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# Leave as an Accommodation: When is Enough, Enough?

Stacy A. Hickox  
*Michigan State University*

Joseph M. Guzman  
*Michigan State University*

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# LEAVE AS AN ACCOMMODATION: WHEN IS ENOUGH, ENOUGH?<sup>1</sup>

STACY A. HICKOX\* AND JOSEPH M. GUZMAN\*\*

## ABSTRACT

The right to reasonable accommodations under the Americans with Disabilities Act includes leave that will enable an employee with a disability to return to work rather than being discharged. This right may seem unreasonable for an employer needing employees to be at work to be productive, raising the question of when leave as an accommodation becomes unreasonable or imposes an undue hardship on an employer. In the absence of specific guidance from the Supreme Court, the circuit courts apply a variety of approaches, ranging from individualized analysis to determinations that any leave exceeding some number of weeks is unreasonable. In this paper, three hundred and fifty-three decisions addressing this question have been analyzed to determine which factors are determinative of reasonableness, including factors identified in the various approaches of the circuit courts as well as those which economists would use to determine the value of an employee and the cost of replacing that employee.

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<sup>1</sup> *Waggoner v. Olin Corp.*, 169 F.3d 481, 484 (7th Cir. 1999) (“But the fact that [the employer] had infinite patience does not necessarily mean that every company must put up with employees who do not come to work. Nor must every company hire replacements for absent employees and call that a reasonable accommodation. The issue before us is, when is enough, enough?”).

\* Assistant Professor, Michigan State University School of Human Resources and Labor Relations; J.D., University of Pennsylvania Law School; B.S., Cornell University School of Industrial & Labor Relations. The authors would like to thank Megan O’Toole & Katie Seager for their research on this paper.

\*\* Joseph Guzman is an Assistant Professor in the School of Human Resources and Labor Relations at Michigan State University. He holds a doctorate in Business Administration and Policy from the Stanford Graduate School of Business, masters’ degrees in statistics, economics, and business research from Stanford, and an MBA from the University of Arizona. His research interests are focused on human capital development and policy.

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Most employees need to be present at work to perform their jobs. At the same time, employees with disabilities have the right to reasonable accommodation under the Americans with Disabilities Act (ADA). The unavailability of accommodations has been identified as a significant barrier to the full employment of people with disabilities.<sup>2</sup> But does reasonable accommodation include an employer's toleration of leave from work? Discrimination prohibited by the ADA includes an employer's "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified . . . employee," unless the employer can show that the accommodation would impose an undue hardship on the employer's operations.<sup>3</sup>

Reasonable accommodation can include absences or leave from work, according to both the federal courts and the Equal Employment Opportunity Commission (EEOC).<sup>4</sup> The duty of accommodation was included in the ADA to provide unemployed persons with disabilities an opportunity to work and retain a position once hired.<sup>5</sup> Leave as an accommodation may be essential for employees with disabilities who need time off for treatment or to wait for remission of symptoms that prevent them from working.<sup>6</sup> To enforce this right to accommodation, the EEOC has been targeting employers with leave policies that result in the discharge of

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<sup>2</sup> David C. Baldrige & Michele L. Swift, *Withholding Requests for Disability Accommodation: The Role of Individual Differences and Disability Attributes*, 39 J. MGT. 743, 744 (2013).

<sup>3</sup> 42 U.S.C.A. § 12112(b)(5)(A) (West 2014).

<sup>4</sup> EQUAL EMP'T OPPORTUNITY COMM'N, ENFORCEMENT GUIDANCE: REASONABLE ACCOMMODATION AND UNDUE HARDSHIP UNDER THE AMERICANS WITH DISABILITIES ACT, available at <http://www.eeoc.gov/policy/docs/accommodation.html> [hereinafter EEOC, ENFORCEMENT GUIDANCE].

<sup>5</sup> See John R. Autry, *Reasonable Accommodation Under the ADA: Are Employers Required to Participate in the Interactive Process? The Courts Say "Yes" but the Law Says "No"*, 79 CHI.-KENT L. REV. 665, 666 (2004); Amy Renee Brown, Note, *Mental Disabilities Under the ADA: The Role of Employees and Employers in the Interactive Process*, 8 WASH. U. J. L. & POL'Y 341 (2002) (ADA "promise[s] a bright future of inclusion and integration for individuals with disabilities" by "adding them into the mainstream of American life").

<sup>6</sup> See Stephen F. Befort, *The Most Difficult ADA Reasonable Accommodation Issues: Reassignment and Leave of Absence*, 37 WAKE FOREST L. REV. 439, 445 (2002).

employees with disabilities without individual consideration of that employee's need for an accommodation.<sup>7</sup>

From the employer's perspective, leave policies and the ability to discharge absent employees are important to overall productivity, since an employee on leave is not performing. In addition to productivity concerns, an employer's reluctance to grant leave as an accommodation may be based on some notion that all employees should be treated the same, or a perceived lack of connection between the request for leave and the employee's disability.<sup>8</sup> Employers may also be reluctant to grant leave as an accommodation because leave may place a relatively greater burden on both employers and coworkers, compared to other accommodations.<sup>9</sup>

This apparent conflict in interests between employers and employees raises the question of where courts should draw the line on requiring at least some leave as an accommodation for an employee with a disability; i.e., how much leave is reasonable? As one employers' attorney explained, employers need further guidance on "what limitations they may place on leaves they offer and the extent of the duty to hold an employee's position open during the leave, while still effectively running their businesses."<sup>10</sup> In addition, employers need guidance as to how to show that leave as an accommodation would impose an undue hardship, thus relieving them of the responsibility of providing the leave.<sup>11</sup>

Since the ADA came into effect for employers in 1992, the law defining reasonable accommodation has been described as "woefully underdeveloped."<sup>12</sup> This lack of guidance from the courts could be due to the imprecise nature of the concepts of "reasonable accommodation" and "undue hardship."<sup>13</sup> Experts have called on the

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<sup>7</sup> See, e.g., *EEOC, Truck Firm Settle for \$4.85 Million Nationwide ADA Case Regarding Leave Policy*, BNA LABOR AND EMPLOYMENT LAW RESOURCE CENTER, <http://laborandemploymentlaw.bna.com/lerc/2453/>.

<sup>8</sup> Cheryl L. Anderson, *What Is "Because of the Disability" Under the Americans with Disabilities Act? Reasonable Accommodation, Causation, and the Windfall Doctrine*, 27 BERKELEY J. EMP. & LAB. L. 323, 348, 350-51, 353 (2006) (accommodation should address limitations arising from impairment).

<sup>9</sup> Befort, *supra* note 6, at 442, 448-49.

<sup>10</sup> Ellen McLaughlin, *Statement before the EEOC Meeting to Examine Use of Leave as Reasonable Accommodation*, EEOC (June 8, 2011), available at <http://www.eeoc.gov/eeoc/meetings/6-8-11/mclaughlin.cfm>; see also Edward Isler, *Statement before the EEOC Meeting to Examine Use of Leave as Reasonable Accommodation*, EEOC (June 8, 2011), available at <http://www.eeoc.gov/eeoc/meetings/6-8-11/isler.cfm> ("Many aspects of the ADA, particularly those dealing with absences purportedly necessitated by a medical condition that may or may not qualify as a disability, remain as ambiguous and ill-defined (if not more so) than when the law first became effective.").

<sup>11</sup> See Peter J. Petesch, *EEOC Moves Toward Guidance Addressing Leave as a Reasonable Accommodation Under the ADA*, BNA Insights (June 23, 2011), available at [http://laborandemploymentlaw.bna.com/lerc/display/story\\_list.adp?mode=ins&frag\\_id=21182889&prod=dlln](http://laborandemploymentlaw.bna.com/lerc/display/story_list.adp?mode=ins&frag_id=21182889&prod=dlln) (additional guidance would benefit both employees and employers).

<sup>12</sup> Grant T. Collins & Penelope J. Phillips, *Overview of Reasonable Accommodation and the Shifting Emphasis from Who is Disabled to Who Can Work*, 34 HAMLINE L. REV. 469, 472, 481 (2011).

<sup>13</sup> Befort, *supra* note 6, at 441.

EEOC to provide guidelines so that determinations about what accommodations are reasonable can be more consistent and based on concrete, objective factors.<sup>14</sup> Even though EEOC held hearings on the issue of leave as an accommodation in 2011, no specific guidance has been provided.

This lack of guidance has led to an “expectations gap” between an employee requesting an accommodation and his or her employer, due to the ADA’s “self-conscious ambiguity about rights and responsibilities.”<sup>15</sup> To resolve this gap, the parties need to exchange and consider information that is relevant to the reasonableness of the accommodation, which may include “how the impairment operates, how it interacts with the employer’s workplace and the worker’s job, how it might affect co-workers, and the worker’s prognosis” as well as the employer’s information regarding production and costs.<sup>16</sup>

This exchange of information is required under the ADA’s obligation to engage in the interactive process.<sup>17</sup> The process should include a thorough analysis regarding what duties are essential to the position for which an employee seeks accommodations.<sup>18</sup> This analysis will help the employer determine whether the accommodation is even reasonable.

Rather than focusing on an employee’s ability to perform the essential duties of a position, many appellate courts reviewing the reasonableness of leave as an accommodation have focused on the length or indefiniteness of the leave request, and have given significant deference to employers’ leave policies.<sup>19</sup> This approach does not take into consideration the value of a particular employee or the difficulty of “covering” for that employee while he or she is on leave. In contrast, a smaller number of appellate courts require that an employer demonstrate an undue hardship caused by an employee’s use of leave, after considering the medical evidence regarding the employee’s ability to return to work as well as the specific job duties of the employee.<sup>20</sup>

The more individualized approach is supported by labor economists’ cost benefit analysis, which supports consideration of an individual employee’s value to the employer, as well as the cost of replacing that employee, when determining whether leave is a reasonable accommodation.<sup>21</sup> Thus, employers should provide more leave to employees with higher skills and greater longevity. Such analysis would also

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<sup>14</sup> Brian East, *Statement before the EEOC Meeting to Examine Use of Leave as Reasonable Accommodation*, EEOC (June 8, 2011), available at <http://www.eeoc.gov/eeoc/meetings/6-8-11/east.cfm>.

<sup>15</sup> Seth D. Harris, *Disabilities Accommodations, Transaction Costs, and Mediation: Evidence from the EEOC’s Mediation Program*, 13 HARV. NEGOT. L. REV. 1, 7 (2008).

<sup>16</sup> *Id.* at 9.

<sup>17</sup> See 29 C.F.R. §1630.2(o)(3) (2012); *Beck v. Univ. of Wis. Bd. of Regents*, 75 F.3d 1130, 1134 (7th Cir. 1995).

<sup>18</sup> Collins & Phillips, *supra* note 12, at 498-99.

<sup>19</sup> See *infra* notes 108-27 and accompanying text (discussion of length of leave); *infra* notes 144-99 and accompanying text (discussion on indefinite leave).

<sup>20</sup> See *infra* notes 272-94 and accompanying text (discussion of undue hardship defense).

<sup>21</sup> Edward P. Lazear, *Personnel Economics: Past Lessons and Future Directions*, 17 J. OF LAB. ECON. 199, 223 (1999).

support policies regarding the use of leave that are tailored to the needs of that particular workplace, including the size of the workforce and the particular skills and abilities required of the workforce.

This article will demonstrate how appellate courts vary significantly in their approach to reviewing the reasonableness of leave as an accommodation. Some guidance is provided by one Supreme Court decision that allowed deference to an employer's seniority policy that came into conflict with a request for a transfer as an accommodation.<sup>22</sup> Both before and after this decision, appellate courts have taken a variety of approaches in addressing the question of how much leave is reasonable as an accommodation, and when leave imposes an undue hardship on an employer. Some courts only require leave of a definite duration, placing the burden on the employee to provide evidence of when he or she will return to work.<sup>23</sup> Appellate courts also consider an employer's policies to determine what length of leave should be deemed reasonable, while others will require that the employer establish that the leave will impose an undue hardship.<sup>24</sup>

Our analysis of both appellate and trial court opinions since 1992 demonstrates that certain factors emerge as significant determinants of whether leave will be required as a reasonable accommodation. Appellate and trial court decisions since the passage of the ADA are reviewed and analyzed to determine what consideration is given to the employee-related factors that would seem relevant to the questions of reasonableness and undue hardship, including the length of the leave as well as the person's particular job duties, tenure with the employer, type of impairment, skill level, and industry. The significance of the appellate courts' emphasis on the certainty of when the employee can be expected to be able to return to work as well as the significance of medical evidence related to the need for leave are tested. The impact of employers' leave policies and the influence of the Family and Medical Leave Act requirements are also measured. The analysis also tests the significance of an employee's particular job duties or responsibilities. This statistical analysis demonstrates which factors play a significant role in the reasonableness of a particular employee's request for leave as an accommodation.

This detailed review of appellate decisions and analysis of decisions regarding the reasonableness of leave as an accommodation gives employers and courts guidance on what factors have been influential on the success of employees' claims. These influential factors can then be compared to the factors that should be considered from an economic perspective in determining whether an accommodation is reasonable or imposes an undue hardship.

#### I. ACCOMMODATIONS UNDER THE ADA

Accommodation is only required if it enables a person with a disability to perform the essential functions of his or her employment position.<sup>25</sup> For an employee seeking leave as an accommodation, this means that the employee will not be protected against discrimination unless the leave would at least eventually enable

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<sup>22</sup> U.S. Airways, Inc. v. Barnett, 535 U.S. 391 (2002).

<sup>23</sup> See *infra* notes 144-99 and accompanying text (discussion of indefinite leave).

<sup>24</sup> See *infra* notes 228-58 and accompanying text (discussion of employer policies); *infra* notes 272-94 (undue hardship defense).

<sup>25</sup> 42 U.S.C.A. § 12111(8) (West 2014) (emphasis added).

that employee to perform his or her essential duties. An employer must take reasonable steps to accommodate an employee's disability unless the accommodation "would impose an undue hardship on the operation of the business" of the employer.<sup>26</sup> Thus, accommodations can be used to preserve the employee's status as a "qualified individual," but reasonableness should be assessed based on "the needs and disability of the employee and the resources and expectations of the employer."<sup>27</sup>

The ADA's accommodation requirement has been characterized as a way for people with disabilities to overcome systemic subordination and oppression.<sup>28</sup> Even though non-discrimination laws generally emphasize equal treatment, the right to reasonable accommodations provides for alterations in conditions of employment to enable persons with disabilities to work. With this duty to accommodate, Congress recognized that "in order to treat some persons equally, we must treat them differently."<sup>29</sup>

Despite this attempt, there is a lack of evidence that the ADA has "substantially improved" the employment opportunities of persons with disabilities.<sup>30</sup> The Bureau of Labor Statistics reports that in 2011, persons with disabilities had a labor force participation rate of 17.8%, compared to a participation rate of 63.6% for others.<sup>31</sup> This shows a decrease from 2009, where the labor force participation rate for persons with disabilities was 21.5%, compared to a participation rate of 73.7% for others.<sup>32</sup> Although not confirmed by research, this lower employment rate logically

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<sup>26</sup> *Id.* § 12112 (b)(5)(A).

<sup>27</sup> Carrie Griffin Basas, *Back Rooms, Board Rooms—Reasonable Accommodation and Resistance under the ADA*, 29 BERKELEY J. EMP. & LAB. L. 59, 68 (2008) (referencing EEOC's Interpretive Guidance on Title I of the Americans with Disabilities Act).

<sup>28</sup> Samuel R. Bagenstos, "Rational Discrimination," *Accommodation, and the Politics of (Disability) Civil Rights*, 89 VA. L. REV. 825, 829-30 (2003).

<sup>29</sup> Stephen F. Befort & Tracey Holmes Donesky, *Reassignment Under the Americans with Disabilities Act: Reasonable Accommodation, Affirmative Action, or Both?*, 57 WASH. & LEE L. REV. 1045 (2000).

<sup>30</sup> Scott Burris & Kathryn Moss, *The Employment Discrimination Provisions of the Americans with Disabilities Act: Implementation and Impact*, 25 HOFSTRA LAB. & EMP. L.J. 1, 3 (2007); David C. Stapleton et al., *Has the Employment Rate of People with Disabilities Declined?*, CORNELL U. EMP. & DISABILITY INST., 1 (Dec. 2004), available at [http://www.ilr.cornell.edu/edi/publications/PB\\_EmpDecline.pdf](http://www.ilr.cornell.edu/edi/publications/PB_EmpDecline.pdf); see also Daron Acemoglu & Joshua D. Angrist, *Consequences of Employment Protection? The Case of the Americans with Disabilities Act*, 109 J. POL. ECON. 915, 917 (2001) (noting decline in employment among disabled persons after passage of ADA); Samuel R. Bagenstos, *The Future of Disability Law*, 114 YALE L.J. 1, 19-20 (2004) (noting drop in employment rate for persons with disabilities during the 1990s); Thomas DeLeire, *The Wage and Employment Effects of the Americans with Disabilities Act*, 35 J. HUM. RES. 693, 705 (2000) (noting that statistics show ADA led to relative decrease in employment).

<sup>31</sup> *Persons with a Disability: Labor Force Characteristics—2011*, BUREAU OF LABOR STATISTICS (June 8, 2012), [http://www.bls.gov/news.release/archives/disabl\\_06082012.htm](http://www.bls.gov/news.release/archives/disabl_06082012.htm).

<sup>32</sup> *Persons with a Disability: Labor Force Characteristics—2009*, BUREAU OF LABOR STATISTICS (Aug. 25, 2010), [http://op.bna.com/dlrcases.nsf/id/mroe-88nsrh/\\$File/Disabilities%20Employment%202009.pdf](http://op.bna.com/dlrcases.nsf/id/mroe-88nsrh/$File/Disabilities%20Employment%202009.pdf).

may be due at least in part to employers' refusal to provide leave as an accommodation, since discharge is often the alternative to extending leave as an accommodation.

The Supreme Court has recognized the affirmative right to accommodation by placing a fairly low burden on employees to show that a requested accommodation is reasonable,<sup>33</sup> which is shown if the accommodation "seems reasonable on its face."<sup>34</sup> An employee may be able to meet this burden by showing that other employers in the industry provide similar accommodations or "some of the more obvious and visible circumstances" of the employer indicating that the accommodation is "facially practicable."<sup>35</sup> An accommodation may have been deemed reasonable in "the run of cases" or in the opinion of the Job Accommodation Network, which provides expert and confidential guidance on accommodations for employers.<sup>36</sup> A strict cost-benefit analysis need not support a request for an accommodation to make it reasonable, but the cost should not be disproportionate to the benefit to the employee with a disability.<sup>37</sup>

Some see accommodation requirements as unwarranted preferential treatment for employees with disabilities.<sup>38</sup> Justice Scalia and other experts argue that the reasonable accommodation requirement unduly restricts the discretion of employers;<sup>39</sup> others believe that the federal courts have narrowly defined the duty to

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<sup>33</sup> Seth D. Harris, *Re-Thinking the Economics of Discrimination: U.S. Airways v. Barnett, the ADA, and the Application of Internal Labor Market Theory*, 89 IOWA L. REV. 123, 144 (2003) [hereinafter Harris, *Re-Thinking*].

<sup>34</sup> *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 401-02; *see also* *Borkowski v. Valley Cent. Sch. Dist.*, 63 F.3d 131, 138 (2d Cir. 1995) (enough for plaintiff to suggest plausible accommodation).

<sup>35</sup> Harris, *Re-Thinking*, *supra* note 33, at 145.

<sup>36</sup> East, *supra* note 14. *See also* Job Accommodation Network's (JAN) extensive *Accommodation and Compliance Series* for both general guidance (EMPLOYERS' PRACTICAL GUIDE TO REASONABLE ACCOMMODATION UNDER THE AMERICANS WITH DISABILITIES ACT (May 15, 2009), available at <http://askjan.org/ErGuide/ErGuide.pdf>) and regarding conditions as diverse as Parkinson's Disease (<http://askjan.org/media/PD.html>), hepatitis (<http://askjan.org/media/hep.html>), mental health impairments (<http://askjan.org/media/Psychiatric.html>), migraine headaches (<http://askjan.org/media/Migraine.html>), cancer (<http://askjan.org/media/Cancer.html>), lupus (<http://askjan.org/media/Lupus.html>), and arthritis (<http://askjan.org/media/Arthritis.html>).

