[ ] . . . .”).

133. *See id.* (“For years Ford has required resale buyers to work in the same building as stampers . . . . Indeed, even those who telecommute do so only one set day per week and agree in advance to come into work if needed.”).

134. *See id.* (finding Harris could not perform essential functions of her job during previous attempts to telecommute).

finding of summary judgment for Ford was appropriate.<sup>135</sup> The *Ford* court determined a finding for the EEOC would encourage companies to constrain their telecommunication policies in an attempt to avoid liability under the ADA.<sup>136</sup>

## 2. *The Dissent Rebutts the Presumption*

The dissent argued the majority incorrectly applied the required case-by-case analysis and failed to follow the proper standard for summary judgment.<sup>137</sup> First, the dissent reasoned the majority failed to engage in the case-by-case analysis required by the EEOC regulations.<sup>138</sup> The dissent emphasized the employer's business judgment was only one of seven factors in the EEOC's regulations.<sup>139</sup> If the employer's business judgment is controlling in these cases, the dissent pointed out that employers can easily circumvent the reasonable accommodation requirement.<sup>140</sup> Next, the

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135. *See id.* at 766 (concluding Harris was not qualified because attendance was essential function of her job).

136. *See id.* (reasoning companies would restrict telecommunication policies if summary judgment granted to EEOC).

The Sixth Circuit reasoned a finding for the EEOC would turn telecommunication into a weapon. *See id.* at 765. Relying on the *Smith* court, the majority stated the "good deed" of finding for Harris would have negative consequences. *See id.* ("A good deed would effectively ratchet up liability, which would undermine Congress'[s] stated purpose of eradicating discrimination against disabled persons." (quoting *Smith v. Ameritech*, 129 F.3d 857, 868 (6th Cir. 1997)) (internal quotation marks omitted)).

137. *See id.* at 771 (Moore, J., dissenting). The dissent also found a genuine dispute of fact regarding whether Ford retaliated against Harris by firing Harris for filing a discrimination claim with the EEOC. *See id.* The dissenting judges also disagreed with the majority's statement that finding for Harris would turn telecommunication requests into weapons against employers. *See id.* at 776 (criticizing majority's argument that finding for EEOC would turn telecommunication requests into weapon against employers). The dissent reasoned that providing a telecommunication accommodation is more than a nice gesture—sometimes the law requires it. *See id.* ("[P]roviding telework is not just a good deed; sometimes it is legally required under the ADA."). The dissent pointed out that the majority failed to address reasons why employers might want their employees to telework, such as motivation or downsizing the physical workplace. *See id.* at 777 ("The majority ignores the myriad other reasons why employers might choose to provide telework to their employees, such as incentivizing individuals to come work for them or reducing the size of the physical workplace.").

138. *See id.* at 775 ("[T]he majority's test is in direct tension with the regulations' insistence that the inquiry is a fact-intensive, case-by-case determination."). The dissent noted the regulations do not warrant an analysis based solely on the seven factors and instead encourage a comprehensive review of the record. *See id.* (pointing out EEOC regulation mentions that case-by-case analysis requires review of all evidence).

139. *See id.* ("The EEOC regulations interpreting this section similarly include the employer's judgment *as just one of seven factors* courts should consider." (citing 29 C.F.R. § 1630.2(n)(3))). The dissent criticized the majority's reliance on Ford's judgment that Harris's position required face-to-face interaction. *See id.*

140. *See id.* at 773–74 (quoting *Rorrer v. City of Stow*, 743 F.3d 1025, 1039 (6th Cir. 2014)) (reasoning that if courts rely on employers' business judgments,

dissent argued the physical presence presumption hinders this case-by-case analysis.<sup>141</sup> Looking at many of the cases the majority relied upon, the dissent found these cases assumed regular attendance only meant physical presence or dealt with jobs that required access to documents or equipment in a physical workplace.<sup>142</sup> The dissent reasoned that due to technological advancements, it cannot be assumed that teamwork must occur in a physical workplace.<sup>143</sup>

