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LEAVE AS A REASONABLE ACCOMMODATION UNDER THE AMERICANS WITH DISABILITIES ACT

RAMIT MIZRAHI

This article explores leave as a reasonable accommodation under the Americans with Disabilities Act of 1990, which must be assessed independently of a determination of entitlement to leave under the Family Medical Leave Act of 1993. This article stems from papers written in connection with a panel on the Family Medical Leave Act presented at the Fifth Annual American Bar Association Conference in Seattle, Washington on November 3, 2011 and a panel on advanced topics in complex leave of absence issues presented at the American Bar Association National Conference on Equal Employment Opportunity Law in San Francisco, California on March 22, 2012.

INTRODUCTION

All too often, employers assume that if employees have exhausted their twelve weeks of leave under the Family and Medical Leave Act of 1993 (FMLA), 29 U.S.C. § 2601 (2006), they are no longer entitled to additional leave time and can be terminated. However, even if an employee's leave is no longer covered by the FMLA, or was not covered by the FMLA in the first place, other protections may apply, including those created by the Americans with Disabilities Act of 1990 (ADA), as amended, 42 U.S.C. § 12101 (2006). Recently, the Equal Employment Opportunity Commission (EEOC) has challenged employer absence and attendance policies which do not accommodate flexible schedules and leaves of absence as provided by the ADA, resulting in significant settlements.

Part I of this article discusses the recognition of leave as a reasonable accommodation under the ADA by the EEOC and almost every circuit court.¹ Next, Part II explains how leave may be required as a reasonable

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[†] See *infra* Part I.

accommodation under ADA even in situations not covered by the FMLA.² Part III discusses how the two statutes operate independently.³ Part IV explains when leave must be granted by employers under the ADA, and includes a discussion of undue hardship.⁴ Part V explores the fact-specific nature of the determination of whether leave is an appropriate reasonable accommodation.⁵ Part VI discusses how “no fault” attendance policies may violate the ADA.⁶ Part VII discusses cases in which courts have examined leaves of varying durations sought by employees.⁷ Part VIII discusses how intermittent leaves and modified work schedules can be reasonable accommodations under the ADA.⁸ Lastly, Part IX discusses expected guidance from the EEOC on the issue of leave as a reasonable accommodation.⁹

This article will not cover other statutes which may entitle an employee to leave, including Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2 (2006), state analogs to the FMLA, ADA, and Title VII, state workers’ compensation statutes, or other state statutes that provide for pregnancy, parental, bereavement, and other such leave.

I. LEAVE IS A RECOGNIZED REASONABLE ACCOMMODATION UNDER THE ADA

It is well-settled that leave can be a reasonable accommodation under the ADA. The EEOC has spoken extensively about the topic.¹⁰ For example, in its Interpretive Guidance on Title I of the ADA (“Interpretive Guidance”), the EEOC identifies as possible reasonable accommodations “permitting the use of accrued paid leave or providing additional unpaid leave for necessary treatment.”¹¹

Leave has also been explicitly identified as a reasonable accommodation

² See *infra* Part II.

³ See *infra* Part III.

⁴ See *infra* Part IV.

⁵ See *infra* Part V.

⁶ See *infra* Part VI.

⁷ See *infra* Part VII.

⁸ See *infra* Part VIII.

⁹ See *infra* Part IX.

¹⁰ See, e.g., Meeting of June 8, 2011 - EEOC to Examine Use of Leave As Reasonable Accommodation: Written Testimony of Brian East, Senior Attorney, Texas Disability Rights, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (June 8, 2011), <http://www.eeoc.gov/eeoc/meetings/6-8-11/east.cfm>, [hereinafter “East Testimony”] (collecting EEOC sources in which leave as a reasonable accommodation is discussed).

¹¹ 29 C.F.R. Pt. 1630 App. § 1630.2(o).

under the ADA in nearly every circuit.¹²

II. ADA LEAVE COVERS SITUATIONS WHERE FMLA LEAVE DOES NOT APPLY

In order for an employee to be entitled to leave under the FMLA, she must be deemed an eligible employee, and must: (1) have been employed by a covered employer for at least twelve months; (2) have had at least 1,250 hours of service during the twelve-month period immediately before the leave started; and (3) be employed at a worksite where the employer employs fifty or more employees within seventy-five miles or at a public agency, public school board, or elementary or secondary school.