<sup>37</sup> Harris, *Re-Thinking*, *supra* note 33, at 149-50; *see also* *VandeZande v. Wis. Dep't. of Admin.*, 44 F.3d 538, 542-43 (7th Cir. 1995) (benefits of accommodation need not exceed its costs for it to be reasonable); *Borkowski v. Valley Cent. Sch. Dist.*, 63 F.3d 131, 138 n.3 (2d Cir. 1995).

<sup>38</sup> Stewart Schwab & Steven Willborn, *Reasonable Accommodation of Workplace Disabilities*, 44 WM. & MARY L. REV. 1197, 1204 (2003).

<sup>39</sup> *Barnett*, 535 U.S. at 418-20 (Scalia, J., dissenting) (stating that the majority opinion "incorrectly subjects all employer rules and practices to the requirement of reasonable accommodation" even where the rule or practice does not work to exclude a disabled employee because of the employee's disability); *see also* Thomas F. O'Neil III & Kenneth M. Reiss, *Reassigning Disabled Employees Under the ADA: Preferences Under the Guise of Equality?*, 17 LAB. LAW. 347, 360 (2001) (criticizing the approach of some courts on the

accommodate in a way that has favored employers.<sup>40</sup> Despite some resistance to requiring accommodations, employers have been “reasonably responsive” to employees’ requests for accommodation.<sup>41</sup> Accommodations may be required where the cost or disruption is minimal, but many employers may consider leave as a costly and disruptive form of accommodation.

These different outlooks toward accommodation are exemplified in the debate over how much leave should be granted as an accommodation, since an employee obviously is not productive while on leave, but he or she could return to work as a productive employee at the end of the leave. One court noted this quandary: “[T]he idea of unpaid leave of absence as a reasonable accommodation presents a troublesome problem, partly because of the oxymoronic anomaly it harbors—the idea that allowing a disabled employee to leave a job allows him to perform that job’s functions.”<sup>42</sup>

#### A. Leave as an Accommodation

If an employee cannot perform the essential duties of his or her position because of the limitations of his or her disability, but could regain that ability in the future, then leave may be a reasonable accommodation. Appellate courts have been consistent in recognizing that some amount of leave may be a reasonable accommodation, at least in some circumstances.<sup>43</sup> This begs the question of how much leave is reasonable.

Leave may be needed as an accommodation for various reasons: obtaining medical treatment, recovering from an illness or episode, or receiving disability-related training.<sup>44</sup> The length of leave available as an accommodation also affects the

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grounds that their interpretations of the reasonable accommodation requirement unduly limit employer discretion).

<sup>40</sup> Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99, 101, 108 (1999); Cheryl L. Anderson, “Neutral” Employer Policies and the ADA: *The Implications of US Airways, Inc. v. Barnett Beyond Seniority Systems*, 51 DRAKE L. REV. 1, 15 (2002) [hereinafter Anderson, *Neutral Policies*] (courts may be reluctant to require that the employer depart from neutral policy “because they cannot get beyond thinking about the ADA in traditional Title VII terms”).

<sup>41</sup> Sharona Hoffman, *Settling the Matter: Does Title I of the ADA Work?*, 59 ALA. L. REV. 305, 307 (2008).

<sup>42</sup> *Graves v. Finch Pruyn & Co.*, 457 F.3d 181, 185 n.5 (2d Cir. 2006).

<sup>43</sup> See *Criado v. IBM Corp.*, 145 F.3d 437, 443 (1st Cir.1998); *Walton v. Mental Health Ass’n. of Se. Pa.*, 168 F.3d 661, 671 (3d Cir. 1999) (“unpaid leave supplementing regular sick and personal days might, under other facts, represent a reasonable accommodation”); *Haschmann v. Time Warner Ent. Co.*, 151 F.3d 591, 601 (7th Cir.1998); *Brannon v. Luco Mop Co.*, 521 F.3d 843, 849 (8th Cir. 2008); *Nunes v. Wal-Mart Stores, Inc.*, 164 F.3d 1243, 1247 (9th Cir. 1999); *Smith v. Diffée Ford-Lincoln-Mercury, Inc.*, 298 F.3d 955, 967 (10th Cir. 2002); *Hudson v. MCI Telecomms. Corp.*, 87 F.3d 1167, 1168-69 (10th Cir. 1996); see also 29 C.F.R. pt. 1630, app. (2012) (note discussing § 1630.2(o) and identifying leave as a reasonable accommodation).

<sup>44</sup> EQUAL EMP’T OPPORTUNITY COMM’N, A TECHNICAL ASSISTANCE MANUAL ON THE EMPLOYMENT PROVISIONS (TITLE I) OF THE AMERICANS WITH DISABILITIES ACT § 3.10(4) (1992), available at <http://ia600504.us.archive.org/21/items/technicalassista00unse/technicalassista00unse.pdf>; EEOC, ENFORCEMENT GUIDANCE, *supra* note 4, at text preceding Q&A 17;

opportunity for reassignment as an accommodation, since an employer is only required to consider employees with disabilities for positions which are vacant at the time they seek a transfer.<sup>45</sup> Even if there is no position available for the employee with a disability at the start of his or her leave, reassignment could still be a reasonable accommodation if a position becomes available while that employee is still out on a reasonable amount of leave.<sup>46</sup>

The reasonableness of leave as an accommodation can also be significant for an employee with a disability who seeks to return to work, but the employer prefers to offer leave as an accommodation. In that situation, the employee may seek to establish that leave would be an unreasonable accommodation so as to force the employer to provide some other accommodation that would enable him or her to return to work.<sup>47</sup> Likewise, a reasonable amount of leave could ameliorate a direct threat posed by an employee with a disability.<sup>48</sup> These various reasons behind requests for leave as an accommodation explain why more than three hundred and fifty claims have been litigated on this issue since the ADA came into effect.

### B. EEOC Guidance

EEOC Guidelines recognize leave as a reasonable accommodation.<sup>49</sup> Generally, reasonable accommodations include “modifications or adjustments that enable an . . . employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities.”<sup>50</sup> An employer should first try to keep the employee in his or her existing job, if a

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*see also* Christopher Kuczynski, *Statement before the EEOC Meeting to Examine Use of Leave as Reasonable Accommodation*, EEOC (June 8, 2011), available at <http://www.eeoc.gov/eeoc/meetings/6-8-11/kuczynski.cfm>.

<sup>45</sup> *See, e.g.*, *Rehling v. City of Chi.*, 207 F.3d 1009, 1015 (7th Cir. 2000).

<sup>46</sup> *See, e.g.*, *Rowe v. Aroostook Med. Ctr.*, No. 1:09-cv-182-DBH, 2010 U.S. Dist. LEXIS 102969, at \*39-40 (D. Me. Aug. 17, 2010) (nurse could have been reassigned to another position in short amount of time if kept on leave); *Boykin v. ATC/Vancom of Colo., L.P.*, 247 F.3d 1061, 1065 (10th Cir. 2001); *Lally v. Commonwealth Edison Co.*, No. 95C4220, 1996 U.S. Dist. LEXIS 19386, at \*64 (N.D. Ill. Dec. 19, 1996) (employer not required to create position as accommodation).

<sup>47</sup> *See, e.g.*, *Hankins v. The Gap*, 84 F.3d 797, 801 (6th Cir. 1996) (leave was reasonable accommodation instead of transfer to another position); *Picinich v. United Parcel Serv.*, 321 F. Supp. 2d 485, 514 (N.D.N.Y. 2004) (disability leave in lieu of transfer to another position argued by employer to be reasonable accommodation); *Baker v. Windsor Republic Doors*, No. 1:06-cv-01137, 2009 U.S. Dist. LEXIS 37176, at \*49-50 (W.D. Tenn. May 1, 2009) (leave instead of providing other accommodations at work could be considered adverse action for employee who sought to return to work); *Nagel v. Husky Lima Refinery*, No. 3:09CV828, 2011 U.S. Dist. LEXIS 30122, at \*23 (N.D. Ohio Mar. 23, 2011) (employer’s provision of short and long term disability was reasonable accommodation).

<sup>48</sup> *See, e.g.*, *Rose v. Laskey*, 110 Fed. Appx. 136, 138 (1st Cir. 2004) (plaintiff argued that leave would reduce threat).

<sup>49</sup> 29 C.F.R. § 1630.2(o) (2013) (emphasis added).

<sup>50</sup> *Id.*; *see also* 29 C.F.R. pt. 1630, App. § 1630.9, p. 364 (2013) (“reasonable accommodation requirement is best understood as a means by which barriers to . . . equal employment opportunity . . . are removed or alleviated”).

reasonable accommodation would enable the employee to perform the essential job duties of that position.<sup>51</sup> If the employee cannot perform the essential job duties, then leave is a form of reasonable accommodation.<sup>52</sup>

If leave is a reasonable accommodation, the burden moves to the employer to show that the proposed accommodation would impose an undue hardship in its particular circumstances.<sup>53</sup> While these guidelines establish the EEOC's position that leave can be a reasonable accommodation if it does not impose an undue hardship, little attention is given to the differences among employees that may affect the reasonableness and relative cost to the employer arising from tolerating leave as an accommodation.

### C. Research on Accommodations

Research on accommodations including leave sheds some light on how employers view their obligations under the ADA and which employees may be benefitting from the ADA's protections. A study of accommodations provided or refused by employers who requested consultation from the Job Accommodation Network (JAN) revealed a lack of significant relationship between employee demographic and employer variables and the provision of an accommodation.<sup>54</sup> Specifically, accommodation decisions were not related to employees' age, gender, education, annual salary or wages, or years with the company.<sup>55</sup> Likewise, direct benefit estimates were not significantly related to company size or calendar year direct costs, but were significantly positively associated with wages.<sup>56</sup> Employees with higher wages likely are more expensive to replace because recruitment, training, and start-up costs may be greater.<sup>57</sup> In providing accommodations, the employer avoids those costs and realizes a greater net benefit.<sup>58</sup>

Almost all employers using JAN reported that providing an accommodation benefited the company through retention (91.6%) and/or promotion (11.3%) of a qualified employee.<sup>59</sup> Other direct benefits reported included eliminating the cost of training a new employee (59.5%), saving on worker's compensation or insurance

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<sup>51</sup> See H.R. REP. NO. 101-485(II), at 63 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 345 ("Efforts should be made, however, to accommodate an employee in the position that he or she was hired to fill before reassignment is considered."); 29 C.F.R. Pt. 1630, App. § 1630.2(o) (2013) ("In general, reassignment should be considered only when accommodation within the individual's current position would pose an undue hardship [to the employer]."); EEOC, ENFORCEMENT GUIDANCE, *supra* note 4, at 39 ("Reassignment is the reasonable accommodation of last resort.").

<sup>52</sup> *Id.*

<sup>53</sup> *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 402.

<sup>54</sup> Helen A. Schartz et al., Symposium, *Workplace Accommodations: Empirical Study of Current Employees*, 75 *MISS. L.J.* 917, 936 (2006).

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 940.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 939.

costs (43.0%), increasing the accommodated worker's productivity (76.7%), improving the accommodated worker's attendance (53.3%), increasing the diversity of the company (41.4%), and "other" direct benefits (20.1%).<sup>60</sup>

Other related studies have found that employers often benefit from providing accommodations to their incumbent employees. Significantly, the benefits gained by employers frequently outweigh their costs, meaning that accommodations benefit employers as well as their employees with disabilities.<sup>61</sup> An earlier JAN study showed that both employers and individuals reported that a significant level of limitation due to the disability could be mitigated significantly by accommodations.<sup>62</sup> Of the employers surveyed who had been requested to provide an accommodation, only 8.4% decided it was not possible to accommodate the individual without creating an undue hardship.<sup>63</sup> Of two hundred and twelve employers providing cost information regarding the accommodation(s) made, half reported no cost, and another 42.0% reported that the costs incurred were one-time only in nature, for a median cost of six hundred dollars.<sup>64</sup>

In line with these studies, an economic perspective suggests that "rational employers should choose to accommodate their employees with disabilities because employers will often benefit from that choice."<sup>65</sup> Accommodations allow employers to retain members of their internal labor market, which preserves productivity-enhancing firm-specific skills and knowledge.<sup>66</sup> This potential led one employer representative to suggest that length of service should be considered favorably in determining whether a leave is a reasonable accommodation.<sup>67</sup> At the same time, an employee with specialized or advanced skills may not be replaced easily, through reassignment or temporary workers, if he or she takes leave as an accommodation.<sup>68</sup> This indispensable employee may arguably be less able to show that his or her leave would not impose an undue burden.

Employers may also benefit from providing accommodations since the provision of an accommodation may increase that employee's commitment to the internal

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<sup>60</sup> *Id.*

<sup>61</sup> Peter David Blanck, *The Economics of the Employment Provisions of the Americans with Disabilities Act: Part I—Workplace Accommodations*, 46 DEPAUL L. REV. 877, 902-04 (1997).

<sup>62</sup> D. J. Hendricks et al., *Cost and Effectiveness of Accommodations in the Workplace: Preliminary Results of a Nationwide Study*, 25 DISABILITY STUD. Q. (2005), available at <http://www.dsq-sds.org/article/view/623/800>.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> Seth D. Harris, *Law, Economics, and Accommodations in the Internal Labor Market*, 10 U. PA. J. BUS. & EMP. L. 1, 6 (2007) [hereinafter Harris, *Internal Labor*].

<sup>66</sup> *Id.* at 12, 53-54.

<sup>67</sup> Isler, *supra* note 10.

<sup>68</sup> Claudia Center, *Statement before the EEOC Meeting to Examine Use of Leave as Reasonable Accommodation*, EEOC (June 8, 2011), available at <http://www.eeoc.gov/eeoc/meetings/6-8-11/center.cfm>.

labor market, which reduces turnover.<sup>69</sup> Retention of employees through accommodations also avoids the transaction costs associated with replacing employees from the external labor market.<sup>70</sup> These costs would increase if an employer does not provide leave as an accommodation, although there may be some costs associated with finding a temporary replacement.

To determine whether an accommodation is reasonable, economists have suggested the development of a “reasonable accommodation cost continuum,” ranging from “wholly efficient accommodations” to “wholly inefficient accommodations,” which would be deemed unreasonable.<sup>71</sup> Between those extremes, the reasonableness of a particular accommodation may vary across different employers.<sup>72</sup> Some economists would allow employers to make their own determination regarding the provision of accommodations, assuming that employers would provide accommodations that are “utility-maximizing” under a cost-benefit analysis.<sup>73</sup> Others argue that laws requiring accommodations which are not “utility maximizing” for employers may be justified by the redistributive goal of assisting workers with disabilities or the normative goal of results-based equality for all workers.<sup>74</sup>

Reliance on an employer’s cost-benefit analysis would only require an accommodation if the burden on the employer were less than the potential of harm to the employee from denying the accommodation.<sup>75</sup> This raises the issue of how to quantify the benefits of an accommodation as well as the difficulty of predicting harm to the employee if the accommodation is not provided.<sup>76</sup> Discrimination can occur when an employer without perfect information about the characteristics of an

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<sup>69</sup> Harris, *Internal Labor*, *supra* note 65, at 35.

<sup>70</sup> *Id.* at 52.

<sup>71</sup> Michael Ashley Stein, *The Law and Economics of Disability Accommodations*, 53 DUKE L.J. 79, 144-78 (2003).

<sup>72</sup> *Id.* at 179.

<sup>73</sup> Rachel Arnow-Richman, *Indenting Flexibility: The Relationship Between Public Law and Voluntary Action in Enhancing Work/Life Balance*, 42 CONN. L. REV. 1081, 1096 (2010) (citing RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* (7th ed. 2007) (“[E]conomics is the science of rational choice in a world . . . in which resources are limited . . . is to explore the implications of assuming that man is a rational maximizer of his . . . ‘self-interest.’”); Russell Korobkin, *A “Traditional” and “Behavioral” Law-and-Economics Analysis of Williams v. Walker-Thomas Furniture Company*, 26 U. HAW. L. REV. 441, 447 (2004) (“[T]he term ‘rational choice theory’ lacks a single, standard definition. . . . [M]ost versions of [rational choice theory] assume, at a minimum, that individuals will use all available information to select behaviors that maximize their expected utility.” (footnotes omitted)).

<sup>74</sup> Arnow-Richman, *supra* note 73, at 1098; *see also* Samuel Bagenstos, *The Americans with Disabilities Act as Welfare Reform*, 44 WM. & MARY L. REV. 921, 957-75 (2003) (tracing themes of “welfare reform” and the “cost saving” function of the ADA in the political movement culminating in the statute’s adoption); Amy L. Wax, *Disability, Reciprocity, and “Real Efficiency”: A Unified Approach*, 44 WM. & MARY L. REV. 1421, 1425 (2003) (“[T]he ADA can be seen as a way for taxpayers to unload some of the costs of supporting the disabled population onto employers.”).

<sup>75</sup> Stein, *supra* note 71, at 113.

<sup>76</sup> *Id.*

employee with a disability bases its assessment on inaccurate “indicators” to evaluate those individuals’ present or future performance, especially when combined with the general assumption that employees with disabilities are less productive than nondisabled employees.<sup>77</sup> For an employee requesting leave as an accommodation, the harm of no accommodation may be clear if the employee is discharged without the accommodation, but the probability that the accommodation of additional leave would prevent that harm is much less predictable.

Employers’ absence and disability management (ADM) practices have not been effective in the retention of employees with disabilities. Surveyed employers believed, on average, that their ADM practices were only a little better than “slightly effective” in delaying or preventing exits from employment due to health conditions or other impairments, and more than half believed that ADM practices were no more than slightly effective in overall retention.<sup>78</sup> Relevant to the treatment of leave as an accommodation, consistent return to work practices were deemed one of the most important factors in delaying or preventing exit from the workforce and improving retention.<sup>79</sup>

Rather than focusing on individual employee characteristics, employers tend to focus on the overall costs associated with employee absenteeism and use of leave, stressing the real business cost of leave arising from its usage.<sup>80</sup> A study of employee absenteeism conducted in 2010 highlights potential costs which could be associated with leave as an accommodation, including direct costs such as paid time off, overtime for remaining employees covering the work of an absent employee, and costs to engage temporary employees, as well as intangible costs such as (with percentages of employers reporting these costs in parentheses):

- Significant losses in productivity because work is completed by less effective, temporary workers or last-minute substitutes, or overtired, overburdened employees working overtime who may be slower and more susceptible to error (42%)
- Lower quality and less accountability for quality (59%)
- Disruption of work of other employees (80%)
- Increased stress on overburdened co-workers (78%)
- Lower morale (63%)<sup>81</sup>

Total costs for extended absences are estimated at 2.9% of an employer’s payroll, and a net loss in productivity per day of 16%.<sup>82</sup> The work of extended leave users is most often covered by co-workers (40-46% of the time, depending on type of work),

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<sup>77</sup> *Id.* at 128, 130.

<sup>78</sup> Rochelle Habeck et al., *Employee Retention and Integrated Disability Management Practices as Demand Side Factors*, 20 J. OCCUP. REHABIL. 443, 449 (2010).

<sup>79</sup> *Id.* at 450.

<sup>80</sup> McLaughlin, *supra* note 10.

<sup>81</sup> Mercer & Kronos Inc., *Survey on the Total Financial Impact of Employee Absences*, at 15 (June 2010), available at <http://www.kronos.com/elqNow/elqRedir.htm?ref=http%3a%2f%2fwww.kronos.com%2fworkarea%2fDownloadAsset.aspx%3fid%3d1396%26dd%3d1>.

<sup>82</sup> *Id.* at 8.

followed by supervisors (14-23% of the time), 7-12% by floaters, 15-17% by temps or contractors, and 0-17% by overtime work.<sup>83</sup> The cost of hiring and training replacement workers has been estimated at 2-4% of payroll.<sup>84</sup> Replacement workers were estimated to be 79% as efficient as the original worker on extended leave.<sup>85</sup>

Generally, such costs may prevent an employer “from operating its business in an efficient and effective manner.”<sup>86</sup> Indirect costs can lead to higher employee turnover, which can lead to higher training costs, more quality control issues, less accountability for quality, and less reliability.<sup>87</sup> In particular, sporadic, unplanned absences may create greater costs for employers.<sup>88</sup>

As an additional indirect cost, some argue that the review of requests for accommodation should focus on the effect of accommodations on other employees.<sup>89</sup> Arguably, leave could have some effect on other employees who may be required to handle additional job duties.<sup>90</sup> In several cases, courts have concluded that job restructuring or a proposed modification of a disabled employee’s work schedule that would result in other employees having to work longer or harder is not a reasonable accommodation.<sup>91</sup>

To control the costs of absenteeism, many employers offer not more than between twelve and twenty-six weeks of leave; only some specifically provide that additional leave “may be considered as a reasonable accommodation on a case-by-case basis.”<sup>92</sup> A maximum duration for the leave is often set by policy to provide employers with “some level of control over their ability to manage their headcount and business operations” and as a way to avoid discriminatory decisions.<sup>93</sup> Some would presume that employers choose the amount of leave allowed “based on an analysis of how much absence from work it can bear.”<sup>94</sup> In line with the use of leave policies to control attendance, one study showed that absence days ranged from 4.0 to 7.2 among employers with such formal policies, whereas absent days at employers with no formal policy ranged from 3.5 to 10.3 days.<sup>95</sup>

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<sup>83</sup> *Id.* at 13.