Finally, the dissent criticized the majority for failing to apply the correct standard of review for summary judgment because it did not view the record in the light most favorable to Harris.<sup>144</sup> The dissent found Harris's testimony and the EEOC's proposed reasons for why attendance was not an essential function of Harris's job created a genuine dispute of material fact.<sup>145</sup>

#### IV. CRITICAL ANALYSIS: FORD INDICATES THE NEED FOR A REWORKING OF THE JUDICIAL APPROACH TO TELECOMMUNICATION REQUESTS

In *EEOC v. Ford Co.*, the Sixth Circuit slowed the progress of telecommuter law in this time of vast technological advancement.<sup>146</sup> *Ford* is a prime example of the flaws in the current judicial approach to these

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employers who do not wish to grant reasonable accommodation only need to claim particular job function is essential). According to the dissent, the majority's reliance on Ford's business judgment was improper because employers can provide self-serving testimony to the same extent as employees can. *See id.* at 773 ("Employers, just as much as employees, can give testimony about whether a particular function is essential that is 'self-serving' or not grounded in reality.").

141. *See id.* ("[T]he majority's insistence that the 'general rule' is that physical attendance at the worksite is an essential function of most jobs does not advance the analysis in this case.").

142. *See id.* at 775–76 (criticizing Ford's reliance on precedent that either assumed regular attendance meant attendance at workplace or dealt with jobs that required accessing documents or equipment at workplace).

143. *See id.* at 776 ("[I]t should no longer be assumed that teamwork must be done in-person.").

144. *See id.* at 771 (criticizing majority for not applying proper summary judgment standard); *see also id.* at 773 ("[W]e must take the evidence in the light most favorable to the nonmovant."). The dissent found the majority failed to look at the facts in the most favorable light for Harris and instead viewed the record in the light least favorable to Harris. *See id.* at 777 (reasoning majority "instead reads factual disputes or ambiguity in the record in the light least favorable to Harris"). The dissent further clarified the role of the court is not to assess who is more credible at the summary judgment stage. *See id.* at 773 ("Our role is not to assess who is more credible.").

145. *See id.* ("As in any case, testimony from the plaintiff can be sufficient to preclude summary judgment, provided that it creates a genuine dispute of material fact."); *see also id.* at 777–78 (listing reasons why EEOC created genuine dispute of material fact regarding whether telecommunication was reasonable accommodation for Harris).

146. For a further discussion of the issues with the *Ford* court's ruling, see *infra* notes 152–82 and accompanying text.

cases.<sup>147</sup> First, reliance on the physical presence presumption is out of place in today's society.<sup>148</sup> The physical presence presumption improperly tips the scale toward the employer from the outset.<sup>149</sup> Second, the Sixth Circuit did not properly adhere to the summary judgment standard, which can be detrimental in ADA cases.<sup>150</sup> Third, courts need to lessen their reliance on the employer's business judgment and focus on the specific facts of the case because the ADA already has a protection in place for employers—the undue hardship provision.<sup>151</sup>

A. *It's Time to Fire Commonsense: Courts Should Abandon the Physical Presence Presumption*

Technology has advanced beyond commonsense.<sup>152</sup> As the *Vande Zande* court prophesized, due to developments in communications technology, the presumption that physical presence is necessary in the workplace is no longer sensible.<sup>153</sup> Although the *Ford* court reasoned this presumption was grounded in commonsense, in today's world, attendance can no longer be assumed to mean presence at a physical workplace.<sup>154</sup> Virtual technology has provided employees with the ability to perform their workplace functions without being physically present.<sup>155</sup> One com-

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147. For a further discussion of the why the current judicial approach to telecommunication requests see *infra* notes 152–82 and accompanying text.

148. See *Ford Motor II*, 752 F.3d 634, 641 (6th Cir. 2014) (acknowledging it can no longer be assumed that attendance is required for job performance), *vacated*, 782 F.3d 753 (6th Cir. 2015) (en banc). For a further discussion of the issues with the physical presence presumption, see *infra* notes 157–62 and accompanying text.