The ADA does not pose such requirements. Instead, a qualified employee with a disability may be entitled to leave as a reasonable accommodation under the ADA even if: (1) the employer has less than fifty—but at least fifteen—employees; (2) the employee has not worked at the company for twelve months; (3) the employee has not worked at the company for the requisite 1,250 hours; or (4) the employee has already exhausted twelve weeks of FMLA leave.¹³

The only basis for a denial of leave as a reasonable accommodation is

¹² See, e.g., *Garcia-Ayala v. Lederle Parenterals, Inc.*, 212 F.3d 638, 648-50 (1st Cir. 2000) (holding that retaining an employee's position while granting unsalaried leave may be a reasonable accommodation under the ADA); *Graves v. Finch Pruyn & Co., Inc.*, 457 F.3d 181, 185, n.5 (2d Cir. 2006) (stating that a leave of absence that is not indefinite could be a reasonable accommodation under the ADA); *Walton v. Mental Health Ass'n of Se. PA.*, 168 F.3d 661, 671 (3d Cir. 1999) (stating that under other facts than those present in this case, unpaid leave may be a reasonable accommodation); *Myers v. Hose*, 50 F.3d 278, 283 (4th Cir. 1995) (rejecting unscheduled paid leave as a reasonable accommodation, but citing with approval the EEOC Interpretive Guidance regarding unpaid leave and accrued paid leave as reasonable accommodations); *Cehrs v. Ne. Ohio Alzheimer's Research Ctr.*, 155 F.3d 775, 781-83 (6th Cir. 1998) (holding that a medical leave of absence can constitute a reasonable accommodation under appropriate circumstances); *Haschmann v. Time Warner Entm't Co.*, 151 F.3d 591, 601 (7th Cir. 1998) (holding that a reasonable juror could have concluded that additional medical leave was a reasonable accommodation); *Browning v. Liberty Mut. Ins. Co.*, 178 F.3d 1043, 1049 n.3 (8th Cir. 1999) (stating that a medical leave of absence can be a reasonable accommodation under the appropriate circumstances); *Nunes v. Wal-Mart Stores, Inc.*, 164 F.3d 1243, 1247 (9th Cir. 1999) (stating that unpaid medical leave may be a reasonable accommodation under the ADA); *Smith v. Diffie Ford-Lincoln-Mercury, Inc.*, 298 F.3d 955, 967 (10th Cir. 2002) (stating that "limited leave for medical treatment may qualify as a reasonable accommodation under the ADA"); *Holly v. Clairson Indus., LLC*, 492 F.3d 1247, 1263 (11th Cir. 2007) (citing, with favor, several cases along with the EEOC enforcement guidance stating that additional unpaid leave can be a reasonable accommodation); *Taylor v. Rice*, 451 F.3d 898, 910 (D.C. Cir. 2006) (stating that using leave time to receive medical care will be reasonable in many circumstances).

¹³ See 42 U.S.C. § 12112 (2006).

through a showing that it would be an undue hardship to the employer.¹⁴ Thus, a qualified individual with a disability is entitled to additional leave time beyond the twelve weeks permitted under the FMLA so long as that additional leave time would not constitute an undue hardship on the employer.¹⁵

III. THE ADA OPERATES INDEPENDENTLY OF THE FMLA

A. A Request for Leave Is a Triggering Event with Respect to the ADA.

When an employee requests time off for a reason related or possibly related to a disability, the employer should determine the employee's rights under all of the relevant statutes.¹⁶ The request should be deemed one for a reasonable accommodation under the ADA as well as a request for FMLA leave.¹⁷ Thus, the employer should "initiate an informal, interactive process with the individual with a disability . . . [to] identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations."¹⁸

In seeking leave as a reasonable accommodation, "the employee need not show that the leave is certain or even likely to be successful to prove that it is a reasonable accommodation, only that it would plausibly enable the employee to return and perform his job."¹⁹

B. The Greater Protection Applies to Cover the Employee.

Given that the ADA and FMLA operate independently of each other,

¹⁴ *Id.* at § 12112(b)(5)(A).

¹⁵ See 29 C.F.R. § 825.702(b) ("[T]he ADA allows an indeterminate amount of leave, barring undue hardship, as a reasonable accommodation."). A person with a "serious health condition" eligible for FMLA is not necessarily a "qualified individual with a disability" entitled to ADA protections; each statute has its own requirements for coverage. See 29 C.F.R. § 825.702(b) ("[T]he ADA allows an indeterminate amount of leave, barring undue hardship, as a reasonable accommodation.").