<sup>84</sup> L. J. Bassi and M.E. Van Buren, *Sharpening the Leading Edge: State of the Industry Report* (Alexandria, VA: Society for Training and Development 1999).

<sup>85</sup> *Id.* at 14.

<sup>86</sup> McLaughlin, *supra* note 10.

<sup>87</sup> *Id.*

<sup>88</sup> Isler, *supra* note 10.

<sup>89</sup> Alex B. Long, *The ADA's Reasonable Accommodation Requirement and "Innocent Third Parties"*, 68 MO. L. REV. 863, 870 (2003).

<sup>90</sup> *Id.* at 871.

<sup>91</sup> *Id.* at 878.

<sup>92</sup> McLaughlin, *supra* note 10.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> Mercer & Kronos Inc., *supra* note 81, at 17.

Accommodations that call for adjustments in policies may meet greater resistance from employers than other requests for accommodations. One survey found that among private employers who made changes to leave policies to meet the needs of employees with disabilities, 10% reported that it was “very difficult” or “difficult” to make those changes.<sup>96</sup> In a survey of employees who sought accommodations, more than 40% reported requesting leave as an accommodation, and 88.75% reported that the request was granted; however, among those whose request was denied, 51.4% attributed the denial to an inflexible leave policy.<sup>97</sup>

These studies suggest that leave as an accommodation should be considered in terms of the employee’s particular characteristics, such as longevity with the company, as well as other circumstances unique to the employer involved, such as the effect of leave usage on overall productivity and other employees. Yet employers may not conduct such an individualized analysis willingly; instead, employers naturally focus on the overall costs of absenteeism.<sup>98</sup> This raises the question of whether courts’ enforcement of the right to leave as an accommodation does or should force employers to engage in a more individualized assessment of the effects of leave usage.

## II. JUDICIAL TREATMENT OF REQUESTS FOR LEAVE AS ACCOMMODATION

Appellate courts take a variety of approaches in reviewing the use of leave as a reasonable accommodation. Some courts do not even reach the question of whether leave can be a reasonable accommodation, instead finding that an absent employee is not ever otherwise qualified.<sup>99</sup> Even if the reasonableness of the leave is addressed, several appellate courts focus only on the amount of leave used or requested, or the definiteness of the amount of leave needed, to determine whether the leave would be a reasonable accommodation.<sup>100</sup> This approach does not consider the particular value of the employee to the employer’s operations, or the specific direct or indirect costs associated with that employee’s use of leave.

A second group of appellate courts may consider the employer’s leave policy or the right to leave under the Family & Medical Leave Act (FMLA) to determine if the

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<sup>96</sup> Susanne M. Bruyere, *Disability Employment Policies and Practices in Private and Federal Sector Organizations* 15 (Ithaca, NY: Cornell University, Program on Employment and Disability, School of Industrial and Labor Relations 2000), available at <http://digitalcommons.ilr.cornell.edu/edicollect/63/>.

<sup>97</sup> Sarah von Schrader et al., EMERGING EMPLOYMENT ISSUES FOR PEOPLE WITH DISABILITIES 25-26 (Cornell University 2011), available at <http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1288&context=edicollect>; see also Kevin McGowan, *Statement at EEOC Public Hearing on Leave As Reasonable Accommodation Under ADA*, EEOC (June 13, 2011) (summarizing testimony of Ellen McLaughlin, a partner with Seyfarth Shaw in Chicago, available at <http://www.bna.com/eeoc-holds-public-n12884902106/> (summarizing testimony of Ellen McLaughlin, a partner with Seyfarth Shaw in Chicago, regarding employer resistance to variation from leave policies).

<sup>98</sup> See *Mercer & Kronos Inc.*, *supra* note 81.

<sup>99</sup> See, e.g., *Kempton v. Mich. Bell Tel. Co.*, No. 13-1036, 2013 U.S. App. LEXIS 17930, at \*12-15 (6th Cir. Aug. 26, 2013) (focus on inability to perform essential duties & lack of other positions); *Cash v. Siegel-Robert, Inc.*, No. 13-5467, 2013 U.S. App. LEXIS, at \*10-13 (6th Cir. Dec. 3, 2013) (focus on failure to request job transfer).

<sup>100</sup> See *infra* notes 95-176 and accompanying text.

leave request is reasonable.<sup>101</sup> Often the determination of reasonableness under these first two approaches is made on a motion for summary judgment without any requirement that the employer demonstrate undue hardship based on the actual or specific costs associated with that use of leave. This focus on reasonableness rather than undue hardship on the employer has been criticized as a way for the “cycle of discrimination” to continue “unchecked,” because such a broad basis for denying accommodation could allow the influence of prejudices or biases against people with disabilities.<sup>102</sup>

A third, smaller number of circuit courts focus on the hardship caused by a particular employee’s use of leave.<sup>103</sup> These courts may consider the amount of leave requested, but also consider whether that leave would unduly harm the particular employer’s operations.<sup>104</sup> These courts may consider an employer’s leave policy or FMLA requirements, but also require that an employer demonstrate that leave beyond these requirements would impose an undue hardship.<sup>105</sup> This approach sometimes takes into account the relative value that a particular employee adds to the organization and the costs associated with replacing them.<sup>106</sup>

Neither the Supreme Court nor the appellate courts have provided a formula for determining what accommodations are reasonable.<sup>107</sup> Instead, these different approaches lead to significantly different outcomes for employees seeking leave as an accommodation.

#### *A. Amount of Leave*

Claims of employees seeking leave as an accommodation are often dismissed based on what the court sees as a significant period leave, or if the leave usage has been unscheduled.<sup>108</sup> Courts have adopted these “cut offs” even though neither the ADA nor the EEOC guidelines indicate what amount of leave would always be unreasonable or impose an undue hardship.<sup>109</sup> This approach may be based on the notion that all employees should be treated equally, regardless of their particular position or disability. Across different courts using this approach; however, the leave amounts deemed unreasonable may range from one week to eighteen months, without any consideration of expectations regarding ability to return or any undue hardship on the employer.<sup>110</sup> Under this approach, the employer need not show that any additional leave would be costly or even inconvenient.

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<sup>101</sup> See *infra* notes 231-44, 260-68 and accompanying text.

<sup>102</sup> Basas, *supra* note 27, at 111-12.

<sup>103</sup> See *infra* notes 272-94 and accompanying text (discussion of undue hardship).

<sup>104</sup> See *infra* notes 273-96 and accompanying text.

<sup>105</sup> See *infra* notes 224-97 and accompanying text.

<sup>106</sup> See *infra* notes 292-93 and accompanying text.

<sup>107</sup> Basas, *supra* note 27, at 77.

<sup>108</sup> See *infra* notes 108-27 and accompanying text.

<sup>109</sup> East, *supra* note 14; Center, *supra* note 68.

<sup>110</sup> See *Browning v. Liberty Mut. Ins. Co.*, 178 F.3d 1043, 1048 (8th Cir. 1999) (more than 1 week deemed unreasonable); *Dudley v. Cal. Dept. of Trans.*, No. 99-15892, 2000 U.S. App. LEXIS 5249, at \*4-5 (9th Cir. Feb. 10, 2000) (6 months of leave unreasonable); *Nowak v. St.*

The dismissal of claims by employees who have taken a lengthy amount of leave may seem reasonable because of the obvious burden on their employers. However, claims have also been dismissed even where the employee used relatively short amounts of leave, without any proof of the costs associated with that use of leave.<sup>111</sup> For example, the Sixth Circuit dismissed the claim of an employee of a tree service employee who was discharged based on his absence of thirteen days, without any showing that the employer suffered any costs or even inconvenience due to that absence.<sup>112</sup>

As shown by this example, even a short amount of leave has justified the dismissal of an employee who cannot perform his or her essential job duties at the time of discharge.<sup>113</sup> Courts adopting such a “cut off” place the burden on the employee to establish that at the time of discharge, he or she “possessed the necessary skills to perform his job and that he was willing and able to demonstrate these skills by coming to work on a regular basis.”<sup>114</sup> In an often-cited opinion, the Fifth Circuit held that where an employee was unavailable for work at the time of his discharge, the employer was not required to provide any additional leave as an accommodation.<sup>115</sup>

Relying on this approach, an employer was permitted to discharge an employee after just one week of leave, explaining that she was not a qualified individual at the time of her discharge.<sup>116</sup> Under this strict “otherwise qualified” approach, an employer is not required to establish the costs of allowing additional leave.<sup>117</sup> This approach assumes that any absence requires the reassignment of duties to other employees, which is generally considered to be an unreasonable expectation.<sup>118</sup>

Courts which dismiss accommodation claims based solely on an employee’s past use of leave allow employers to assume that an employee’s past use of leave because of a disability is indicative of future attendance at work.<sup>119</sup> Based on this assumption,

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Rita High Sch., 142 F.3d 999, 1003 (7th Cir. 1998) (teacher took more than 18 months of leave and attendance was essential to performance).

<sup>111</sup> Denman v. Davey Tree Expert Co., 266 Fed. App’x 377, 380 (6th Cir. 2007).

<sup>112</sup> *Id.*

<sup>113</sup> See *Nowak*, 142 F.3d at 1002-3; *Rogers v. Int’l Marine Terminals, Inc.*, 87 F.3d 755, 759 (5th Cir. 1996) (citing *Myers v. Hose*, 50 F.3d 278, 283 (4th Cir. 1995)).

<sup>114</sup> *Nowak*, 142 F.3d at 1003.

<sup>115</sup> *Rogers*, 87 F.3d at 759.

<sup>116</sup> *Browning v. Liberty Mut. Ins. Co.*, 178 F.3d 1043, 1048 (8th Cir. 1999); see also *Waggoner v. Olin Corp.*, 169 F.3d 481, 483 (7th Cir. 1999) (attendance is requirement of job); *Byrne v. Avon Prods., Inc.*, 328 F.3d 379, 381 (7th Cir. 2003), *appeal after remand*, 125 Fed. App’x 704 (7th Cir. 2004) (request for additional leave to treat mental illness seen as admission of inability to work at time of discharge).

<sup>117</sup> *Nowak*, 142 F.3d at 1048.

<sup>118</sup> *Id.*; see also *Duello v. Buchanan Co. Bd. of Supers.*, 628 F.3d 968, 973-74 (8th Cir. 2010) (employer’s ability to cover previous absences does not make excuse of essential job duties reasonable).

<sup>119</sup> See, e.g., *Denman v. Davey Tree Expert Co.*, 266 Fed. App’x. 377, 380 (6th Cir. 2007). *But see* *Cehrs v. Ne. Ohio Alzheimer’s Research Ctr.*, 155 F.3d 775, 782 (6th Cir. 1998) (no per se rule that leave of indefinite duration could never be reasonable accommodation);

the employer can treat any additional leave as an unreasonable accommodation. For example, even where an employee's attendance fell within the parameters of an employer's leave policy, a manufacturing plant could treat a request for one additional week of leave as unreasonable.<sup>120</sup> This employer could assume that the plaintiff was "unable to regularly attend his job" after he had taken seventy weeks of leave over a three year period; therefore, any additional leave would be "an ineffectual gesture."<sup>121</sup> The court sought to protect the employer against any future uncertainty: "[T]he employer never knows when the employee's medical leave will really terminate since the employee is likely to request yet another leave shortly after returning to work following the previous leave," allowing the employer to "compensate for the missing employee's frequent, yet unpredictable absences."<sup>122</sup>

Like courts adopting a leave "cut off," courts also dismiss claims for leave as an accommodation based on plaintiffs' irregular or unscheduled use of leave.<sup>123</sup> Courts take the position that these unscheduled absences need not be tolerated as an accommodation, even for only a few days of work.<sup>124</sup> Even the EEOC's Enforcement Guidelines indicate that an employer need not necessarily tolerate frequent and unpredictable absences as an accommodation, if those absences impose a strain on the employer's operations.<sup>125</sup> This strain can be shown by an inability to ensure a sufficient number of employees to accomplish the work required, a failure to meet work goals or to serve customers/clients adequately, a need to shift work to other employees, and/or incurring significant additional costs due to overtime or hiring temporary workers.<sup>126</sup> Similarly, courts have explained that unpredictable absences leave an employer unable to rely on its schedule to efficiently run its operations.<sup>127</sup>

These decisions demonstrate the low threshold that employers must meet in many appellate courts to justify the discharge of an employee who is on a "significant" period of leave because of his or her disability. In these courts, leave of just a few weeks need not be provided even without any showing by the employer

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Garcia-Ayala v. Lederle Parenterals, Inc., 212 F.3d 638, 650 (1st Cir. 2000) ("These are difficult, fact intensive, case-by-case analyses, ill-served by per se rules or stereotypes.").

<sup>120</sup> Amadio v. Ford Motor Co., 238 F.3d 919, 928-29 (7th Cir. 2001).

<sup>121</sup> *Id.* at 929.

<sup>122</sup> *Id.*; see also Teague v. Las Vegas Sands, Inc., No. 96-15401, 1997 U.S. App. LEXIS 7618, at \*2 (9th Cir. Feb. 12, 1997) (use of 7 months of leave indicated inability to return to work after any additional leave).

<sup>123</sup> Waggoner v. Olin Corp., 169 F.3d 481, 485 (7th Cir. 1999) (unpredictable days off need not be accommodated); Wilson v. State Ins. Fund *ex rel.* Okla., No. 96-6100, 1997 U.S. App. LEXIS 602, at \*6 (10th Cir. Jan. 15, 1997) (frequent, unauthorized, & prolonged absences made plaintiff unqualified); Berkey v. Henderson, 120 F. Supp. 2d 1189, 1192 (S.D. Iowa 2000) (burdensome for employer to assign another employee to compensate for unpredictable tardiness).

<sup>124</sup> Fisher v. Vizioncore, Inc., 429 Fed. App'x 613, 615-16 (7th Cir. 2011).

<sup>125</sup> EEOC, ENFORCEMENT GUIDANCE, *supra* note 4.

<sup>126</sup> *Id.*

<sup>127</sup> Maziarka v. Mills Fleet Farm, Inc., 245 F.3d 675, 682 (8th Cir. 2001).

that the leave would interfere with its operations or otherwise impose any specific costs on the employer. It is also noteworthy that none of these courts considered the tenure of the employee with the employer or their specific skills, which would have a direct relationship to the indirect costs on the employer due to extending the leave compared to retaining the employee for some additional period of time.

*B. Leave Would Not Result in Qualification*

Under the ADA's requirement that a claimant be otherwise qualified for the position in question, employers are expected to provide alterations of the work environment that will facilitate performance of the person's essential work duties.<sup>128</sup> This means that leave may be a reasonable accommodation for an employee who is unable to perform his or her essential job duties for a limited period of time.<sup>129</sup> Yet courts will not require that an employer provide leave as an accommodation if the employee cannot provide any assurance that he or she will be able to return anytime in the future.<sup>130</sup>

Past use of leave has been used by an employer or a court to predict that an employee will be unable to return to work even if leave were provided as an accommodation, rendering any additional leave unreasonable.<sup>131</sup> For example, the claim of a municipality employee was dismissed based in large part on her absence from 19-56% of her scheduled work time over a period of three years.<sup>132</sup> The absences forced the employer to change her work schedule and reassign some of her work, but the use of leave did not impose any direct costs on the municipality since the leave was unpaid after she exhausted her sick and annual leave.<sup>133</sup> Without any evidence of the specific indirect costs the municipality incurred due to those

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<sup>128</sup> Schartz et al., *supra* note 54, at 936.

<sup>129</sup> *See, e.g.*, Haschmann v. Time Warner Entm't Co., 151 F.3d 591, 600-01 (7th Cir. 1998) (finding that leave of additional 2-4 weeks, based on physician's opinion that symptoms would be "short lived," could be reasonable); Humphrey v. Mem'l Hosp. Ass'n, 239 F.3d 1128, 1136 (9th Cir. 2001); Garcia-Ayala v. Lederle Parenterals, Inc., 212 F.3d 638, 647 (1st Cir. 2000).

<sup>130</sup> *See, e.g.*, Duckett v. Dunlop Tire Corp., 120 F.3d 1222, 1226 (11th Cir. 1997) (finding that plaintiff was unable to assure that he "likely would have been able to work" at the end of that period).

<sup>131</sup> *See, e.g.*, Trujillo v. U.S. Postal Serv., 330 F. App'x 137, 139 (9th Cir. 2009) (finding that past use of leave had not improved attendance); Brannon v. Luco Mop Co., 521 F.3d 843, 848-49 (8th Cir. 2008) (dismissing claim of employee with 40 absences within 70 days of scheduled work after she suffered an injury at work but was expected to return 27 days later); Tubbs v. Formica Corp., 107 F. App'x 485 (6th Cir. 2004) (finding that 14 leaves of absence over 23 years of employment showed that additional leave would not allow future return to work); Vice v. Blue Cross & Blue Shield of Okla., 113 F. App'x 854, 856 (10th Cir. 2004) (finding that no additional leave was required beyond 9 months to treat anxiety & depression); Tyndall v. Nat'l Educ. Ctrs., Inc., 31 F.3d 209, 211-14 (4th Cir. 1994) (finding that previous leaves had not improved attendance).

<sup>132</sup> Colon-Fontanez v. Mun. of San Juan, 660 F.3d 17, 43-44 (1st Cir. 2011).

<sup>133</sup> *Id.* at 24.

absences, the court dismissed her claim because her past use of leave had not led to any improvement in her attendance.<sup>134</sup>

Even short periods of leave may be enough to deny further leave as an accommodation, based on predictions about the employee's inability to return to work at the end of the leave.<sup>135</sup> Under this approach, employees could not show that one and two months of leave, respectively, were reasonable.<sup>136</sup> An additional month of leave was not required for additional addiction treatment where the first treatment was unsuccessful, since the employer was only "judged on what it knew at the time or could reasonably foresee" at the time of the employee's discharge.<sup>137</sup> Similarly, an employee with cancer could not show that he would have been able to return to work at the end of an additional two months of leave,<sup>138</sup> while the employer was not required to show that his additional absence from work would impose any particular costs on that large employer.<sup>139</sup> Accordingly, courts have dismissed claims of employees seeking leave despite their assurances that the leave would enable them to work in the future.<sup>140</sup>

These decisions demonstrate that employers are free to make assumptions about an employee's future recovery. For example, additional leave was unreasonable for an employee who had refused to follow her treatment recommendations in the past, based on the employer's assumption that no accommodation would assist in managing her mental illness so as to prevent future absences from work.<sup>141</sup>

This approach places the entire burden of producing evidence of an ability to return to work on the employee seeking an accommodation. A much more limited number of courts require that the employer show that some limited amount of leave would not enable the person to return to work.<sup>142</sup> This approach prevents an employer from relying solely on its assumption that the employee will not be able to perform his or her job duties after the leave.<sup>143</sup> These courts recognize the reality that

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<sup>134</sup> *Id.* at 43; *see also* *Paleologos v. Rehab Consultants, Inc.*, 990 F. Supp. 1460, 1467 (N.D. Ga. 1998) (finding 6 weeks of leave unlikely to enable to return to work where plaintiff alleged that management style caused stress reaction).

<sup>135</sup> *Evans v. Fed. Express Corp.*, 133 F.3d 137, 140 (1st Cir. 1998); *Hamm v. Exxon Mobil Corp.*, 223 F. App'x 506, 508 (7th Cir. 2007).

<sup>136</sup> *Evans*, 133 F.3d at 140; *Hamm*, 223 F. App'x at 508.

<sup>137</sup> *Evans*, 133 F.3d at 140; *Hamm*, 223 F. App'x at 508.