149. See *Ford Motor III*, 782 F.3d at 761–62 (finding physical presence presumption was controlling rule).

150. See *id.* at 771 (Moore, J., dissenting) (stating majority did not properly adhere to summary judgment standard). For a further discussion of the *Ford* court's application of the summary judgment standard, see *infra* notes 163–74 and accompanying text.

151. See *id.* at 762 (majority opinion) (quoting 29 C.F.R. § 1630.2(n) app.) (explaining courts' essential functions inquiry should not invalidate employer's business judgment). *But see* 42 U.S.C. § 12112(b)(5)(A) (2012) (stating employers do not need to make a reasonable accommodation if it would be undue hardship).

152. See Sullenger, *supra* note 3, at 537 (“Developments in technology over the last few decades, including computer enhancements and widespread Internet use, have changed the way society communicates and conducts business.”); see also *Ford Motor III*, 782 F.3d at 762–63 (finding attendance is an essential job function based on commonsense).

153. See *Ford Motor III*, 782 F.3d at 776 (Moore, J., dissenting) (“Technology has undoubtedly advanced since 1995 in facilitating teamwork through fast and effective electronic communication such that it should no longer be assumed that teamwork must be done in-person.”); see also *Vande Zande v. Wis. Dep't of Admin.*, 44 F.3d 538, 544 (7th Cir. 1995) (concluding physical presence presumption will “no doubt change as communications technology advances”).

154. See *Ford Motor II*, 752 F.3d 634, 641 (6th Cir. 2014) (reasoning “attendance at the workplace can no longer be assumed to mean attendance at the employer's physical location”), *vacated*, 782 F.3d 753 (6th Cir. 2015) (en banc).

155. See *id.* (“[T]he ‘workplace’ is anywhere that an employee can perform her job duties.”).

mentator stated the physical presence presumption will become more irrational as telecommunication becomes more prevalent.<sup>156</sup>

The physical presence presumption directly contradicts the legally required case-by-case analysis for at-home work accommodations.<sup>157</sup> Courts need to give more deference to the EEOC regulations and focus on the specific facts of each case.<sup>158</sup> The EEOC should discredit the physical presence presumption in an updated version of their regulations.<sup>159</sup> In non-binding EEOC guidance, the EEOC has stated attendance is not a de facto essential function under the ADA because it is not a duty employees must necessarily perform.<sup>160</sup> Though physical presence should no longer be assumed to be an essential job function, courts still have the discretion to conclude that telecommunication is not a reasonable accommodation in any given case.<sup>161</sup> Many jobs, such as those in the medical profession, continue to require physical presence as an essential function.<sup>162</sup>

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156. See Sullenger, *supra* note 3, at 553 (“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.”).

157. See Ludgate, *supra* note 48, at 1335 (“Not only is a fact-specific approach to telecommuting cases more analytically sound [than the physical presence presumption], it is also the approach that the ADA requires.”). Some courts have reached the conclusion that the physical presence presumption violates the legally required case-by-case analysis. See, e.g., *Hernandez v. City of Hartford*, 959 F. Supp. 125, 132 (D. Conn. 1997) (finding *Vande Zande* physical presence presumption violates statutorily required case-by-case analysis).

158. For a further description of why courts are required to defer to the EEOC’s case-by-case analysis in ADA employment claims, see *supra* note 54 and accompanying text. For a further discussion of why courts are not limited to the seven factors listed in the EEOC regulations, see *supra* note 63. One commentator has called for more judicial deference to EEOC interpretations of the ADA because they tend to favor employees. See Ann C. Hodges, *Working with Cancer: How the Law Can Help Survivors Maintain Employment*, 90 WASH. L. REV. 1039, 1112 (2015) (“Finally, more judicial deference to EEOC interpretations of the ADA, which tend to be more favorable to employees and less deferential to existing employer policies and work structures, would benefit cancer survivors.”).