¹⁶ See Equal Emp't Opportunity Comm'n, Notice 915.002, Enforcement Guidance: Reasonable Accommodation And Undue Hardship Under the Americans with Disabilities Act (Oct. 17, 2002), available at <http://www.eeoc.gov/policy/docs/accommodation.html>, at Q&A 21 [hereinafter "EEOC, Reasonable Accommodation"].

¹⁷ *The Family and Medical Leave Act, the Americans with Disabilities Act, and Title VII of the Civil Rights Act of 1964*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (1995), <http://www.eeoc.gov/policy/docs/fmlaada.html> [hereinafter "FMLA, ADA, and Title VII"].

¹⁸ 29 C.F.R. § 1630.2(o)(3); see also *U.S. Airways v. Barnett*, 535 U.S. 391, 407 (2002) (stating that triable issue of fact as to whether employer engaged in interactive process with employee precluded summary judgment).

¹⁹ *Humphrey v. Mem'l Hosps. Ass'n*, 239 F.3d 1128, 1136 (9th Cir. 2001).

“[a]n employer must therefore provide leave under whichever statutory provision provides the greater rights to employees.”²⁰ For example, although the FMLA permits the employer to place an employee returning from a covered leave in an “equivalent” position,²¹ the ADA requires that the person returning from leave be returned to her original position.²² Therefore, an employee covered by both statutes would need to be returned to her original position following a return from a medical leave, absent the employer demonstrating undue hardship.

The following examples illustrate the interplay between the statutes and are therefore quoted at length:

(1) A reasonable accommodation under the ADA might be accomplished by providing an individual with a disability with a part-time job with no health benefits, assuming the employer did not ordinarily provide health insurance for part-time employees. However, FMLA would permit an employee to work a reduced leave schedule until the equivalent of 12 workweeks of leave were used, with group health benefits maintained during this period. FMLA permits an employer to temporarily transfer an employee who is taking leave intermittently or on a reduced leave schedule for planned medical treatment to an alternative position, whereas the ADA allows an accommodation of reassignment to an equivalent, vacant position only if the employee cannot perform the essential functions of the employee’s present position and an accommodation is not possible in the employee’s present position, or an accommodation in the employee’s present position would cause an undue hardship (2) A qualified individual with a disability who is also an “eligible employee” entitled to FMLA leave requests 10 weeks of medical leave as a reasonable accommodation, which the employer grants because it is not an undue hardship. The employer advises the employee that the 10 weeks of leave is also being designated as FMLA leave and will count towards the employee’s FMLA leave entitlement. This designation does not prevent the parties from also treating the

²⁰ 29 C.F.R. § 825.702(a).

²¹ 29 C.F.R. § 825.215.

²² See EEOC, Reasonable Accommodation, Example B, *supra* note 16. An employee who is granted leave as a reasonable accommodation under the ADA is “entitled to return to the same position unless the employer demonstrates that holding open the position would impose an undue hardship.” *Id.* at Q&A 18. It is the EEOC’s position that if holding the position open would be an undue hardship, or the employee is no longer qualified to hold the position, the employer must reassign the employee to a vacant equivalent position for which he or she is qualified. *Id.* at Q&A 21. If such a position is unavailable, then the employer must reassign the employee to a vacant position at a lower level if one is available. FMLA, ADA, and Title VII, *supra* note 17, at Q&A 14.

leave as a reasonable accommodation and reinstating the employee into the same job, as required by the ADA, rather than an equivalent position under FMLA, if that is the greater right available to the employee. At the same time, the employee would be entitled under FMLA to have the employer maintain group health plan coverage during the leave, as that requirement provides the greater right to the employee. (3) If the same employee needed to work part-time (a reduced leave schedule) after returning to his or her same job, the employee would still be entitled under FMLA to have group health plan coverage maintained for the remainder of the two-week equivalent of FMLA leave entitlement, notwithstanding an employer policy that part-time employees do not receive health insurance. This employee would be entitled under the ADA to reasonable accommodations to enable the employee to perform the essential functions of the part-time position. In addition, because the employee is working a part-time schedule as a reasonable accommodation, the FMLA's provision for temporary assignment to a different alternative position would not apply. Once the employee has exhausted his or her remaining FMLA leave entitlement while working the reduced (part-time) schedule, if the employee is a qualified individual with a disability, and if the employee is unable to return to the same full-time position at that time, the employee might continue to work part-time as a reasonable accommodation, barring undue hardship; the employee would then be entitled to only those employment benefits ordinarily provided by the employer to part-time employees.²³