<sup>138</sup> *Evans*, 133 F.3d at 140 (citing *Haschmann v. Time Warner Entm't Co.*, 151 F.3d 591, 601 (7th Cir. 1998)); *Hamm*, 223 F. App'x at 508 (citing *Haschmann*, 151 F.3d at 601); *see also* *Halperin v. Abacus Tech. Corp.*, 128 F.3d 191 (4th Cir. 1997) (noting that employee was unable to work 46 days in 6 month period as well as 5 months after discharge date); *Jovanovic v. In-Sink-Erator Div. of Emerson Elec. Co.*, 201 F.3d 894, 899 (7th Cir. 2000) (finding that employee who missed 24 days in 12 months could not show that he was qualified to meet attendance requirements of position).

<sup>139</sup> *Evans*, 133 F.3d at 140; *Hamm*, 223 F. App'x at 508.

<sup>140</sup> *Corder v. Lucent Tech., Inc.*, 162 F.3d 924, 926-28 (7th Cir. 1998) (noting that employee had taken 18 months of leave).

<sup>141</sup> *Tubbs v. Formica Corp.*, 107 F. App'x 485, 488 (6th Cir. 2004).

<sup>142</sup> *See infra* notes 272-94 and accompanying text (discussion of undue burden).

<sup>143</sup> *Befort, supra* note 6, at 461.

leave may be necessary to give the employee time to show that, in the future, he or she will become able to perform his or her duties again.

*C. Indefinite Leave is Unreasonable*

Employees with disabilities who cannot predict the amount of leave needed find it difficult, if not impossible, to establish that any additional leave would be a reasonable accommodation. Like the employee who cannot establish that leave will ever enable his or her future return to work, this indefiniteness regarding the length of leave needed will often doom a request for leave, even if the employee has not used significant amounts of leave in the past.<sup>144</sup> The EEOC agrees that an employer has no obligation to provide leave of an indefinite duration as an accommodation.<sup>145</sup> Even if the leave is deemed reasonable, an employer can establish an undue hardship if the indefinite nature of the leave of absence would not allow the employer to plan for the employee's return or permanently fill the position.<sup>146</sup> Indefinite leave is distinguished by the EEOC from a leave request with an approximate date of return, which could be considered reasonable and could be reconsidered if that date changes or becomes less definite.<sup>147</sup>

Under this approach, courts typically will not require that an employer establish that an indefinite period of leave would impose any specific costs or inconvenience for that organization.<sup>148</sup> Instead, the indefiniteness of the leave request itself makes the request for leave unreasonable.<sup>149</sup> Like the courts adopting a "cut off" for leave usage, these courts profess that an accommodation must enable the employee to perform either presently or in the "immediate future," because any additional requirement would place employers in an "untenable business position."<sup>150</sup>

Uncertainty as to a date of return typically obviates the need for an employer to show undue hardship. The Eighth Circuit, for example, has explained that "employers are not qualified to predict the degree of success of an employee's

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<sup>144</sup> See *Oestringer v. Dillard Store Servs., Inc.*, 92 F. App'x 339, 348 (7th Cir. 2004) (finding that employee who had only taken several short absences of 1-2 weeks each and one 6 week period was not entitled to any additional leave because she did not request specific period of additional leave).

<sup>145</sup> EQUAL EMP'T OPP. COMM'N, THE AMERICANS WITH DISABILITIES ACT: APPLYING PERFORMANCE AND CONDUCT STANDARDS TO EMPLOYEES WITH DISABILITIES (Oct. 14, 2008), <http://www.eeoc.gov/facts/performance-conduct.html>.

<sup>146</sup> EQUAL EMP'T OPP. COMM'N, SMALL EMPLOYERS AND REASONABLE ACCOMMODATION (Oct. 21, 2009), <http://www.eeoc.gov/facts/accommodation.html>.

<sup>147</sup> *Id.*

<sup>148</sup> *Befort*, *supra* note 6, at 463.

<sup>149</sup> See S. Elizabeth Wilborn Malloy, *The Interaction of the ADA, the FMLA and Workers' Compensation: Why Can't We Be Friends?*, 41 BRANDEIS L. J. 821, 839 (2003); John E. Matejkovic & Margaret E. Matejkovic, *What Is Reasonable Accommodation under the ADA? Not an Easy Answer; Rather a Plethora of Questions*, 28 MISS. C. L. REV. 67, 88 (2009).

<sup>150</sup> See *Rascon v. U.S. W. Commc'ns*, 143 F.3d 1324, 1334 (10th Cir. 1998) (finding that prognosis of employee with PTSD was good so leave of 4 months to complete treatment was reasonable accommodation); *Fogleman v. Greater Hazleton Health Alliance*, 122 F. App'x 581, 585-86 (3d Cir. 2004) (finding no evidence that leave would enable her to perform duties within reasonable time where no duration given by plaintiff).

recovery from an illness or injury.”<sup>151</sup> Providing an employee with ADA protection during her indefinite period of recovery would burden the employer with “the duty to see into the future,” which the court did not see as “the intent of Congress in passing the ADA.”<sup>152</sup> As a court explained in a claim arising under the Rehabilitation Act, if the date of return is not certain, “an employee could conceivably forestall dismissal indefinitely.”<sup>153</sup> If the request for leave is considered to be indefinite, courts often do not go farther to consider the circumstances surrounding the request that would affect the burden imposed on the employer. Instead, courts confronted with a request for an indefinite amount of leave routinely deny the reasonableness of such an accommodation.<sup>154</sup>

An indefinite amount of leave may be deemed unreasonable because an employer should not be required to assign the work of the person with a disability to someone else for an indefinite period of time, rather than filling the position on a permanent basis.<sup>155</sup> In rejecting the reasonableness of an indefinite amount of leave, one appellate court noted that other employees performed the plaintiff’s work during his absences but did not explain why unlimited leave was too burdensome for this employer, even for an employee who had received favorable yearly evaluations despite his previous absences.<sup>156</sup>

Appellate courts have consistently put the onus on the employee with a disability to provide a specific date of return before an employer is required to provide any amount of leave as an accommodation.<sup>157</sup> In a 1995 decision often cited for the proposition that leave of an indefinite duration is an unreasonable accommodation, the Fourth Circuit refused to require that an employer provide leave for an employee who sought time off to control his blood sugar and hypertension.<sup>158</sup>

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<sup>151</sup> *Browning v. Liberty Mut. Ins. Co.*, 178 F.3d 1043, 1046-47 (8th Cir. 1999).

<sup>152</sup> *Id.* at 1049; *see also* *Peyton v. Fred’s Stores of Ark., Inc.*, 561 F.3d 900, 903 (8th Cir. 2009) (finding employee able to work after 6 months treatment for cancer); *Crano v. Graphic Packaging Corp.*, 65 F. App’x 705, 708 (10th Cir. 2003) (finding that one sentence stating that maintaining an employee on indefinite leave is not a reasonable accommodation).

<sup>153</sup> *Fuller v. Frank*, 916 F.2d 558, 562 (9th Cir. 1990).

<sup>154</sup> *Reed v. Petroleum Helicopters, Inc.*, 218 F.3d 477, 481 (5th Cir. 2000) (noting 9 months of leave taken over 14 month period).

<sup>155</sup> *Wood v. Green*, 323 F.3d 1309, 1311 (11th Cir. 2003) (finding that accommodation must allow employee to perform job duties in present or immediate future); *see also* *Roddy v. City of Villa Rica*, 536 F. App’x 995, 1001 (11th Cir. 2013) (finding no certain date for police officer’s return to work without restrictions).

<sup>156</sup> *Wood*, 323 F.3d at 1311.

<sup>157</sup> *See, e.g.,* *Mitchell v. Washingtonville Cent. Sch. Dist.*, 190 F.3d 1, 9 (2d Cir. 1999) (plaintiff did not indicate intention to return to work at any time in the future without restructuring of his position); *Reed*, 218 F.3d at 481 (finding employer not required to retain pilot after using all paid and 9 months additional leave); *Hudson v. MCI Telecomms. Corp.*, 87 F.3d 1167, 1169 (10th Cir. 1996) (finding that plaintiff failed to present any evidence of expected duration of her impairment as of the date of her termination); *Duckett v. Dunlop Tire Corp.*, 120 F.3d 1222, 1226 (11th Cir. 1997) (finding that plaintiff could not represent that he likely would have been able to work within a month or two).

<sup>158</sup> *Myers v. Hose*, 50 F.3d 278, 283-84 (4th Cir. 1995).

To its credit, the Fourth Circuit did go on to explain why unlimited leave would be unreasonable for that particular employer.<sup>159</sup> The employee was a driver for the county's transit system, and the court explained that "every business day, there are routes to be serviced and passengers to be transported," so it would be unreasonable for the county to keep his position vacant.<sup>160</sup> Requiring the employer to hire temporary help was found to be an unreasonable requirement, only noting that the treatment was not certain of success.<sup>161</sup> In addition, the court noted that "requiring paid leave in excess of an employee's scheduled amount would unjustifiably upset the employer's settled budgetary expectations."<sup>162</sup>

Other appellate courts have followed the Fourth Circuit's lead in rejecting the reasonableness of an indefinite amount of leave.<sup>163</sup> The Seventh Circuit gave some consideration to the employee's particular duties in determining the reasonableness of a request for an indefinite amount of leave, even while noting that "the absence of employees is disruptive to any work environment."<sup>164</sup>

In many cases, the Fourth Circuit's logic regarding indefinite leave requests has been adopted without requiring a showing of undue hardship on a particular employer.<sup>165</sup> These courts have looked for a definite medical opinion indicating when the employee will be able to return to work to justify the leave as an accommodation. Without such an opinion, the leave request is deemed

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<sup>159</sup> *Id.* at 283-84.

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> *Id.* at 283.

<sup>163</sup> See *Pickens v. Soo Line R.R. Co.*, 264 F.3d 773, 777 (8th Cir. 2001) (reversing jury verdict for plaintiff where he sought leave until he was able to return to work); *Mack v. State Farm Mut. Auto. Ins. Co.*, No. 99-2315, 2000 U.S. App. LEXIS 1012, at \*14 (7th Cir. Jan. 21, 2000) (finding that plaintiff's physician could not predict when he would be able to return to work); *Corder v. Lucent Tech., Inc.*, 162 F.3d 924, 928 (7th Cir. 1998) (finding that 18 months of leave required by employer showed lack of ability to work in future).

<sup>164</sup> *Equal Emp't Opp. Comm'n v. Yellow Freight Sys.*, 253 F.3d 943, 950-51 (7th Cir. 2001).

<sup>165</sup> See *Lara v. State Farm Fire & Cas. Co.*, 121 F. App'x 796, 800-01 (10th Cir. 2005) (noting lack of reliable information in hand regarding date of return despite testimony that plaintiff needed 3-6 weeks of leave); *Cisneros v. Wilson*, 226 F.3d 1113, 1129 (10th Cir. 2000) (leave request unreasonable without expected duration of impairment, where employee thought she could return in 4 months but doctor stated that duration of illnesses were unknown); *Taylor v. Pepsi-Cola Co.*, 196 F.3d 1106, 1110 (10th Cir. 1999) (plaintiff gave no indication of when he could return after 1 year of leave); *Vice v. Blue Cross & Blue Shield of Okla.*, 113 F. App'x 854, 856 (10th Cir. 2004) (employee failed to notify employer of when she could return during 9 months of leave); *Walsh v. United Parcel Serv.*, 201 F.3d 718, 727 (6th Cir. 2000) (reasserting requirement for individualized analysis but not requiring accommodation because even after one year's paid leave, followed by five months unpaid leave, plaintiff's homeopathic physician only offered the vague possibility of returning in one to three more years, and suggested no other work he could do).

unreasonable.<sup>166</sup> These employees are not given an opportunity to show that their absence would not impose an undue hardship on their particular employer.<sup>167</sup>

The Tenth Circuit exemplified this approach in its dismissal of a claim on behalf of an employee who was diagnosed with cancer and had taken just fifteen days of leave, after having taken approved intermittent leave prior to that time.<sup>168</sup> The employee was not expected to be able to return to work for at least another twenty days, and his diagnosis remained unchanged.<sup>169</sup> The court explained that whenever an employee is “uncertain if or when he will be able to return to work,” a leave of absence is unreasonable.<sup>170</sup> It is noteworthy that this court based this finding of “uncertainty” regarding the plaintiff’s ability to return to work on just two months of leave, one of which occurred two years earlier, and its concern that the plaintiff could not prove that the impairment itself, the cancer, could not be “resolved” at the end of the requested leave.<sup>171</sup>

Generally, the lack of qualification for a position resulting from a person’s disability must be based on a reliable medical opinion. For example, an employee suffering from paranoia raised issues of fact regarding her ability to perform essential job duties based on the supportive opinions of two physicians.<sup>172</sup> A court reviewing a claim that the employee is not otherwise qualified to perform the essential duties of his or her position may challenge the reliability of a medical opinion that qualification is lacking, but that challenge may raise issues of fact that will defeat an employer’s motion for summary judgment. Requests for leave as an accommodation are typically based on an employee’s medical condition. Such medical conditions inherently often carry some amount of uncertainty as to the time necessary for treatment and/or recovery. Most courts put the burden of that uncertainty on the employee seeking leave as an accommodation.<sup>173</sup>

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<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> *Valdez v. McGill*, 462 F. App’x 814, No. 11-2051, 2012 U.S. App. LEXIS 2783, at \*2-4, \*9-10 (10th Cir. Feb. 13, 2012).

<sup>169</sup> *Id.* at \*3.

<sup>170</sup> *Id.* at \*9.

<sup>171</sup> *Id.*

<sup>172</sup> *Fredenburg v. Contra Costa Cnty. Dept. of Health Servs.*, 172 F.3d 1176, 1179 (9th Cir. 1999); *see also Gillen v. Fallon Ambulance Serv. Inc.*, 283 F.3d 11, 19 (1st Cir. 2002) (no direct threat shown where doctor failed to conduct testing of applicant’s strength or lifting mechanics before finding that she failed pre-employment examination); *Quinney v. Swire Coca-Cola, USA*, No. 2:07-cv-788-PMW, 2009 U.S. Dist. LEXIS 42098, at \*3-4 (D. Utah May 18, 2009) (lack of qualification shown by Medical Review Officer opinion that employee should not operate company a vehicle while taking narcotic pain medication).

<sup>173</sup> *See, e.g., Valdez v. McGill*, 462 F. App’x 814, 818-19 (10th Cir. 2012) (summary judgment for employer even though employee submitted two doctors’ notes regarding expected date of return, discharged just 1 day after FMLA expired and 3 weeks before second expected date of return); *Weigel v. Target Stores*, 122 F.3d 461, 468 (7th Cir. 1997) (opinion that employee had good chance of returning after leave was insufficient); *Cisneros v. Wilson*, 226 F.3d 1113, 1126 (10th Cir. 2000) (letter from physician stated it was “uncertain” when she might be able to return to work and second physician’s letter stated that duration of her

Under this approach, employees who need an undetermined amount of additional leave face a heavy, if not impossible, burden of production. For example, the Second Circuit expected a seventeen-year employee to produce factual information regarding his medical condition that did not exist, and consequently approved his discharge, based on the expiration of six months of disability leave.<sup>174</sup> That court had originally remanded the claim because the employee alleged that he only needed two additional weeks of leave to obtain a doctor's release to return to work.<sup>175</sup> Yet the claim was ultimately dismissed on summary judgment because the employee failed to show that "the accommodation would likely result in his return to work" and because any further absences would have caused the employer a "business hardship."<sup>176</sup> Citing the Fourth Circuit, the court opined that "the employee must make a showing that the reasonable accommodation would allow him to do so at or around the time at which it is sought."<sup>177</sup>

This employee could not establish even a factual question regarding whether two additional weeks of leave would be a reasonable accommodation.<sup>178</sup> To survive a motion for summary judgment, the court expected that at the time of the request for leave, the employee should have provided his employer with "assurance" that the accommodation would allow him to perform.<sup>179</sup> The court made the factual determination to rely on a doctor's report sent to the employer on the day his leave was denied, which stated that it was unlikely that he would be able to return to his previous job, and stated that it could take two to three months of recovery before he could return to any employment.<sup>180</sup> The employee could not avoid summary judgment despite a report issued six days later by the same doctor, who stated that he "would not be able to return to his job 'in the foreseeable future'" and stating that he was "totally incapable of performing his job."<sup>181</sup> Summary judgment was granted despite the court's conclusion that a reasonable jury could find that this second report "did not accurately state whether [the employee] was 'qualified' to 'perform the essential functions' of his job with a reasonable accommodation," because it was prepared in support of his claim for disability benefits.<sup>182</sup> This set of decisions illustrates the lengths to which some courts will go to grant summary judgment in favor of an employer seeking to avoid leave as an accommodation. At least some courts demand this very specific level of proof in response to a motion for summary judgment to preserve the employee's claim for a reasonable accommodation.

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illnesses were "unknown," even though plaintiff gave expected date of return just 2 months after employer refused to extend leave).

<sup>174</sup> *Graves v. Finch Pruyn & Co.*, 353 F. App'x 558 (2d Cir. 2009).

<sup>175</sup> *Graves v. Finch Pruyn & Co.*, 457 F.3d 181 (2d Cir. 2006).

<sup>176</sup> *Graves*, 353 F. App'x at 560.

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

<sup>178</sup> *Id.* at 560-61.

<sup>179</sup> *Id.* at 561.

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

In stark contrast to the heavy burden placed on a plaintiff seeking leave as an accommodation by these above-referenced courts, other appellate courts have been reluctant to require that an employee provide a specific, firm date for his or her return to work.<sup>183</sup> These appellate courts have been leery of a per se rule that any leave of an indefinite duration is unreasonable.<sup>184</sup> Under this approach, the court considers the reasonableness of an employee's request for leave as "a factual determination untethered to the defendant employer's particularized situation."<sup>185</sup>

These courts stress that an individualized assessment must be used to determine if the leave would constitute a reasonable accommodation.<sup>186</sup> One of these courts recognized that even though "[s]ome employees, by the nature of their disability, are unable to provide an absolutely assured time for their return to employment," each case must be reviewed individually rather than requiring a definite date of return in each situation.<sup>187</sup> In this claim, the plaintiff had requested a specific two-month period of leave as an accommodation, and the employer failed to show that the additional leave would impose an undue hardship.<sup>188</sup> Yet even under a more individualized approach, the indefiniteness of the employee's expected date of return to work may show the unreasonableness of a request for additional leave, particularly if the treating physician cannot give a time frame regarding a return to work.<sup>189</sup>

Like the approach of these courts, but in contrast to the EEOC's guidance described above, the EEOC's technical assistance states that leave may be a reasonable accommodation even if he or she cannot provide a fixed date of return.<sup>190</sup> At the same time, the EEOC advises that the lack of a fixed return to work date may constitute an undue hardship if the employer cannot plan for the employee's return or permanently fill the position.<sup>191</sup> The EEOC makes a distinction between an indefinite amount of leave, which is unreasonable if it involves situations in which an employee can give no indication of if or when he or she will be able to return to work, and situations where the employee is able to give an approximate date of

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<sup>183</sup> See *Dark v. Curry Cnty.*, 451 F.3d 1078, 1090 (9th Cir. 2006); *Humphrey v. Mem'l Hosp. Ass'n*, 239 F.3d 1128, 1136 (9th Cir. 2001) (ADA does not require employee to show that leave of absence is certain or even likely to be successful to prove that it is a reasonable accommodation).

<sup>184</sup> *Cehrs v. Ne. Ohio Alzheimer's Research Ctr.*, 155 F.3d 775, 782 (6th Cir. 1998); *Humphrey*, 239 F.3d at 1136; *Garcia-Ayala v. Lederle Parenterals, Inc.*, 212 F.3d 638, 647 (1st Cir. 2000); *Dark*, 451 F.3d at 1090 (89 days of sick leave could be reasonable accommodation to give employee time to adjust to new medication to control seizures).

<sup>185</sup> *Walsh v. United Parcel Serv.*, 201 F.3d 718, 726 n.3 (6th Cir. 2000).

<sup>186</sup> *Garcia-Ayala*, 212 F.3d at 647.

<sup>187</sup> *Id.* at 648; see also *Haschmann v. Time Warner Entm't Co.*, 151 F.3d 591, 600-01 (7th Cir. 1998) (leave of additional 2-4 weeks, based on her physician's opinion that the symptoms would be "short lived," could be reasonable).

<sup>188</sup> *Id.* at 648-49.

<sup>189</sup> *Walsh*, 201 F.3d at 726-27.

<sup>190</sup> EEOC, ENFORCEMENT GUIDANCE, *supra* note 4.