159. The EEOC has also written guidance on the ADA’s reasonable accommodation requirement that, among other suggestions, encourages an interactive process between the employee and employer to develop a mutually acceptable accommodation. See EEOC Telework Facts, *supra* note 40 (providing information concerning telecommunication as reasonable accommodation and how to interpret ADA’s reasonable accommodation provision). The EEOC should provide a structure for this interactive process and make it binding on employers to assist the courts in their approach to these cases. See *id.*

160. See *supra* note 68. For a further discussion of the EEOC’s binding and non-binding guidance regarding telecommunication and interpretation of the reasonable accommodation requirement, see *supra* notes 54–73 and accompanying text.

161. See Hancock, *supra* note 76, at 168 (“Given that physical presence remains integral to many forms of employment, a court might still determine, on a case-by-case basis, that a disabled employee could never perform all essential functions to employment without his or her physical presence at the job site.”).

162. See *id.* (declaring many jobs still require physical presence). Some jobs do not lend themselves to telecommunication. See, e.g., *Samper v. Providence St. Vincent Med. Ctr.*, 675 F.3d 1233, 1238–39 (9th Cir. 2012) (finding telecommuni-

B. *Working at Home Could Have Worked: The Sixth Circuit Did Not Properly Apply the Summary Judgment Standard*

As the dissent notes, the *Ford* majority did not view the record in the light most favorable to Harris.<sup>163</sup> The majority reasoned Harris's failed telecommunication attempts indicated presence was an essential function of her job.<sup>164</sup> Yet, there was a question as to whether those trials occurred during core business hours.<sup>165</sup> Harris's testimony and other evidence supported the claim that Harris would be able to complete the majority of her job functions from home.<sup>166</sup> Further, the dissent pointed out that Harris's past attendance and performance issues should have had no impact on her telecommunication request.<sup>167</sup> Denying reasonable accommodations because of past problems stemming from the disability is a potential violation of the ADA.<sup>168</sup> The ADA states employers may not discriminate "on the basis of [the employee's] disability."<sup>169</sup> According to the dissent, Harris and the EEOC presented enough evidence to create a genuine dispute of material fact.<sup>170</sup>

This issue extends far beyond the Sixth Circuit.<sup>171</sup> One commentator has reported that, contrary to popular media portrayals, the ADA has not

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cation cannot be reasonable accommodation for neo-natal nurse); *see also Ford Motor III*, 782 F.3d 753, 773 (6th Cir. 2015) (en banc) (Moore, J., dissenting) ("Some jobs clearly require an employee to be in the office—for example, an employee who works in a factory and must use large immobile equipment that is located only on-site.").

163. *See Ford Motor III*, 782 F.3d at 771 (Moore, J., dissenting) (dissenting because "majority . . . repeatedly refuses to take the facts in the light most favorable to Harris, as summary judgment requires"); *see also* Van Detta & Gallipeau, *supra* note 18, at 574 (claiming many ADA plaintiffs fail summary judgment because of bad lawyering, not faulty court interpretation).

164. *See Ford Motor III*, 782 F.3d at 763 (acknowledging Harris's previous attempts to telecommute were unsuccessful).

165. *See id.* at 778 (Moore, J., dissenting) (indicating Harris may not have been able to access important information outside of core business hours).

166. *See id.* at 772 (acknowledging Harris's declaration contradicted Ford's view of her job); *see also id.* at 772 n.1 (noting evidence stating only three of Harris's responsibilities could not be performed from home).

167. *See id.* at 777 ("That Harris had attendance issues does not make her request to telework unreasonable. Harris missed work because of her disability."); *see also id.* at 759 (indicating Ford denied Harris's requested accommodation).

168. For a further description of the Ninth Circuit case which found denying reasonable accommodations because of past problems resulting from the disability needing accommodation is inconsistent with ADA, *see supra* note 44 and accompanying text.

169. *See* 42 U.S.C. § 12112(a) (2012) ("No covered entity shall discriminate against a qualified individual on the basis of disability . . .").

170. *See Ford Motor III*, 782 F.3d at 777–78 (Moore, J., dissenting) (arguing Harris and EEOC created genuine dispute of material fact over whether telework was reasonable accommodation).