<sup>191</sup> *Id.*

return or a range of possible return dates.<sup>192</sup> The EEOC does not suggest that an employer must grant leave as an accommodation where an employee can give no indication of whether he or she will ever be able to return to work.<sup>193</sup>

The EEOC's Guidance on Performance and Misconduct responds to the question "Do employers have to grant indefinite leave as a reasonable accommodation to employees with disabilities?" with the answer "No . . . they have no obligation to provide leave of indefinite duration."<sup>194</sup> This guidance provides inconsistent information to both employers and employees seeking leave.<sup>195</sup> This inconsistency may underlie employers' criticism of the EEOC's guidance as providing "very little assistance in determining when a request for leave stops being definite and reasonable and becomes indefinite and unreasonable."<sup>196</sup>

The per se rule adopted by many appellate courts regarding leave of an indefinite duration places a heavy burden on the employee with a disability and his or her health care providers to determine with some certainty not only the length of leave that is needed, but also the expected duration of the impairment which is causing the need for leave. This burden may result in a loss of employment for people with disabilities, since no one can predict with "total certainty" the time required for future medical treatment and recovery.<sup>197</sup> In other appellate courts, professional evidence that some additional leave is necessary may be sufficient to demonstrate the reasonableness of that leave request, even if neither the employee nor the health care provider can predict with certainty when the employee will be able to return.<sup>198</sup>

This deference to employers who discharge employees who need an indefinite amount of leave gives employers a strong incentive to discharge earlier rather than later. As exemplified by the decisions described above,<sup>199</sup> an employee is unlikely to know a definite date of return shortly after diagnosis or even during treatment. Thus, an employer can discharge an employee with a disability at that early stage without fear of liability for any failure to accommodate.

#### D. Consideration of Leave Policies

An employer's leave policies have been considered and sometimes afforded controlling weight in determining whether a leave request is reasonable.<sup>200</sup> In many circumstances where the leave requested exceeds the amount provided by an

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<sup>192</sup> *Id.*

<sup>193</sup> Kuczynski, *supra* note 44; East, *supra* note 14.

<sup>194</sup> EEOC, ENFORCEMENT GUIDANCE, *supra* note 4.

<sup>195</sup> East, *supra* note 14.

<sup>196</sup> McLaughlin, *supra* note 10.

<sup>197</sup> Center, *supra* note 68.

<sup>198</sup> See, e.g., Garcia-Ayala v. Lederle Parenterals, Inc., 212 F.3d 638, 648 (1st Cir. 2000); Haschmann v. Time Warner Entm't Co., 151 F.3d 591, 600-01 (leave of additional 2-4 weeks, based on her physician's opinion that the symptoms would be "short lived," could be reasonable).

<sup>199</sup> Peyton v. Fred's Stores of Ark., Inc., 561 F.3d 900, 903 (8th Cir. 2009); Hudson v. MCI Telecomm. Corp., 87 F.3d 1167, 1169 (10th Cir. 1996).

<sup>200</sup> Befort, *supra* note 6, at 461-62.

employer's policy or even just past practice, the employer is not required to show that additional leave would impose an undue hardship.<sup>201</sup> Instead, the policy itself is enough to establish that the leave requested is unreasonable. At the same time, experts have contended that an employer's policies or practices are not a complete defense to the requirement to provide reasonable accommodation.<sup>202</sup> In other words, even "neutral rules are not sacrosanct."<sup>203</sup> The role of employer policies in determining what accommodations are reasonable was addressed by the Supreme Court with respect to seniority policies, but the Court's reasoning may not translate well to determine the reasonableness of requests for leave.

### 1. Supreme Court Consideration of Employer Policies

The Supreme Court considered the significance of employer seniority policies in determining whether a transfer to another position would be a reasonable accommodation, in one of only a few decisions concerning the reasonableness of accommodations.<sup>204</sup> Under this 2002 decision, an employer's leave policy is relevant but not conclusive as to whether a transfer would be a reasonable accommodation, even where another employee may seek that same position under an employer's seniority policy.<sup>205</sup> For the reasons outlined below, an employer's policy regarding leave should not be given the same weight as a seniority policy in determining whether the amount of leave is reasonable.

The Supreme Court reviewed the claim of an employee who sought a transfer to a position to which another employee was entitled under the employer's seniority policy and concluded that an employer's seniority system was entitled to a presumption of deference to support a conclusion that the transfer was an unreasonable accommodation.<sup>206</sup> At the same time, the Court also recognized that accommodation sometimes requires differential treatment<sup>207</sup> and therefore refused to find that an employer's neutral policy created an automatic exemption from any requirement to provide reasonable accommodation.<sup>208</sup> Such an automatic exemption would not allow the ADA's reasonable accommodation provision to accomplish its intended objective.<sup>209</sup>

The Court reasoned that an employer's seniority policy may justify the denial of an accommodation based on "the importance of seniority to employee-management relations."<sup>210</sup> Seniority systems have been given special consideration under all non-

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<sup>201</sup> See *infra* notes 228-58 and accompanying text.

<sup>202</sup> Mark C. Weber, *Unreasonable Accommodation and Due Hardship*, 62 FLA. L. REV. 1119, 1152 (2010).

<sup>203</sup> *Id.*

<sup>204</sup> U.S. Airways, Inc. v. Barnett, 535 U.S. 391, 404 (2002).

<sup>205</sup> *Id.*

<sup>206</sup> *Id.* at 397.

<sup>207</sup> Weber, *supra* note 202, at 1161.

<sup>208</sup> Barnett, 535 U.S. at 398.

<sup>209</sup> *Id.* at 397.

<sup>210</sup> *Id.* at 403.

discrimination statutes because the typical seniority system creates and fulfills employee expectations of fair, uniform treatment.<sup>211</sup> To require an employer to prove undue hardship, rather than just the existence of a seniority system, could undermine those expectations as well as a seniority system as a whole.<sup>212</sup>

This respect for seniority systems should not give employers' leave policies the same influence in determining whether leave is a reasonable accommodation. Overall, a broad application of the Supreme Court's reasoning to other employer policies could lead to the discharge of productive employees with disabilities.<sup>213</sup> In fact, the Court's reasoning regarding seniority systems has been criticized since it does not consider the costs of failing to provide an accommodation, including the departure costs associated with losing the employee with a disability who cannot remain employed without the accommodation.<sup>214</sup>

In addition, nondiscrimination statutes and decisions interpreting the ADA have not recognized an employer's right to determine an appropriate amount of leave, in contrast to their specific deference to seniority policies.<sup>215</sup> Moreover, unlike seniority, leave policies are not closely tied to employment relations or employment decisions such as reassignment or promotion, and do not represent a system of "delayed benefits" as does a seniority system.

More specifically, the Court's deference to seniority policies should not be directly applied to accommodation requests for leave that exceed the amount of leave provided under an employer's policies because the interests created or protected by a seniority policy are much more distinct than any coworkers' interests affected by extension of leave as an accommodation beyond what is required under an employer's policy. In respecting an employer's seniority policy, the Court specifically aimed to protect the particular coworker interests in enforcement of a seniority policy, based on the expectations created by such a policy.<sup>216</sup> Since leave would not trample on such clearly defined interests of other employees, the deference to seniority policies shown by the Supreme Court should not necessarily be extended to other employer policies.<sup>217</sup>

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<sup>211</sup> *Id.* at 404. At least one expert has suggested that an employer should be required to present evidence of loss, such as damage to co-workers' expectations under a seniority system, since the employer alone has this information. Harris, *Re-Thinking*, *supra* note 33, at 171.

<sup>212</sup> *Barnett*, 535 U.S. at 404-05.

<sup>213</sup> Nicole B. Porter, *Reasonable Burdens: Resolving the Conflict Between Disabled Employees and their Coworkers*, 34 FLA. ST. U.L. REV. 313, 324 (2007); *see also* Anderson, *Neutral Policies*, *supra* note 40, at 35-36.

<sup>214</sup> Harris, *Re-Thinking*, *supra* note 33, at 183-84. These costs include the disabled employee's loss of his investments in skills and knowledge specific to that employer and the remaining dividends from his sunk investments/delayed dividends contract, while facing the prospect of lower wages and uncertain employment prospects in the external labor market. *Id.* at 189.

<sup>215</sup> *Barnett*, 535 U.S. at 403.

<sup>216</sup> *Id.* at 403-05.

<sup>217</sup> Weber, *supra* note 202, at 1164.

Even though it could be argued that other employees may be required to perform extra work if a coworker's leave is extended, that interest is much less distinct than a coworker who expects to benefit from his or her seniority. Rather, leave as an accommodation may not greatly interfere with the interests of other employees.<sup>218</sup> When one employee takes leave, a coworker may experience at most minimal adverse consequences, particularly where work can be distributed among several employees, compared to the harm to a coworker losing out on a transfer to which he or she is entitled based on seniority. In addition, any effects on coworkers caused by leave taken by an employee with a disability can be minimized by the employer much easier than the effects of ignoring rights existing under a seniority system.<sup>219</sup>

Seniority policies are also worthy of greater deference than employer leave policies because a seniority system is typically well publicized and understood by all affected employees.<sup>220</sup> In contrast, an employer's leave may be granted on an ad hoc basis. In fact, any policies can and should be read so as to imply an exception for accommodations. Leave policies can be seen as providing a floor above which an employer has promised to stay, rather than a ceiling on benefits to be provided to employees. Leave policies generally apply to all employees, not just those with disabilities, including those who may be using leave for a variety of reasons that provide no benefit to the employer. Since the ADA does require that employers provide different accommodations based on employees' disabilities, it may not be unreasonable to expect employers to vary from leave policies, particularly if the employer cannot show that such a variation would impose an undue hardship.

Lastly, leave policies are not worthy of as much deference as seniority systems because of the strong connection between use of leave and an employee's disability. An exception to an employer's leave policy is often sought because of limitations imposed by the person's disability.<sup>221</sup> Therefore, a blanket policy of discharging employees after a certain period of leave screens out or tends to screen out individuals with disabilities at a disproportionate rate compared to other employees. Since uniformly applied leave policies are not subject to challenge under disparate impact theory,<sup>222</sup> it is particularly important for employees to be able to request a variation from such a leave policy as an accommodation.

The impact of employer's leave policies on reasonable accommodation determinations should also be limited by the Supreme Court's reluctance to give absolute deference to an employer's seniority policy. Under its decision, an employee can still show that a transfer is a reasonable accommodation even though it conflicts with an employer's seniority system, if "special circumstances" alter the expectations of other employees under that seniority system.<sup>223</sup> These circumstances include an employer's past exceptions to that policy, or different application of that

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<sup>218</sup> Porter, *supra* note 213, at 355.

<sup>219</sup> *Id.* at 359.

<sup>220</sup> Harris, *Re-Thinking*, *supra* note 33, at 148.

<sup>221</sup> Carlos A. Ball, *Preferential Treatment and Reasonable Accommodation under the Americans with Disabilities Act*, 55 ALA. L. REV. 951, 954 (2004) (discussing the "sameness" model of equality).

<sup>222</sup> 29 C.F.R. pt. 1630, app. § 1630.15(b) and (c).

<sup>223</sup> *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 405 (2002).

policy to other employees.<sup>224</sup> Under these circumstances, the employee with a disability could show that such a policy should not be used to establish the unreasonableness or even the undue hardship caused by his or her use of leave.<sup>225</sup>

This consideration of “special circumstances” demonstrates that if a policy is not enforced consistently, then it may not be sufficient basis for denying a particular accommodation. Therefore, the emphasis in reviewing requests for leave that goes beyond an employer’s policies should focus on whether that employer has made exceptions for other employees without disabilities.<sup>226</sup> Courts should also consider whether a greater burden is being placed on employees with disabilities who are seeking leave compared to other employees whose requests for leave are granted without the concrete medical evidence that is often required to justify leave as an accommodation.<sup>227</sup>

For these reasons, appellate courts should not give unlimited deference to employers who rely on their own policies in denying leave as an accommodation. Instead, both the past application of that policy and the individual circumstances surrounding the request for leave should be considered under the Supreme Court’s guidance.

## 2. Courts’ Deference to Leave Policies

Appellate courts have taken two distinct approaches when considering the reasonableness of leave that exceeds an employer’s policies. In line with an equal treatment approach, several appellate courts have consistently given deference to an employer’s policies as the upper limit on how much leave is reasonable.<sup>228</sup> This deference gives considerable flexibility to employers who have developed policies for all employees, without requiring that those employers justify those policies by establishing undue hardship in the face of a claim for reasonable accommodation. A second, smaller group of appellate courts do not give complete deference to an employer’s leave policies in determining the reasonableness and undue hardship caused by a leave request; instead, those courts focused on whether a variance from that policy would negatively affect the employer.<sup>229</sup>

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<sup>224</sup> *Id.*

<sup>225</sup> *Id.*

<sup>226</sup> Petesch, *supra* note 11.

<sup>227</sup> See *supra* notes 99-101 and accompanying text (discussion of evidence required to justify leave requests).

<sup>228</sup> See *Equal Emp’t Opp. Comm’n v. Yellow Freight Sys.*, 253 F.3d 943, 950-51 (7th Cir. 2001) (allowing employer to rely heavily on its five-step progressive discipline procedure regarding employee absences to justify denial of leave); *Denman v. Davey Tree Expert Co.*, 266 F. App’x 377, 380 (6th Cir. 2007) (discharge for absence of 16 days upheld under policy that “The availability to work the normal workday is a condition of employment and good attendance is a job requirement that all . . . Employees are expected to meet.”); *Greer v. Emerson Electric Co.*, 185 F.3d 917, 921-22 (8th Cir. 1999) (upholding employee discharge based on employer’s policy and progressive discipline practice regarding absenteeism); *Crano v. Graphic Packaging Corp.*, 65 F. App’x 705 (10th Cir. 2003) (discharge after 1 year approved under employer’s policy).

<sup>229</sup> See *infra* notes 243-48 and accompanying text.

In many decisions, a leave request has been deemed unreasonable because it exceeds the amount of leave allowed under the employer's policies.<sup>230</sup> Such deference to an employer's policies allows employers to define the amount of leave that is reasonable as an accommodation. In addition, many of these courts have not considered how the leave policy has been applied or interpreted in the past,<sup>231</sup> despite the importance of these factors recognized by the Supreme Court.<sup>232</sup> Such blind deference to employer's policies undermines an employee's ability to show that he or she is being treated less preferentially than other employees, even those without disabilities.

This deference to employer's policies foregoes courts' statutory obligation under the ADA to consider whether leave as an accommodation in a particular situation would place an undue hardship on the employer. Consequently, courts and employers are not considering the relative costs associated with keeping the position open for an employee with a disability who may be difficult to replace because of his or her tenure with that employer and the skills and abilities held by that employee.

In these policy-deferential courts, employees have not been successful in using leave policies or past practices to establish the reasonableness of their requests for leave that is allowed under those policies.<sup>233</sup> The Fourth Circuit explained that leave is not necessarily reasonable even if it is required by an employer's policy, which "are not the definitive source of the standard by which reasonable accommodation is measured under federal law."<sup>234</sup> These courts have not addressed the significant policy considerations which were relied upon by the Supreme Court in giving considerable deference to an employer's seniority policy which do not apply to a leave policy, as discussed above.<sup>235</sup>

If an employer does not have a set policy in place, a past practice of allowing unpaid absences does not necessarily establish that future leave is a reasonable accommodation.<sup>236</sup> The Third Circuit held, for example, that an obese employee failed to show that an additional four days of unpaid leave would be a reasonable accommodation, even though the employer had granted past leave to her in excess of its eighteen days of paid sick leave per year.<sup>237</sup> Any additional leave would have created an undue burden for this employer where it had already granted her extensive unpaid leave in the past.<sup>238</sup> The court was not influenced by the employer's policy of

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<sup>230</sup> See *infra* cases at note 241.

<sup>231</sup> See, e.g., *Colón-Fontáñez v. Municipality of San Juan*, 660 F.3d 17, 43-44 (1st Cir. 2011) (absences in excess of 90 days provided for sick leave deemed unreasonable regardless of past application of policy).

<sup>232</sup> *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 405 (2002).

<sup>233</sup> *Myers v. Hose*, 50 F.3d 278, 283 (4th Cir. 1995); see also *Buckles v. First Data Res., Inc.*, 176 F.3d 1098, 1100-01 (8th Cir. 1999) (use of all leave allowed by policy at start of year made additional leave unreasonable); *Waggoner v. Olin Corp.*, 169 F.3d 481, 485 (7th Cir. 1999) (request to use leave whenever needed was unreasonable).

<sup>234</sup> *Id.*

<sup>235</sup> See *supra* notes 214-27 and accompanying text.

<sup>236</sup> See *supra* notes 214-27 and accompanying text.

<sup>237</sup> *Walton v. Mental Health Ass'n*, 168 F.3d 661, 664-65 (3d Cir. 1999).

<sup>238</sup> *Id.* at 671.

allowing up to six months on leave without pay.<sup>239</sup> Note that the court used the “undue burden” language, but the only burden shown by this employer was the amount of leave previously taken by this employee.<sup>240</sup>

These decisions show that employers can often take advantage of an established leave policy to establish that leave that exceeds that policy allotment would be unreasonable. At the same time, an employee who seeks leave allowed by an employer’s policy may not be able to show that the leave is required as an accommodation, if the court finds that the amount of leave already used or the timing of the leave would be unreasonable for the employer to tolerate.

In contrast to these policy—deferential courts, the EEOC and some appellate courts are more reluctant to use an employer’s leave policy as the benchmark for reasonableness. Some courts have refused to find that leave is an unreasonable accommodation even if it would not be required under an employer’s policy.<sup>241</sup> In these courts, employers are required to show that leave beyond the requirements of their policies would impose an undue hardship.<sup>242</sup>

Under such a fact-specific, individualized approach, some courts “weigh the risks and alternatives, including possible hardships on the employer, to determine whether a genuine issue of material fact exists as to the reasonableness of the accommodation.”<sup>243</sup> The First Circuit, for example, has held that an employer cannot justify a discharge solely because the employee had used all leave available under the employer’s policy.<sup>244</sup> That employer had a policy of reserving a job for one year when employees had been out on short-term disability and had discharged the plaintiff after her one-year reservation period ended.<sup>245</sup> The court made it clear that the ADA can require an employer to grant an accommodation beyond the leave allowed under the company’s own leave policy.<sup>246</sup>

The limited deference to leave policies shown by these courts is consistent with the legislative history of the ADA, which demonstrates that variation from a neutral employer rule or policy could be required as an accommodation.<sup>247</sup> Similarly, the

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<sup>239</sup> *Id.*; see also *Duckett v. Dunlop Tire Corp.*, 120 F.3d 1222, 1226 (11th Cir. 1997) (2 additional months of leave after 10 months off was unreasonable despite employer’s 12 month Salary Continuation Program).

<sup>240</sup> *Id.* at 670-71.

<sup>241</sup> See, e.g., *Nunes v. Wal-Mart Stores, Inc.*, 164 F.3d 1243, 1247 (9th Cir. 1999) (leave of up to 1 year was reasonable accommodation where employer policy allowed for 1 year of unpaid medical leave and employer regularly used temporary help); *Rascon v. U.S. W. Comm’n*, 143 F.3d 1324, 1334 (10th Cir. 1998) (request for 4 additional months of leave could be reasonable under policy allowing 6 months of disability leave and additional personal leave); *Ralph v. Lucent Tech.*, 135 F.3d 166, 172 (1st Cir. 1998) (employer may be required to grant leave beyond the 52 weeks provided by the employer’s policy).

<sup>242</sup> *Garcia-Ayala v. Lederle Parenterals, Inc.*, 212 F.3d 638, 648-49 (1st Cir. 2000).

<sup>243</sup> *Nunes*, 164 F.3d at 1247.

<sup>244</sup> *Garcia-Ayala*, 212 F.3d at 646.

<sup>245</sup> *Id.*

<sup>246</sup> *Id.*

<sup>247</sup> H.R. REP. NO. 101-485, at 62-63 (1990), reprinted in 1990 U.S.C.C.A.N. 303, 345.