171. *See* Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99, 100 (1999) ("[D]efendants prevail in more than ninety-three percent of reported ADA employment discrimination cases decided on the merits at the trial court level. Of those cases that are appealed, de-



been a “windfall” for plaintiffs.<sup>172</sup> Many judges are deciding issues that should have the chance to be heard before a jury.<sup>173</sup> A reluctance to send cases to juries can lead to a difference in outcome because juries are generally more likely to favor plaintiffs in employment discrimination cases.<sup>174</sup>

C. *Reset the Meeting Agenda: Courts Need to Lessen Their Deference to the Employer’s Business Judgment*

Although the EEOC regulations demand a case-by-case analysis, courts have placed significant weight on the seven listed factors, particularly the employer’s business judgment.<sup>175</sup> One section of the regulations state the case-by-case inquiry should not “second guess an employer’s business judgment.”<sup>176</sup> While the employer’s position must be taken into consideration, if courts continue to defer to the employer’s business judgment, an employer can merely claim a function is essential to avoid making an accommodation.<sup>177</sup>

The ADA already protects employers from unreasonable accommodations that will negatively impact their businesses.<sup>178</sup> The undue hardship provision is an exception to the reasonable accommodation requirement, which allows employers to avoid making reasonable accommodations if it

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endants prevail in eighty-four percent of reported cases.” (footnotes omitted)); *see also* Stephen F. Befort, *An Empirical Examination of Case Outcomes Under the ADA Amendments Act*, 70 WASH. & LEE L. REV. 2027, 2071 (2013) (“This preliminary trend may suggest a continuing judicial unease with disability discrimination claims generally and with reasonable accommodation requests more specifically.”).

172. *See* Colker, *supra* note 171, at 102 (“I report my judicial outcome data, refuting the media portrayals of the ADA as a windfall for plaintiffs.”); *see also id.* at 161 (“[T]here is sufficient data to conclude that the ADA has not been a windfall for plaintiffs.”)

173. *See id.* at 111–12 (“[M]any of the normative questions raised by ADA cases, such as . . . whether an accommodation is reasonable . . . should be decided by juries rather than judges if the evidence presents a genuine issue of material fact.”).

174. *See id.* at 102 (“Eisenberg has found, for example, that plaintiffs fare better in jury trials than in court trials in . . . employment discrimination . . . cases. Thus, a reluctance to send cases to the jury may make a difference in substantive outcome under the ADA.” (footnote omitted)).

175. *See supra* note 59.

176. *See* 29 C.F.R. § 1630.2(n) app. (2016) (“The essential function inquiry is not intended to second guess the employer or to require the employer to lower company standards.”).

177. *See Ford Motor III*, 782 F.3d at 773 (Moore, J., dissenting) (finding if courts defer to employers’ business judgments, employers could easily avoid reasonable accommodation requirement); *see also* Sullenger, *supra* note 3, at 542 (acknowledging workers may be unable to prove they can perform jobs successfully from home if employers can convince court attendance is necessary).

178. *See* 42 U.S.C. § 12112(b)(5)(A) (2012) (describing undue hardship exception to reasonable accommodation requirement).

will impose a severe enough burden on the employer.<sup>179</sup> The undue hardship provision renders considerable deference to the employer's business judgment unnecessary.<sup>180</sup> The EEOC should reconstruct its regulations to ensure courts balance the needs of employers and employees, which will further the ADA's goal of eliminating societal discrimination against individuals with disabilities.<sup>181</sup> Favoring employers in these cases does not advance the purpose of the ADA.<sup>182</sup>

#### V. CONCLUSION: THE NEW 9 TO 5

The Sixth Circuit's decision in *Ford* will make it easier for employers to deny employees' reasonable accommodation requests to work from home.<sup>183</sup> This ruling contradicts the purpose of the ADA, which aims to prevent societal discrimination against persons with disabilities.<sup>184</sup> The

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179. See 29 C.F.R. § 1630.2(p)(1) ("Undue hardship means . . . significant difficulty or expense incurred by a covered entity . . ."); see also Katherine V.W. Stone, *Legal Protections for Atypical Employees: Employment Law for Workers Without Workplaces and Employees Without Employers*, 27 BERKELEY J. EMP. & LAB. L. 251, 275 (2006) ("The Equal Employment Opportunity Commission has indicated that telecommuting, like other accommodations, is reasonable unless it imposes an undue hardship.").