EEOC takes the position that if an employee needs leave which exceeds the amount of leave allowed under an employer's "no fault" leave policy, "the employer must modify its 'no fault' leave policy to provide the employee with additional leave," unless the employer can show that another effective accommodation would enable the performance of the essential functions of the employee's position, or additional leave would impose an undue hardship.<sup>248</sup>

Under this guidance, the EEOC recently has settled class action claims against an increasing number of large employers, including both Sears Roebuck (\$6.2 million) and Supervalu supermarkets (\$3.2 million), based on claims that those employers automatically discharged employees who were unable to return to work when their leave "expired" under the employers' policies.<sup>249</sup> The EEOC explained that both employers failed to engage in an individualized analysis or the interactive process required by the ADA.<sup>250</sup> The EEOC has taken the position that "(1) an inflexible leave period, even if it provides a substantial amount of leave, is not sufficient; and (2) individualized analysis on leave accommodations is needed, even with a generous policy."<sup>251</sup> These guidelines have been criticized as failing to define the scope of the requirement to modify an employer's leave policy.<sup>252</sup> Given such potential liability and the lack of clarity in the EEOC's guidance, employer representatives have called for more detailed and defined examples of situations where maximum leave policies are called into question and provide examples of times when additional leave will be deemed necessary and when it will not.<sup>253</sup>

Some courts are more willing to find that leave which exceeds an employer's policy is reasonable if past practice has allowed or condoned such leave in the past. This approach is consistent with the Supreme Court's reluctance to defer to policies that have not been applied consistently.<sup>254</sup> Thus, an employer's past practice of tolerating absences can establish the reasonableness of tolerating such attendance as an accommodation in certain courts. For example, the Third Circuit has twice considered an employer's own application of its leave policy.<sup>255</sup> In one case, the court refused to conclude that the employee's attendance had "significantly impacted her performance" given the employer's own positive reviews of her performance and the five year tolerance of her absences.<sup>256</sup> In a second claim, the court focused on the consistency of the employer's application of its attendance policies with respect to

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<sup>248</sup> 29 C.F.R. § 1630.2(o)(2)(ii) (2011); EEOC, ENFORCEMENT GUIDANCE, *supra* note 4.

<sup>249</sup> Sears, 26 Daily Labor Report A-12 (BNA) (Feb. 10, 2010); Supervalu, 3 Daily Labor Report AA-1(BNA) (Jan. 5, 2011).

<sup>250</sup> McGowan, *supra* note 97.

<sup>251</sup> John Hendrickson, Statement at EEOC Meeting to Examine Use of Leave as Reasonable Accommodation, EEOC (Jun. 8, 2011), <http://www.eeoc.gov/eeoc/meetings/6-8-11/hendrickson.cfm>; *see also* Petesch, *supra* note 11.

<sup>252</sup> McLaughlin, *supra* note 10.

<sup>253</sup> *Id.*

<sup>254</sup> *See supra* Part II.D.1 (discussing the Supreme Court's reasoning on past practice).

<sup>255</sup> Flory v. Pinnacle Health Hosps., 346 F. App'x. 872, 874, 876 (3d Cir. 2009); Miller v. Univ. of Pittsburgh Med. Ctr., 350 F. App'x. 727, 728 (3d Cir. 2009).

<sup>256</sup> Flory, 346 F. App'x. at 876.

non-disabled employees, and the employer's adherence to its progressive discipline policy.<sup>257</sup> At the same time, consistent application of an employer's policy helps establish that leave in excess of that policy would be unreasonable or impose an undue hardship.<sup>258</sup>

These courts are willing to consider the reasonableness of leave as an accommodation separate from the employer's interpretation of what leave would be reasonable for all of its employees. Yet most of the appellate courts, as outlined above, give deference to an employer's leave policies as evidence of what leave would be reasonable, especially if that policy has been applied consistently to employees without disabilities. This deference gives considerable discretion to employers to set leave policies that fit with their overall needs without much fear that the ADA will be interpreted to require additional leave.

#### *E. Legal Requirements and Reasonableness*

Employers that meet their legal requirements for granting leave may be able to establish the reasonableness of denying any additional leave as an accommodation. Generally, an employee who takes leave under the Family and Medical Leave Act (FMLA) is only entitled to restoration in the same or an equivalent position if by end of the FMLA leave period, the employee is able to perform the essential functions of the job.<sup>259</sup> Yet an employee who has exhausted his or her FMLA leave may still be able to show that he or she is entitled to accommodations under the ADA, including additional leave.<sup>260</sup>

Despite this distinct duty to accommodate, many employers discharge employees who have exhausted their FMLA leave without providing any additional leave as an accommodation under the ADA.<sup>261</sup> In many circuits, these employers have not been required to accommodate by extending additional leave beyond the leave required by the FMLA as an accommodation.<sup>262</sup> For some appellate courts, the provision of

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<sup>257</sup> *Miller*, 350 F. App'x at 729; *see also* *Carmona v. Sw. Airlines Co.*, 604 F.3d 848, 851-52, 859-60 (5th Cir. 2010) (attendants have unlimited discretion in determining when and how often they want to work); *Criado v. IBM Corp.*, 145 F.3d 437, 444 (1st Cir. 1998) (more than 5 weeks leave reasonable where all employees allowed 52 week of paid disability leave).

<sup>258</sup> *See* *Samper v. Providence St. Vincent Med. Ctr.*, 675 F.3d 1233, 1235-36 (9th Cir. 2012) (seven unplanned absences by nurse exceeded policy allowing five); *Breneman v. MedCentral Health Sys.*, 366 F.3d 412, 416, 418-19 (6th Cir. 2004) (employer's attendance point system was uniformly applied to each employee and the employer had discharged other non-disabled employees under that system).

<sup>259</sup> 29 C.F.R. § 825.214 (2014).

<sup>260</sup> EEOC, ENFORCEMENT GUIDANCE, *supra* note 4, at Q&A 21; EQUAL EMP'T OPPORTUNITY COMM'N, THE FAMILY AND MEDICAL LEAVE ACT, THE AMERICANS WITH DISABILITIES ACT, AND TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 (2009), *available at* <http://www.eeoc.gov/policy/docs/fmlaada.html>; *see also* *Parker v. Columbia Pictures Indus.*, 204 F.3d 326, 335 (2d Cir. 2000) (summary judgment denied where employee sought to return part time after FMLA leave ended).

<sup>261</sup> *Center*, *supra* note 68; *see, e.g.,* *Reed v. Petroleum Helicopters*, 218 F.3d 477, 478, 480 (5th Cir. 2000) (helicopter pilot unable to return to work at end of leave); *Orta-Castro v. Merck Sharpe & Dohme Quimica P.R. Inc.*, 447 F.3d 105, 112 (1st Cir. 2006).

<sup>262</sup> *See, e.g., Orta-Castro*, 447 F.3d at 112 (employee granted leave required by Puerto Rican law).

leave under federal or state standards is enough to satisfy the duty to accommodate.<sup>263</sup> The Fifth Circuit, for example, dismissed a claim of an employee because she could not show that she could perform the essential duties of her position either while she was on FMLA leave or on the day she was discharged, which was the final day of that leave.<sup>264</sup> Similarly, in denying a claim for leave beyond FMLA requirements, the Seventh Circuit explained that coverage of absences by the FMLA was “irrelevant” in determining whether the leave was a reasonable accommodation, because the ADA only applies to someone who can perform the job.<sup>265</sup> This approach directly nullifies the right to leave as an accommodation as well as an employee’s rights under the FMLA.<sup>266</sup>

This deference to an employer’s compliance with the FMLA or other leave requirements ignores the substantial policy reasons for providing reasonable accommodation under the ADA in addition to the FMLA’s leave requirements. The FMLA itself recognizes that “[n]othing in this Act or any amendment made by this Act shall be construed to discourage employers from adopting or retaining leave policies more generous than any policies that comply with the requirements under this Act.”<sup>267</sup>

There are several reasons why the FMLA should not be seen as the upper limit on leave provided as an accommodation. First, FMLA leave is available to any employees who meet the service requirements and can show a qualifying event, regardless of whether or not they are a person with a disability.<sup>268</sup> Therefore, the concerns about discrimination and job retention that support the reasonable accommodation requirement do not necessarily apply to employees asserting FMLA rights.<sup>269</sup>

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<sup>263</sup> *Id.*

<sup>264</sup> *Reed*, 218 F.3d at 481.

<sup>265</sup> *Perkins v. Ameritech Corp.*, 161 Fed. Appx. 578, 581 (7th Cir. 2005); *see also* *Byrne v. Avon Prods. Inc.*, 328 F.3d 379, 380 (7th Cir. 2003) (leave for several months not reasonable accommodation despite eligibility for FMLA leave); *Spangler v. Fed. Home Loan Bank of Des Moines*, 278 F.3d 847, 851 (8th Cir. 2002) (ADA claim based on request for leave dismissed despite right to FMLA leave); *Trevino v. United Parcel Serv. Inc.*, No. 3:08-CV-0889, 2009 U.S. Dist. LEXIS 98738, at \*12 (N.D. Tex. Oct. 23, 2009) (request for FMLA leave cannot establish failure to accommodate).

<sup>266</sup> *See* *Watkins v. J&S Oil Co. Inc.*, 164 F.3d 55, 62 (1st Cir. 1998) (employer was not required by ADA to hold position open until end of the FMLA leave).

<sup>267</sup> 29 U.S.C.A. § 2653 (West 2014).

<sup>268</sup> The purposes of FMLA include the following:

- (1) to balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity; [and] (2) to entitle employees to take reasonable leave for medical reasons, for the birth or adoption of a child, and for the care of a child, spouse or parent who has a serious health condition; . . . .

Family Medical Leave Act of 1993 (FMLA), 29 U.S.C.A. § 2601(b)(1), (2) (West 2014).

<sup>269</sup> *See* *Navaro v. Pfizer Corp.*, 261 F.3d 90, 101 (1st Cir. 2001) (“The ADA and the FMLA have divergent aims, operate in different ways, and offer disparate relief.”).

Second, the FMLA requires no more than twelve weeks of leave based on an employee's own health condition.<sup>270</sup> Twelve weeks may be insufficient time to enable an employee with a disability to receive treatment or recover from a significant injury or illness, such as cancer. Yet after a relatively short and possibly even certain time beyond the twelve weeks, that employee could return to his or her previous position without causing the employer undue hardship.

Third, the FMLA does not require accommodations.<sup>271</sup> Therefore, if an employer can discharge an employee at the end of his or her FMLA leave, without considering extension of that leave as an accommodation, then the employee foregoes the opportunity to seek other accommodations at the end of his or her accommodation leave which could enable the return to work. For example, with an additional two weeks of leave beyond her FMLA leave, an employee may be able to return to work if she is also provided with periodic breaks or a flexible schedule.

Courts have failed to recognize that leave as an accommodation may exceed the amount of leave available under the FMLA. Instead, many courts conflate the two obligations, while only a few make a separate determination regarding the reasonableness of the leave request.

#### *F. Undue Hardship Caused by Leave*

Thus far we have seen the significant evidence that many courts require for a plaintiff employee to show that leave is a reasonable accommodation. Even if a request for leave is considered to be a reasonable accommodation, an employer can still avoid the obligation to accommodation if that accommodation would impose an undue hardship. When considering whether an accommodation imposes an undue hardship, the ADA requires that courts consider various factors, including cost, the effect on an employer's operations, the overall financial resources and size of the employer, and the type of operation involved.<sup>272</sup> These factors should be assessed on a case-by-case basis.<sup>273</sup>

It is noteworthy that these factors provided by the EEOC do not include any effect of the accommodation on other employees.<sup>274</sup> Some have argued that effects on other employees should be compared to the benefit provided by the accommodation to the employee with a disability, and this factor should only be considered if the accommodation would result in the discharge of another employee.<sup>275</sup>

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<sup>270</sup> 29 U.S.C.A. § 2612 (West 2014).

<sup>271</sup> 29 C.F.R. § 825.214(b) (2014); *Rinehimer v. Cemcolift, Inc.*, 292 F.3d 375, 384 (3d Cir. 2002).

<sup>272</sup> 42 U.S.C.A. §12111(10)(B) (West 2014).

<sup>273</sup> *US Airways, Inc. v. Barnett*, 535 U.S. 391, 404-05 (2002); *see also Morton v. United Parcel Serv., Inc.*, 272 F.3d 1249, 1256-57 (9th Cir. 2001), *overruled in part on other grounds sub nom. by Bates v. United Parcel Serv., Inc.*, 511 F.3d 974 (9th Cir. 2007) (en banc) ("Undue hardship analysis is thus a fact-intensive inquiry, rarely suitable for resolution on summary judgment."); *Smith v. Midland Brake, Inc.*, 180 F.3d 1154, 1178 (10th Cir. 1999) (en banc) ("[D]efinition [of undue hardship] by necessity requires a case-by-case analysis."); *Petes*, *supra* note 11.

<sup>274</sup> *Porter*, *supra* note 213, at 326.

<sup>275</sup> *Id.* at 335-36.

As evidenced by the employer-specific statutory factors, the determination of whether an accommodation imposes an undue hardship should be based on specific facts regarding the individual employee making the request as well as the organization where he or she works.<sup>276</sup> This makes the undue hardship determination particularly appropriate for juries, rather than motions for summary judgment.<sup>277</sup> Leaving these factual questions to a jury makes sense since “members of the community will collectively be much more familiar with the modern workplace than a judge whose non-legal work experience may have come decades earlier.”<sup>278</sup>

Many dismissals of claims seeking leave as an accommodation do not reach the question of undue hardship because the court determines that the accommodation is unreasonable.<sup>279</sup> In only limited circumstances have appellate courts denied summary judgment for employers in claims for accommodation based on the absence of tangible costs associated with employees’ use of leave.<sup>280</sup> In courts following this approach, an employer must show that the leave by the particular employee will have a negative effect on that employer, either as part of the determination regarding whether the accommodation is reasonable or, more often, as part of its undue hardship analysis.<sup>281</sup>

For example, the Sixth Circuit, in reviewing a request for leave by one employee with lupus, refused to adopt a “bright-line rule defining a maximum duration of leave that can constitute a reasonable accommodation,” and instead expected the employer to establish that the leave would impose an undue hardship.<sup>282</sup> In line with the EEOC guidelines, the court considered the type of operation or operations of the covered entity, including the difficulty that this employer would have in covering the claimant’s duties with another employee at that location.<sup>283</sup> The court concluded that without evidence regarding the employer’s financial situation, “reasonable jurors could find by a preponderance of evidence that the plaintiff is entitled to a verdict.”<sup>284</sup> The court also discounted the evidence related to undue hardship based on the disparaging statements made by her supervisor regarding the plaintiff’s

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<sup>276</sup> Weber, *supra* note 202, at 1151.

<sup>277</sup> *Id.*

<sup>278</sup> *Id.* at 1175; *see also* Haschmann v. Time Warner Entm’t Co., 151 F.3d 591, 602 (7th Cir. 1998) (“Consideration of the degree of excessiveness is a factual issue well suited to a jury determination.”).

<sup>279</sup> *See supra* notes 100-273 and accompanying text (discussing of grounds for finding leave to be an unreasonable accommodation based on the length or indefiniteness of the leave or based on employer’s policies or legal obligations).

<sup>280</sup> *See* Cleveland v. Fed. Express Corp., 83 F. App’x. 74, 78 (6th Cir. 2003); Gantt v. Wilson Sporting Goods Co., 143 F.3d 1042, 1046 (6th Cir. 1998).

<sup>281</sup> *Id.*

<sup>282</sup> Cleveland, 83 F. App’x. at 78.

<sup>283</sup> *Id.* at 80; *see also* Siekaniec v. Columbia Gas Co., 48 F. App’x. 173, 175 (6th Cir. 2002) (requiring employer to cover sporadic absences with two on call employees would cause undue hardship).

<sup>284</sup> Cleveland, 83 F. App’x at 80.

disability,<sup>285</sup> concluding that the supervisor's "business judgment was clouded by his animosity towards individuals who have lupus."<sup>286</sup> This reasoning highlights why it is important for courts to look beyond employers' policies to determine whether a specific request for leave would impose a hardship on an employer.

Like the Sixth Circuit, the First Circuit has required some employers to show that the leave requested by an employee with a disability would impose an undue hardship.<sup>287</sup> For example, an IBM employee was able to enforce a jury verdict in her favor based in part on IBM's provision of fifty-two weeks of paid disability leave to all employees.<sup>288</sup> This circuit has at least twice recognized that leave did not financially burden an employer because a permanent replacement was not necessary, noting that "it was always more profitable to allow an employee time to recover than to hire and train a new employee."<sup>289</sup> For example, a claim was upheld where one plaintiff's temporary replacement was being paid no more than the plaintiff, and there was no evidence that the temporary replacement was less effective at her job.<sup>290</sup>

In line with the EEOC Guidelines, the resources of the employer are sometimes considered in determining whether the leave requested would impose an undue hardship.<sup>291</sup> For example, an employer with fifty to sixty thousand employees worldwide could not show an undue hardship where the employer did not replace the plaintiff while he was on leave and other employees covered for him.<sup>292</sup> Similarly, Time Warner was unable to show undue hardship where the plaintiff's position remained vacant approximately six months after her discharge and Time Warner's policy allowed for leave while the employee was on short or long term disability.<sup>293</sup> At the same time, individualized consideration of undue hardship may work in favor of an employer with limited resources or a need for a particular level of staffing.<sup>294</sup>

Regardless of which side is favored, consideration of undue hardship analysis is unusual. Instead, most appellate courts favor the cleaner, seemingly more

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<sup>285</sup> *Id.*

<sup>286</sup> *Id.*; see also *Brenneman v. MedCentral Health*, 366 F.3d 412, 416, 418-19 (6th Cir. 2004) (employee's absences "placed a great strain on the department" by requiring employer to call in another employee or reassign her duties).

<sup>287</sup> *Criado v. IBM Corp.*, 145 F.3d 437, 441 (1st Cir. 1998).

<sup>288</sup> *Id.* at 444.

<sup>289</sup> *Id.*; see also *Garcia-Ayala v. Lederele Parenterals, Inc.*, 212 F.3d 638, 648 (1st Cir. 2000) (temporary employee used to replace plaintiff and no need to permanently replace her).

<sup>290</sup> *Garcia-Ayala*, 212 F.3d at 649.

<sup>291</sup> *Rascon v. U.S. W. Commc'ns, Inc.*, 143 F.3d 1324, 1335 (10th Cir. 1998); *Haschmann v. Time Warner Entm't Co.*, 151 F.3d 591, 596 (7th Cir. 1998).

<sup>292</sup> *Rascon*, 143 F.3d at 1335.

<sup>293</sup> *Haschmann*, 151 F.3d at 597, 602.

<sup>294</sup> See *Epps v. City of Pine Lawn*, 353 F.3d 588, 593 n.5 (8th Cir. 2003) (six month leave of absence was unreasonable for a police officer for a small municipality which could not reallocate that employee's job duties among its small staff); *Samper v. Providence St. Vincent Med. Ctr.*, 675 F.3d 1233, 1235-36 (9th Cir. 2012) (summary judgment granted for employer which had difficulty replacing specially trained nurse on irregular basis and understaffing compromised patient care).

“objective” approach focusing on the reasonableness of the accommodation. To the employees’ detriment, this approach does not require that the employer establish any actual harm caused by the accommodation. If the amount of leave needed is indefinite or has exceeded the amount available under the employer’s policies at the time of the employee’s discharge, then any additional leave can be deemed unreasonable and the employee’s discharge can be deemed nondiscriminatory.

This approach provides two significant incentives for employers of persons with disabilities. First, employers are encouraged to discharge an employee early in the course of their recovery or treatment, before the employee has enough medical information to predict when he or she can return to work. This timing makes the employee’s need for leave indefinite, and therefore the discharge without providing additional leave can be justified.

Second, employers are encouraged to provide little or no leave in their policies and to deny leave as a matter of practice. By doing so, the employer is better positioned to argue that leave as an accommodation would be unreasonable. This incentive may cause employers to disregard the factors that might otherwise support more generous leave policies, such as the recruitment and training costs associated with replacing valuable employees. Instead, employers may deny leave requests of valuable employees for fear of creating a “policy” of providing leave.

In addition, as the reasoning of the Sixth Circuit highlights, the failure to require individualized assessment of the undue hardship caused by leave as an accommodation allows employers to rely on broad assumptions about the overall costs of absenteeism to deny requests for leave from employees with disabilities. Instead of considering the costs versus the benefits of providing leave, employers often discharge the employee with a disability.

### III. ANALYSIS OF TWENTY YEARS OF DECISIONS

Federal opinions addressing requests for leave as an accommodation have been reviewed to determine how trial courts are applying the different approaches of appellate courts outlined above. Decisions of district and appellate court opinions reviewing requests for leave as an accommodation since the passage of the ADA have been analyzed to determine whether courts follow any detectable pattern in allowing or dismissing these claims for accommodation.

First, decisions are reviewed to determine whether the leave request was deemed unreasonable because it was of the amount of leave that had been used previously or the request was for an indefinite length of leave. Decisions are also specifically analyzed as to whether a medical opinion was considered and if so, whether that medical opinion was deemed to be sufficiently definite regarding the employee’s ability to return to work.

Second, the impact of an employer’s leave policy or FMLA obligations is determined by reviewing whether policies or the FMLA were considered by the court, and whether or not the requested leave would exceed the amount of leave allowed by that employer’s policies or required under the FMLA. Lastly, the individual characteristics of the employee requesting leave, including the nature of their impairment, job tenure, job classification, and employer industry classification, are considered to determine whether more “valuable” employees tend to be more able to show that their leave request is reasonable or imposes less of a burden, with value being measure by tenure with the employer and level of position or skills. Decisions are also reviewed for consideration of the individual job requirements or duties that would show the undue hardship imposed by leave as an accommodation.

### *A. The Data*

The data for analysis consist of all three hundred and fifty-three disability claim appellate decisions in federal courts since the ADA came into effect in 1992 through December 2012, including seventy-seven appellate court decisions and two hundred and seventy-six district court decisions. The data are considered complete for the identified time frame. These decisions were included in the analysis because an employee's request for leave as an accommodation was denied by the employer and the court's decision addressed whether that leave would have been a reasonable accommodation or not. Judgment was entered in favor of the employer in 68.8% of the district court opinions and in 85.7% of the appellate court opinions.

Although the data were collected on court decisions, the unit of analysis can be considered to be the individual plaintiff. Accordingly, the analysis includes a number of demographic and case detail parameters including type of impairment, years of service, type of employer, and position skill level. In addition to corresponding outcomes and court-recorded details, the data included details on both the plaintiffs and the defendants gleaned from the court documents. Related to the request for accommodation, the analysis includes the amount of prior leave taken (in weeks), whether the amount of leave requested as an accommodation was fixed or indefinite, whether FMLA obligations and employer leave policies were considered, whether the amount of leave exceeded that allowed by the employer's policy (if any), and whether health care provider input was considered by the court. A full list of raw variables and descriptions appears in Appendix Table 1.

There is no uniform data collection requirement for ADA cases beyond what is necessary for the documentation of the claim. As such, a good number of the observations were missing one or more of the far ranging data fields. In fact, of the entire set, with each observation having fifty or more fields, only some sixty-five cases included every possible field collected. In order for the data set to lend itself to regression modeling, a missing data strategy was called for. The strategy utilized in this analysis was to utilize separate categories for missing data as needed—this permitted full incorporation of all observations with incomplete fields. This allows for the inclusion of the maximum number of observations while not discarding valuable observations that might be missing only a small portion of the fifty or more fields of interest.

### *B. Statistical Model*

A logistic model is employed to examine the statistical connection between the outcome variable, motions for summary judgment finding that the requested leave was or was not a reasonable accommodation, and the explanatory variables. We defined the key outcome of interest as Motion for Summary Judgment (MSJ). This binary variable represents whether requested leave is deemed as reasonable accommodation or not, with zero representing a ruling favorable to the plaintiff (employee) and one, indicating a finding for the defendant (employer). Unknown values (as noted above) were given an additional category within each variable where they occurred. It was important to fully utilize all observations, as the observations for which court documents did not permit definition of certain characteristics were nonetheless informative. N.B., only categorical variables appear in this model as specified. The full logistic regression results and variables appear in Appendix Table 2.

*C. Analysis*

Overall, employees seeking leave as an accommodation succeeded in surviving a motion for summary judgment in 27.2% of the claims reviewed. As can be seen from Table 1, in the two hundred and seventy-six trial court opinions, the employer prevailed in one hundred and ninety of two hundred and seventy-six cases (68.8% of the time), and in the seventy-seven appellate court decisions, the employer prevailed in seventy-two of eighty-three cases (86.7% of the time). Outcomes were differentiated based on whether decisions occurred either before or after the Supreme Court's 2002 Barnett decision,<sup>295</sup> to determine if the Court's consideration of reasonableness of accommodations had any effect. Outcomes showed similar percentages of successful motions for summary judgment for the employer in the pre- and post- April 2002 periods, 74.8% and 71.7%, respectively, and the regression results showed that the Barnett decision was not a significant factor influencing whether or not leave was deemed reasonable.

There was a wide variation in the treatment of cases depending on the Circuit Court in which the claims arose, ranging from courts in the Ninth Circuit finding for employers 48% of the time and the First Circuit with 50%, contrasted against courts in the Eighth and Eleventh Circuits, which decided in favor of employers in 96.8% and 100% of cases, respectively. The number of cases handled varied, as would the types of cases. The significance of circuit court identified by the logit regression model ranges from  $p \leq 0.002$  in the case of the Fourth and Eighth Circuit Courts to almost one, as in the case of the Eleventh and D.C. Circuit Courts. This suggests that the variety of approaches to these types of claims across different circuit courts, as described in the previous section, may be having a significant impact on employees' success in obtaining leave as an accommodation.

Decisions were analyzed to determine the impact of individual employee and employer characteristics on the reasonableness of leave as an accommodation. It is important to note that court decisions did not discuss any of these factors (years of service, professional skill level or industry category) in determining the reasonableness of a request for leave. These factors were analyzed to determine if those factors may be having an unstated effect on those determinations.

Years of service had a significant effect on court decisions. Years of service was divided into three categories: 0-4 years, 5-15 years, and over 15 years. With 0-4 years as the reference, the 5-15 years of service category proved to be the most significant in favor of the plaintiff, while those with over 15 years found favorable outcomes less likely, when compared to employees with less than five years of experience. The corresponding p-values were 0.043 and 0.307, respectively. This suggests that some value may be placed on employees who have undergone on the job training or acquired job-related expertise compared to newer employees, while the oldest employees may be seen as less likely to be able to return to work.

There was some variation in outcome based on the professional skill level of the employee. In the sample, 25.2% of the plaintiffs were unskilled workers, 31.7% were semi-skilled workers, 15% skilled, and 21% professionals. Compared to unskilled workers (the reference category), professional workers were significantly more likely to receive a favorable outcome, with a p-value of .047. The skilled and semi-skilled categories, while trending similarly, were not significant, however.

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<sup>295</sup> U.S. Airways, Inc. v. Barnett, 535 U.S. 391 (2002).

The coarse industry classifications outcomes did not appear to vary greatly and statistical significance was wanting. Industries were grouped as follows: agriculture-construction-manufacturing (19.6%); transportation-communication-wholesale-retail (22.7%); and finance-real estate-services (41.5%). A combined general category accounted for the remaining 16.2%. The greater prevalence of decisions in favor of employers was in the transportation-communication-wholesale-retail and the agriculture-mining-construction-manufacturing categories, with 77.5% and 75.4% of outcomes favorable to employers. The finance-real estate-services category had 71.2%. The unique general category, added to include court cases that indicated a combination of industries involved, had the lowest rate of success for employers (64.9%). None of the categories proved to be statically significant.

The decisions were also analyzed for the effect of the type of impairment(s) reported by the plaintiffs. Like the other individual characteristics discussed above, none of the decisions analyzed discussed the impact of a particular impairment on the determination of reasonableness, beyond discussions of the length of leave already used or needed by the employee with that impairment. It is interesting that of the cases analyzed, 54.9% involved plaintiffs with multiple impairments, which was a significant factor ( $p=.072$ ) in court decisions finding claims to be unreasonable. Fully 78.4% of the rulings in cases involving multiple impairments were in favor of the employer.

A chronic injury, such as a back condition, was identified in 23.2% of the claims and was significantly associated with positive outcomes for employers. The claimant's impairment was described as work related in 20.1% of the claims, which was associated with positive outcomes for plaintiffs but was not significant. Neither the presence of chronic non-life-threatening conditions such as asthma, present in 42.2% of the claims, nor chronic life-threatening conditions, such as cancer, present in 14.2% of the claims, affected outcomes significantly. Although both led to a slightly lower rate of decisions for employers (69.8% vs. 75.3% and 68.0% vs. 73.7%), the effect was not statistically significant in the logistic model.

It is noteworthy that the presence of multiple disabilities or chronic injury may wield a confounding effect over claimant outcomes. Claimants not limited by multiple disabilities experienced a significantly higher occurrence of favorable outcomes (33.3%) compared to those who had multiple disabilities (21.6%). The latter was slightly significant, ( $p=0.072$ ) in favor of employers. This may be due to difficulties in the attribution of the disabilities or, perhaps, a conclusion that the several disabilities would be more difficult to surmount. The absence of chronic injury, while it did lead to claimant-favorable outcomes (30.7% vs. 15.9%), was found to have moderate statistical significance in the logistic regression model. ( $p=0.088$ )The confounding effect of multiple or chronic injuries seemed to push claimant outcomes in the same direction in both cases. Where the court noted whether the injury was work-related, this effect was not significant in the model.

In the 30% of the claims analyzed involving a plaintiff with a mental illness, that impairment proved to be a significant factor in decisions favoring the employer ( $p=0.055$ ). In the presence of mental illness, 79.2% of the motions for summary judgment were granted for the employer, while 70.0% of cases were decided in favor of the employer when mental illness was not established. This effect, similar in direction to that of multiple disability (and chronic injury), was somewhat smaller in magnitude.

Personality disorders were present in 16.1% of the cases, while alcohol or drug addictions were presented in 2.5% of the claims. None of these impairments favored

the plaintiff in the outcomes of court decisions since the results in favor of employers happened in 71.9% and 77.8% and respectively, without statistical significance.

Among the personal characteristics, chronic injury and mental illness were the only factors to persist statistically in the logistic regression model, all with  $\alpha < 0.10$ . The other items of personal information considered, to include personality disorder and alcohol/drug problems, did not persist statistically. Moreover, their impact on the raw data was also relatively small.

Given the focus of appellate court reported decisions on the length of leave being taken by an employee with a disability,<sup>296</sup> the decisions were analyzed based on how much leave a plaintiff had used before the current request for leave as an accommodation. In three hundred and thirty-one or more than 92% of the decisions, the court noted the amount of leave taken prior to the current accommodation request, which was divided in these categories: 0 weeks, 1-12 weeks, 13-52 weeks, and more than 52 weeks. Generally, the more leave taken, the more likely the employer is to prevail. Consideration of this factor was significant overall in favor of employers. Surprisingly, the amount of leave taken was not significant for most of these categories. The 1-12 weeks and 13-52 weeks categories were associated with results in favor of employers but were not a significant factor. Only the prior use of more than 52 weeks of leave was a significant factor in outcomes for employers. This suggests that employees who have used a relatively short amount of leave in the past may be able to convince a court that additional leave is a reasonable accommodation, but the use of more than one year of leave in the past will definitely have a negative effect on outcomes for plaintiffs seeking approval of even more leave as an accommodation.

It is interesting that two hundred and twenty-five, or over 63%, of the decisions involved a claim for leave as an accommodation without noting or considering the amount of additional leave being sought. This is in part because 68.3% of the requests were for leave of an indefinite duration, which were treated as lacking an amount of leave being sought. In the remaining one hundred and twenty-eight decisions that specifically considered the amount of leave requested as an accommodation, some of these amounts proved to be more significant than the amount of leave used by the plaintiffs in the past. These requests were divided into these categories: 0-4 weeks, 5-15 weeks, 16-52 weeks, and 52-500 weeks. 78.6% of the cases favored the employer when 5 to 15 weeks of leave were offered as accommodation. In the case of plaintiffs with 16 to 52 weeks of leave, 72.4% of the decisions favor the employer. And absolutely all the claims seeking more than 52 weeks of accommodation resulted in negative outcomes for the employees. The categories of 5-15 weeks and 16-52 weeks were significantly associated with judgments in favor of the employer, with the greatest effect coming from leave of more than 52 weeks. As expected, this suggests that employers and courts are more reluctant to deem future leave to be reasonable as its length surpasses one year. However, the effect of a request for 16-52 weeks of leave was less pronounced than a request for 5-15 weeks of leave.

Given the analysis of these types of claims in the appellate courts, one would expect that the definiteness of the amount of leave requested as an accommodation as well as the scheduling of a need for leave would both have a positive effect for

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<sup>296</sup> See *supra* notes 109-28 and accompanying text.

employees seeking leave as an accommodation.<sup>297</sup> Decisions were analyzed based on whether the amount of leave sought as an accommodation was of a definite or indefinite duration, and whether or not the leave was unscheduled, such as calling in the morning of scheduled work. In the sample, 31.7% of the cases included definite amount of leaves and 22.7% involved unscheduled leave. In the analysis of the cases, a need for a definite amount of leave was positively associated with a decision that the leave request was reasonable. When the amount of leave needed was indefinite, 78.8% of the cases were decided in favor of the employer, and when they were definite, this percentage decreased to 59.8%. In contrast, the use of leave on an unscheduled basis was positively associated with judgments for the employer but was not a statistically significant factor in the logistic model.

Decisions were also analyzed regarding the consideration of health care provider input supporting the need for leave. Courts considered whether the plaintiff had the support of a health care provider to justify the need for leave in one hundred and thirteen or 32% of the claims reviewed. When healthcare providers' input was not considered, courts ruled in favor of employers in 72.9% of the cases. If a health care provider's opinion was considered, the determination of reasonableness often turned on whether the health care provider was able to provide a definite opinion as to when the employee will be able to return to work. Where the opinion of a health care provider was considered, courts found this opinion to be sufficiently definite in forty, or 35.4% of those cases. Compared to decisions where a health care providers' opinion was not considered, a definite opinion as to an employee's ability to return was significantly favorable to plaintiffs, resulting in judgments for the plaintiffs in 57.5% of the cases with a p-value of 0.002. In contrast, a finding that the health care provider's opinion was not sufficiently definite was significantly associated with outcomes for employers. Employers prevailed in 89% of the claims where the health care provider's opinion was considered but was considered to lack a definite date of return, with high statistical significance (p=0.01).

Decisions were also analyzed to determine whether the amount leave sought as an accommodation would exceed the leave available under the Family & Medical Leave Act (FMLA) or under an employer's own leave policy. Employer policies were expected to be a significant factor in the determination of whether leave was a reasonable accommodation, based on appellate court deference to these policies in determining the reasonableness of a leave request.<sup>298</sup> Employer policies were a significant factor in the determination of whether leave was a reasonable accommodation. Of the decisions analyzed, the employer's leave policy was considered in 28.6% of those decisions. The court's failure to consider an employer's leave policy was a statistically significant factor in decisions finding that the leave was reasonable.

In claims where the employer's leave policy was considered, the leave sought as an accommodation exceeded the leave allowed by the employer's policy in eighty-two of the cases, compared to nineteen claims where the leave sought was less than allowed by an employer's policy. Consideration of employer policies on leave was a significant factor in favor of the employee for cases in which the policy was not exceeded (p=0.007). When the employer's leave policy was exceeded, consideration

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<sup>297</sup> See *supra* text accompanying notes 146-201.

<sup>298</sup> See *supra* text accompanying notes 202-29.

of employer policy regarding leave tended to support outcomes in favor of the employer, though not significantly.

Decisions were also analyzed to determine whether the fact that an employer's satisfaction of leave requirements under the FMLA was a significant factor in determining that any additional leave would be an unreasonable accommodation.<sup>299</sup> The employer's FMLA requirements were only considered in thirty-seven or 10.5% of the decisions. The actual outcomes of the claims were not well differentiated—with 72.5% and 75.7% favorable outcomes for the employer, respectively. Although the consideration of FMLA obligations was positively associated with decisions in favor of employers, this consideration was not a significant factor.

Decisions were also analyzed to determine whether the court considered the employee's individual job duties or other circumstances. Given some courts' reluctance to consider such individualized factors, it was not surprising that only 24.9% of the studied cases considered the duties or other individual circumstances. Of the decisions where such individual factors were considered, courts found that leave as an accommodation was reasonable and required in 43.2% of the claims, which was highly significant for the model in outcomes in favor of the plaintiff. ( $p=0.005$ ). Where this factor was not considered, employers were successful in defeating accommodation claims in 78% of the claims.

#### *D. Discussion*

Considered together, we have an interesting combination of results. The central theme of these analyses is whether and to what degree policy details and claimant parameters affect appellate decisions for disability claims. The additional question of whether the Barnett ruling significantly affected appellate decisions, even if not put to rest, might now be viewed differently. In our sample, 65.2% of the cases occurred before the Barnett decision, but it certainly did not impact outcomes as strongly as expected.

While it is reassuring that some of the explanatory variables did not significantly drive decisions in a statistical sense, it is clear that courts do matter, and that is not reassuring. Further it is difficult to take the position that the sample size is a problem in this case. The number of explanatory variables considered was practically exhaustive and as large as the sample size would permit. Among the data that could be included in any further follow-up to this work would be expanded demographic detail, to include minority status, and possibly a larger time window that would permit analysis of changes over time. This would be particularly informative given the evolving state of labor and the present market challenges.

Further, the apparent inclusion of multiple factors in support of the claimant case would indicate that the explicit ambiguities of the law that permit consideration of undue hardship on the employers might extend to consideration of claimant individual circumstances as well. What is clear is that the legal grey zones intended to foster economically rational decisions incorporates both employer and claimant factors to a significant degree in some cases.

Lastly, and perhaps the most important result from a policy point of view, we found that health care provider input, when considered, did weigh heavily in the decisions of the court. Similarly, circumstances in which the leave sought exceeded

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<sup>299</sup> See *supra* text accompanying notes 261-73.

established employer policies were also differentiated statistically. It would seem that both policy and specialized input weigh heavily on the processes of the courts.

#### IV. RECOMMENDATIONS & CONCLUSION

Both employers and employees with disabilities can benefit from clearer guidance on how much leave should be provided as a reasonable accommodation, and under which circumstances such leave could cause the employer an undue hardship. In various current circuit court opinions, the reasoning focuses on the amount of leave taken prior to the current request for leave and whether the employee expects to return at a specific time in the fairly near future. A minority of appellate courts go a bit farther and consider whether the employer's leave policies or perhaps the FMLA would require provision of the requested leave.

The analysis of trial and appellate court decisions was surprising in that smaller amounts of past leave taken by an employee were not significant determinants of whether the leave was deemed reasonable under the ADA. Only when the prior use of leave exceeded one year did it become significant. Similarly, the fact that prior leave usage was unscheduled was not a significant factor in outcomes for employers. This suggests that although appellate reasoning often mentions the length of prior leave or its unscheduled use as important factors in a reasonableness analysis, courts do not necessarily dismiss claims because of these factors. Therefore, employers should not deny requests for future leave based on how much leave an employee has used in the past or the fact that its use was unscheduled.

With respect to an employee's future need for leave, the amount needed appears to be significant, but the indefiniteness of the need by itself does not appear to be significant. The significance of the specific amount of time needed by the employee in the future shows that employers should pay close attention to the amount of leave that employees are expected to need. However, a need for a longer amount of leave does not necessarily make the request unreasonable. A definite length of time for future leave favored plaintiffs but surprisingly, indefiniteness was not a significant determinant of whether the leave was reasonable. Therefore, an employee's inability to articulate an exact amount of future leave that is needed should not result in the denial of the request for leave.

Like the length of leave requested, courts' consideration of health care provider input on the length of leave necessary to enable the plaintiff to return was extremely influential. Conversely, the unavailability or a court's failure to consider such information worked significantly in favor of employers. If the health care provider provided a definite opinion regarding when the employee would be able to return to work, the plaintiff was even more likely to be able to show that the leave was reasonable. This suggests that employers should request and consider carefully the opinion of a treating health care provider before determining whether a leave request is reasonable.

The influence of employer leave policies was a significant result. Courts appear to be following the logic of one expert, Stephen Befort, who would allow employers to rely on a documented leave policy to justify the denial of leave as an accommodation.<sup>300</sup> The analysis of ADA decisions since 1992 suggests that courts are following this logic: Recognition that a request for leave exceeds an employer's policy favors the employer, while a court's failure to consider leave policies works

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<sup>300</sup> Befort, *supra* note 6, at 471.

significantly in the employee's favor. If the leave requested exceeds the amount provided in an employer's policy, the employer is even more likely to be able to show that the leave is unreasonable. Unfortunately, this approach ignores the individualized analysis that is required for accommodation requests under the ADA. In addition, this weight on employer's policies without any examination of how these policies have been interpreted or applied in the past fails to apply the reasoning of the Supreme Court in *Barnett*, which warned that policies should not be used to avoid the duty to accommodate if they have not been applied consistently in the past.<sup>301</sup> Even if the employer's policies are applied consistently, this approach allows and even encourages employers to adopt very restrictive leave policies that can then be used to show that an employee's request for leave as accommodation is unreasonable.