Courts sometimes overestimate the actual cost of making an accommodation. See Sullenger, *supra* note 3, at 555 ("[C]ourts often overestimate the actual costs of accommodation and fail to take into account the benefits of compliance with the requested accommodation."); *id.* at 556 ("This assumption that costs will outweigh the benefits is often made without reliable data."). One commentator has claimed the reasonable accommodation requirement only imposes a minimal cost on the employer or actually saves the employer money. See Michael Ashley Stein, *Empirical Implications of Title I*, 85 IOWA L. REV. 1671, 1674 (2000) ("Despite the dearth of research measuring the actual costs of accommodating disabled workers, available evidence indicates that many accommodation costs are recurrently nonexistent, minimal, or even cost effective for the providing employers."); see also Sullenger, *supra* note 3, at 557 (recognizing telecommunication provides economic and other benefits to employers).

180. See *supra* note 59. But see 42 U.S.C. § 12112(b)(5)(A) (providing exception to reasonable accommodation requirement if making the accommodation would be undue hardship).

181. See Sullenger, *supra* note 3, at 560 ("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."); *id.* at 557 ("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.").

182. See Olsen, *supra* note 39, at 1522 (finding ADA has not succeeded in goal of lessening discrimination against employees with disabilities partly because of deference to employers' business judgments).

183. See *Ford Motor III*, 782 F.3d 753, 762 (6th Cir. 2015) (en banc) (applying general rule that "in most jobs, especially those involving teamwork and a high level of interaction, the employer will require regular and predictable on-site attendance from all employees"). For a further discussion of the Sixth Circuit's reasoning, see *supra* notes 116–36 and accompanying text.

184. See Sullenger, *supra* note 3, at 539 (describing ADA's purpose is to limit discrimination against individuals with disabilities).

EEOC should update its regulations to provide courts with an unbiased structure for interpreting employment discrimination claims, particularly telecommunication requests.<sup>185</sup> More circuits should follow the lead of the Second Circuit and abandon the physical presence presumption in favor of a fact-intensive, case-by-case analysis.<sup>186</sup> An employee in the Second Circuit could win on a claim that the Sixth or Ninth Circuit would barely consider because those courts would still presume physical presence was an essential function of the employee's job regardless of the specific facts of the case.<sup>187</sup> Ideally, the Supreme Court will step in to demand the abandonment of the physical presence presumption.<sup>188</sup> Persons who cannot commute to physical workplaces deserve to benefit from technological advancements and have the chance to work from home.<sup>189</sup>

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185. See Ludgate, *supra* note 48, at 1315–16 (describing EEOC regulations as “open-ended”). For a further discussion of why EEOC should update its regulations, see *supra* notes 175–82 and accompanying text. The regulations were published long before telecommunication became an issue under the ADA. See *supra* note 62 (recognizing EEOC regulations were published before first ADA telecommunication case).

186. See, e.g., *McMillan v. City of New York*, 711 F.3d 120, 126 (2d Cir. 2013) (criticizing physical presence presumption and emphasizing necessity to adopt fact-specific, case-by-case analysis).

187. Compare *id.* at 126 (disregarding physical presence presumption and using case-by-case analysis), with *Ford Motor III*, 782 F.3d at 761–62 (finding general rule that physical presence is required in most jobs was commonsense), and *Samper v. Providence St. Vincent Med. Ctr.*, 675 F.3d 1233, 1237–38 (9th Cir. 2012) (reasoning it was “common-sense” that attendance is essential function of jobs).

188. For a further discussion of why the physical presence presumption should be abandoned, see *supra* notes 152–62 and accompanying text.

189. See Sullenger, *supra* note 3, at 537 (discussing how ability to work remotely increases employment opportunities for persons with disabilities); *id.* at 557 (“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.”).