With respect to individual employee characteristics, it was encouraging that both years of service and profession had a significant effect on determinations of reasonableness. Factors such as length of service, professional skill level and industry classification, as well as some measure of how difficult the employee would be to replace, would be relevant to economists' determinations of reasonableness and hardship. Indeed our analysis of decisions since 1992 shows that some employees' skill levels and experience of 5-15 years in length are significant when considered by the court. But it is important to note that while profession was often mentioned by a reviewing court, none of the courts discussed this as a determinant factor. Moreover, more than 7% of the courts did not even mention the plaintiff's profession in their opinions. Similarly, while length of service was mentioned in 91.5% of the decisions, none of the courts explicitly gave experience as the reason for finding that leave would be a reasonable accommodation.

Some other individual circumstances were surprisingly significant. An employee with a mental illness, a chronic injury, or multiple impairments is significantly less likely to successfully challenge the denial of leave as an accommodation, even controlling for possibly related factors such as length of leave used in the past. This suggests that preconceived notions about either the effects of such impairments or the value of employees with such impairment, or both, have influenced courts' determinations of whether leave for these employees would be a reasonable accommodation. This effect also suggests that both employers and reviewing courts are making assumptions about employees based on the extent or type of their impairments, thereby defeating one of the essential purposes of the ADA.

The decisions that carefully considered the opinion of a health care provider or the individual duties of an employee seeking leave show the significant impact of such individualized information on determinations of reasonableness. Unfortunately, health care provider input was only considered in less than a third of the decisions, and individual duties or other factors were only considered in less than 25% of the decisions. Employees seeking leave as an accommodation should present information to both their employers and the courts regarding their health care provider's opinion on their future ability to return to work, as well as individual work circumstances and potential solutions which would make the leave relatively less burdensome. Moreover, employers seeking to fulfill their accommodation

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<sup>301</sup> *US Airways, Inc. v. Barnett*, 535 U.S. 391, 405 (2002); *see supra* text accompanying notes 212-14.

requirements and courts seeking to fully enforce the ADA should be sure to consider such information in making reasonableness and undue hardship determinations.

In reviewing claims for leave as a reasonable accommodation, courts and the EEOC should stress the obligation of employers to consider the individual circumstances surrounding accommodation requests. This approach has been required by the Supreme Court.<sup>302</sup> Moreover, this approach would encourage employers to weigh the benefits against the costs of retaining an employee who is seeking the accommodation. Such an analysis would not only fulfill the individual assessment requirements of the ADA, but would also encourage economically rational decisions by employers, including consideration of the costs of hiring and training a replacement for the employee who seeks the leave.

An individual analysis of the reasonableness and the undue hardship posed by a request for leave as an accommodation may lead to different interpretations of the facts involved. In particular, the reasonableness of a request for leave as an accommodation often turns on interpretation of facts such as the effect of the leave on the employer's operations as well as facts which are unknown at the time the employer considers the accommodation. One way to approach this dispute over factual interpretations would be to apply the logic of the "honest belief" defense, which has been relied upon as a defense in other types of discrimination claims. If there are issues of fact regarding the basis for an employee's discharge, the honest belief defense allows the employer to avoid liability based on its interpretation of the facts known at the time of the discharge.<sup>303</sup>

Under the honest belief defense, if an employer relies on particularized facts which later turn out to be mistaken, foolish, trivial or baseless, that reliance is not discriminatory,<sup>304</sup> if the decision was "reasonably informed and considered."<sup>305</sup> The Sixth Circuit has explained that it "will not blindly assume that an employer's description of its reasons is honest."<sup>306</sup> Therefore, "[w]hen the employee is able to produce sufficient evidence to establish that the employer failed to make a reasonably informed and considered decision before taking its adverse employment action, thereby making its decisional process 'unworthy of credence,' then any reliance placed by the employer in such a process cannot be said to be honestly held."<sup>307</sup>

This honest belief defense relies on the extent of the employer's investigation showing that the employer made "a reasonably informed and considered

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<sup>302</sup> *Bragdon v. Abbott*, 524 U.S. 624, 649 (1998) (citing *Sch. Bd. of Nassau Cnty. v. Arline*, 480 U.S. 273, 288 (1987)); *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555, 569 (1999); *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 483 (1999).

<sup>303</sup> *Smith v. Chrysler Corp.*, 155 F.3d 799, 807-08 (1998).

<sup>304</sup> *Chen v. Dow Chem. Co.*, 580 F.3d 394, 401 (6th Cir. 2009) (at time of discharge, employer documentation of substandard performance and poor behavior).

<sup>305</sup> *Wright v. Murray Guard, Inc.*, 455 F.3d 702, 708-09 (6th Cir. 2006) (employer relied on information regarding plaintiff's performance and harassment of coworkers based on employee interviews).

<sup>306</sup> *Id.*

<sup>307</sup> *Id.* at 708 (quoting *Smith*, 155 F.3d at 807-08).

decision.<sup>308</sup> For example, an employer showed an honest belief that a Plaintiff was unable to perform the physical requirements of her job duties based on reports from other employees and employee and health records documenting her inability to perform the duties.<sup>309</sup>

Under the honest belief defense, the employer has the burden of identifying the particularized facts it relied upon in taking an adverse action.<sup>310</sup> An employer failed to establish a honest belief, for example, when it discharged an employee shortly after he was hurt by an accident at work, since the supervisor who discharged him did not question him about the incident and the employer could not produce any documentation of any investigation of the accident or evidence of the specific facts known by the supervisor at the time of the discharge.<sup>311</sup>

This same approach could be applied to employers' consideration of requests for leave as an accommodation. If the employer engages in a reasonable investigation of the employee's potential for returning to work and an analysis of the actual costs of extending the leave, then the employer should be able to rely on the facts known at the time the accommodation is considered. Conversely, if the facts suggest that the employee may be able to return to work in a fairly short or definite amount of time, or that the costs of replacing that employee may exceed the costs associated with extending the leave, then the employer should grant the accommodation.

This approach is consistent with the proposed requirements in the Working Families Flexibility Act, which would require certain procedures before an employer responds to a request for leave as an accommodation.<sup>312</sup> This Act would require that an employer respond to a request for leave with a written decision that explains the reason for any denial, including the limitations posed by the resources of the employer, the costs posed by the change in terms, potential effects of the change on customers, and other managerial concerns.<sup>313</sup>

Placement of some burden on the employer to show that leave as an accommodation would not be reasonable or imposes an undue hardship is also appropriate since a uniform policy against use of leave could well have a disparate impact on employees with disabilities. Such a qualification standard that screens out or tends to screen out an individual with a disability must be proven by the employer

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<sup>308</sup> *Tingle v. Arbors at Hilliard Care, LLC*, 692 F.3d 523, 531 (6th Cir. 2012) (employer conducted reasonable investigation into plaintiff's performance); *see also* *Davis v. City of Clarksville*, 492 F. App'x 572, 581 (6th Cir. 2012) (employer investigation into plaintiff's dishonesty was reasonable where investigator was unbiased and interviewed numerous witnesses, hearing allowed Plaintiff to present his version).

<sup>309</sup> *MacDonald-Bass v. J.E. Johnson Contracting, Inc.*, 493 F. App'x 718, 726 (6th Cir. 2012).

<sup>310</sup> *Clay v. United Parcel Serv. Inc.*, 501 F.3d 695, 713-14 (6th Cir. 2007) (summary judgment for employer denied where employer did not show belief was "reasonably based on particularized facts").

<sup>311</sup> *Brooks v. Davey Tree Expert Co.*, 478 Fed. Appx. 934, 943 (6th Cir. 2012); *see also* *Ramey v. Vacument Corp.*, No. 2:09-CV-196, 2012 U.S. Dist. LEXIS 9121, at \*17 (E.D. Tenn. Jan. 26, 2012) (discharge for abuse of sick leave not based on honest belief when based on brief observation of plaintiff and timing of doctor's visits).

<sup>312</sup> *Arnow-Richman*, *supra* note 73, at 1110.

<sup>313</sup> *Id.*

to be job-related and consistent with business necessity, and performance cannot be achieved through reasonable accommodation.<sup>314</sup> Congress expressed its intention in the ADA that an employer can insist upon across-the-board qualification standards only if those standards “provide an accurate measure of an applicant’s actual ability to perform the job . . . .”<sup>315</sup>

Leave as an accommodation is an important tool for admitting and retaining employees with disabilities in the workforce. To be an effective tool, however, employers and courts cannot continue to deny requests for leave or discharge employees who have taken leave that exceeds an individual employer’s policy or some abstract notion of how much leave is “too much.” Instead, employers should rely on an individual employee’s health care provider as well as factors related to the job in question to determine the reasonableness and hardship potentially caused by a particular request for leave. Like employers asserting the honest belief defense, employers taking such an individualized approach should be able to rely on the information available to them. But decisions that will greatly affect an employee’s future in the workforce should not be made based on assumptions or a lack of information. Such decisions are not economically efficient and should be deemed discriminatory.

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<sup>314</sup> 29 U.S.C.A. § 12112(b)(6) (West 2014).

<sup>315</sup> H.R. REP. NO. 101-485, pt. 3, at 42 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 465, 1990 WL 121680.

## APPENDIX

Table 1: Descriptive Statistics

<b>Appellate Decision</b>	<b>Frequency (%)</b>	<b>MSJ for ER = 1 (%)</b>
No	270 (76.5)	185 (72.0)
Yes	83 (23.5)	72 (86.7)
<b>Circuit Court</b>	<b>Frequency (%)</b>	<b>MSJ for ER = 1 (%)</b>
1	20 (5.7)	10 (50)
2	32 (9.1)	19 (59.4)
3	37 (10.5)	22 (59.5)
4	26 (7.4)	22 (84.6)
5	29 (8.2)	24 (82.8)
6	41 (11.6)	27 (65.9)
7	64 (18.1)	50 (78.1)
8	31 (8.8)	30 (96.8)
9	25 (7.1)	12 (48)
10	28 (7.9)	21 (75)
11	18 (5.1)	18 (100)
D.C.	2 (0.6)	2 (100)
<b>Years of Service</b>	<b>Frequency (%)</b>	<b>MSJ for ER = 1 (%)</b>
Zero through four years	117 (33.1)	85 (72.6)
Five through 15 years	148 (41.9)	102 (68.9)
Over 15 years	58 (16.4)	47 (81.0)
<b>Leave Taken before this Request</b>	<b>Frequency (%)</b>	<b>MSJ for ER = 1 (%)</b>
Zero	9 (2.5)	5 (55.6)
1-12 weeks	134 (38.0)	94 (70.1)
13-52 weeks	141 (39.9)	106 (75.2)
1 Year and More	47 (13.3)	40 (85.1)
<b>Weeks of Leave Offered as Accommodation</b>	<b>Frequency (%)</b>	<b>MSJ for ER = 1 (%)</b>
Unknown	225 (63.7)	176 (78.2)
Zero through four	69 (19.5)	35 (52.2)
Five through 15	28 (7.9)	22 (78.6)
16 through 52	29 (8.2)	21 (72.4)
52 through 500	2 (0.6)	2 (100)
<b>Professional Skill Level</b>	<b>Frequency (%)</b>	<b>MSJ for ER = 1 (%)</b>
Unskilled	89 (25.2)	66 (74.2)
Semi-Skilled	112 (31.7)	82 (73.2)
Skilled	53 (15)	42 (79.2)
Professional	74 (21)	51 (68.9)
<b>Coarse Groupings of Industry Classifications</b>	<b>Frequency (%)</b>	<b>MSJ for ER = 1 (%)</b>
Combination	57 (16.2)	38 (66.7)
Ag/Mining/Construction/Manuf	69 (19.6)	52 (75.4)
Transp/Commun/Wholesale/Retail	80 (22.7)	62 (77.5)
Finance/Real Estate/Services	146 (41.5)	104 (71.2)
<b>FMLA Considered?</b>	<b>Frequency (%)</b>	<b>MSJ for ER = 1 (%)</b>
No	316 (89.5)	229 (72.5)
Yes	37 (10.5)	28 (75.7)
<b>Chronic Non-Life Threatening</b>	<b>Frequency (%)</b>	<b>MSJ for ER = 1 (%)</b>
No	194 (55)	146 (75.3)
Yes	149 (42.2)	104 (69.8)
<b>Chronic Life Threatening</b>	<b>Frequency (%)</b>	<b>MSJ for ER = 1 (%)</b>
No	293 (83)	216 (73.7)
Yes	50 (14.2)	34 (68.0)
<b>MULTDISAB</b>	<b>Frequency (%)</b>	<b>MSJ for ER = 1 (%)</b>
No	156 (45.1)	104 (66.7)
Yes	190 (54.9)	149 (78.4)

<b>Chronic Injury</b>	<b>Frequency (%)</b>	<b>MSJ for ER = 1 (%)</b>
No	261 (73.9)	181 (69.3)
Yes	82 (23.2)	69 (84.1)
<b>Mental Illness</b>	<b>Frequency (%)</b>	<b>MSJ for ER = 1 (%)</b>
No	237 (67.1)	166 (70.0)
Yes	106 (30)	84 (79.2)
<b>Personality Disorder</b>	<b>Frequency (%)</b>	<b>MSJ for ER = 1 (%)</b>
No	286 (81)	209 (73.1)
Yes	57 (16.1)	41 (71.9)
<b>Alcohol/Drugs</b>	<b>Frequency (%)</b>	<b>MSJ for ER = 1 (%)</b>
No	334 (94.6)	245 (72.8)
Yes	9 (2.5)	7 (77.8)
<b>Work Related?</b>	<b>Frequency (%)</b>	<b>MSJ for ER = 1 (%)</b>
No	273 (77.3)	195 (71.4)
Yes	71 (20.1)	56 (78.9)
<b>Post 4-29-02</b>	<b>Frequency (%)</b>	<b>MSJ for ER = 1 (%)</b>
No	123 (34.8)	92 (74.8)
Yes	230 (65.2)	165 (71.7)
<b>Amount Definite</b>	<b>Frequency (%)</b>	<b>MSJ for ER = 1 (%)</b>
No	241 (68.3)	190 (78.8)
Yes	112 (31.7)	67 (59.8)
<b>Unscheduled Leave</b>	<b>Frequency (%)</b>	<b>MSJ for ER = 1 (%)</b>
No	273 (77.3)	200 (73.3)
Yes	80 (22.7)	57 (71.3)
<b>Individual Circumstances Considered</b>	<b>Frequency (%)</b>	<b>MSJ for ER = 1 (%)</b>
No	264 (74.8)	206 (78.0)
Yes	88 (24.9)	50 (56.8)
<b>Health Care Policy</b>	<b>Frequency (%)</b>	<b>MSJ for ER = 1 (%)</b>
Considered Not Sufficiently Definite	73 (20.7)	65 (89.0)
Considered Sufficiently Definite	40 (11.3)	17 (42.5)
Not Considered	240 (68.0)	175 (72.9)
<b>Whether Leave Policy was Considered</b>	<b>Frequency (%)</b>	<b>MSJ for ER = 1 (%)</b>
Leave Exceeded Policy	82 (23.2)	62 (75.6)
Leave Did Not Exceed Policy	19 (5.4)	7(36.8)
Not Considered	252 (71.4)	188 (74.6)

Table 2: Logistic Regression

Variables in the Equation	B	S.E.	Wald	Df	Sig.	Exp(B)	95% C.I. for Exp(B)	
							Lower	Upper
Appellate decision for ER	2.519	0.635	15.731	1	.000	12.416	3.576	43.108
Circuit Court (reference 1st)			29.318	11	.002			
2nd Circuit	0.866	0.812	1.137	1	.286	2.377	0.484	11.674
3rd Circuit	.539	0.824	.429	1	.513	1.715	0.341	8.621
4th Circuit	3.922	1.079	13.218	1	.000	50.504	6.096	418.383
5th Circuit	2.981	1.025	8.452	1	.004	19.700	2.641	146.937
6th Circuit	1.698	0.853	3.963	1	.047	5.461	1.027	29.049
7th Circuit	2.453	0.851	8.311	1	.004	11.619	2.193	61.566
8th Circuit	5.687	1.797	10.016	1	.002	295.071	8.715	9990.487
9th Circuit	.395	0.917	.185	1	.667	1.484	0.246	8.958
10th Circuit	1.595	0.952	2.806	1	.094	4.928	0.762	31.852
11th Circuit	22.210	8091.687	.000	1	.998	4.42E+09	0.000	.
12th Circuit	22.223	2.77E+04	.000	1	.999	4.48E+09	0.000	.
Years of Service (reference 0-4)			8.686	3	.034			
5-15 Years	-.930	0.459	4.113	1	.043	0.394	0.161	0.969
Over 15 Years	0.647	0.633	1.044	1	.307	1.909	0.552	6.597
Leave taken before this request (reference 0 weeks)			11.880	4	.018			
1-12 Weeks	.363	1.137	.102	1	.750	1.437	0.155	13.340
13-52 Weeks	0.825	1.141	0.523	1	.470	2.283	0.244	21.366
1 Year and More	2.246	1.336	2.826	1	.093	9.446	0.689	129.503
Leave offered as accommodation (reference 0-4 weeks)			17.428	4	.002			
5-15 Weeks	3.005	0.919	10.701	1	.001	20.179	3.335	122.109
16-52 Weeks	1.916	0.785	5.962	1	.015	6.791	1.459	31.602
52-500 Weeks	21.991	2.56E+04	0.000	1	.999	3.55E+09	0.000	.
Professional skill level (reference unskilled)			8.220	4	.084			
Semi-skilled	-0.744	0.549	1.833	1	.176	0.475	0.162	1.395
Skilled	-.577	0.673	0.735	1	.391	0.561	0.150	2.100
Professional	-1.155	0.581	3.958	1	.047	0.315	0.101	0.983
Coarse industry grouping (reference general)			2.817	3	.421			
Ag/Mining/Construction/Manuf	1.074	0.676	2.519	1	.112	2.926	0.777	11.015
Transp/Commun/Wholesale/Retail	.223	0.649	0.118	1	.731	1.250	0.350	4.463
Finance/Real Estate/Services	.293	0.552	.282	1	.595	1.341	0.454	3.959
FMLA Considered	.067	0.650	.011	1	.917	1.070	0.299	3.826
Chronic Non-Life Threatening	-.043	0.530	.007	1	.935	0.958	0.339	2.705
Chronic Life-Threatening	-.025	0.652	.002	1	.969	0.975	0.272	3.496
Multiple Disability	.758	0.421	3.247	1	.072	2.135	0.936	4.870
Chronic Injury	1.032	0.604	2.919	1	.088	2.806	0.859	9.166
Mental Illness	1.048	0.547	3.672	1	.055	2.852	0.976	8.328
Personality Disorder	.267	.552	.233	1	.629	1.31E+00	4.42E-01	3.85E+00

Alcohol/Drugs	1.000	1.288	0.603	1	.437	2.72E+00	2.18E-01	3.39E+01
Work-Related	-.779	.553	1.987	1	.159	4.59E-01	1.55E-01	1.36E+00
Post 4-29-2002	-0.188	0.448	0.176	1	0.675	0.829	0.345	1.994
Amount Definite	-0.611	0.456	1.792	1	0.181	0.543	0.222	1.328
Unscheduled Leave	0.007	0.511	0.000	1	0.989	1.007	0.370	2.744
Health Care Provider Option (reference not considered)			19.133	2	0.000			
Considered not sufficiently definite	1.583	0.614	6.645	1	0.010	4.869	1.461	16.220
Considered sufficiently definite	-1.947	0.629	9.592	1	0.002	0.143	0.042	0.489
Individual circumstances considered	-1.268	0.453	7.845	1	0.005	0.281	0.116	0.683
Leave Exceeding Policy (reference not considered)			10.453	2	0.005			
No	-2.412	0.898	7.205	1	0.007	0.090	0.015	0.522
Yes	0.694	0.503	1.903	1	0.168	2.002	0.747	5.371
Constant	<b>-2.649</b>	<b>1.515</b>	<b>3.058</b>	<b>1</b>	<b>0.08</b>	<b>0.071</b>		
Cox & Snell R Square	.417							
Nagelkerke R Square	.606							