IV. A REQUESTED ACCOMMODATION MUST BE GRANTED UNLESS IT WOULD CAUSE THE EMPLOYER AN UNDUE HARDSHIP

An employer must provide a reasonable accommodation to a qualified employee under the ADA unless the employer “can demonstrate that the accommodation would impose an undue hardship on the operation of its business.”²⁴ A requested accommodation would impose an “undue hardship” where it requires “significant difficulty or expense” to the employer.²⁵ The following factors are to be considered:

- (i) The nature and net cost of the accommodation needed under

²³ 29 C.F.R. § 825.702(c). Further examples can be found in sections (b) through (e).

²⁴ 42 U.S.C. § 12112(b)(5)(A); *see also* 29 C.F.R. § 1630.9(a).

²⁵ 42 U.S.C. § 12111(10)(A); 29 C.F.R. § 1630.2(p)(1).

this part, taking into consideration the availability of tax credits and deductions, and/or outside funding;

(ii) The overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation, the number of persons employed at such facility, and the effect on expenses and resources;

(iii) The overall financial resources of the covered entity, the overall size of the business of the covered entity with respect to the number of its employees, and the number, type and location of its facilities;

(iv) The type of operation or operations of the covered entity, including the composition, structure and functions of the workforce of such entity, and the geographic separateness and administrative or fiscal relationship of the facility or facilities in question to the covered entity; and

(v) The impact of the accommodation upon the operation of the facility, including the impact on the ability of other employees to perform their duties and the impact on the facility's ability to conduct business.²⁶

However, cost is rarely asserted by employers as the basis for a claim of undue hardship.²⁷ Instead, “[i]n certain circumstances, undue hardship will derive from the disruption to the operations of the entity that occurs because the employer can neither plan for the employee’s return nor permanently fill the position.”²⁸

In addition to the payroll costs incurred in having an employee on leave (for example, the additional costs of hiring a temporary employee), the following costs may be incurred:

- 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;
- Lower quality and less accountability for quality;
- Lost sales;
- Less responsive customer service and increased customer dissatisfaction;

²⁶ 29 C.F.R. § 1630.2(p)(2).

²⁷ Meeting of June 8, 2011 - EEOC to Examine Use of Leave As Reasonable Accommodation: Written Testimony of Christopher Kuczynski, Assistant Legal Counsel, EEOC, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (June 8, 2011), <http://www.eeoc.gov/eeoc/meetings/6-8-11/kuczynski.cfm> [hereinafter “Kuczynski Testimony”].

²⁸ See EEOC, Reasonable Accommodation, *supra* note 16, at Q&A 44; see also Kuczynski Testimony, *supra* note 27 (quoting EEOC, Reasonable Accommodation).

- Deferred projects;
- Increased burdens on management staff required to find replacement workers, or readjust workflow or readjust priorities in light of absent employees;
- Increased stress on overburdened co-workers; and
- Lower morale.²⁹

Thus, leave is more likely to be deemed an undue hardship the more complex the nature of the employee's work, the more difficult it would be to replace the employee, or the more difficult it would be to redistribute that employee's work.³⁰

According to the EEOC, an employer cannot base an assertion of undue hardship on the negative effect an accommodation would have on the morale of other employees,³¹ but may claim undue hardship when the accommodation sought would be "unduly disruptive" to other employees' ability to do their jobs.³² Additionally, "the employer may consider the impact on its operations caused by the employee's initial twelve-week absence, along with the undue hardship factors specified in the ADA" in evaluating whether additional leave would impose an undue hardship.³³

V. THE ADA REQUIRES AN INTERACTIVE, FACT-SPECIFIC PROCESS

A. The Employee Need Only Show That a Requested Accommodation Is Generally Reasonable; It Is the Employer's Obligation to Demonstrate Specifically That a Request Would Create an Undue Hardship.

An employee requesting a reasonable accommodation, such as a leave, need only show that the requested accommodation is "reasonable on its

²⁹ Meeting of June 8, 2011 - EEOC to Examine Use of Leave As Reasonable Accommodation: Written Testimony of Ellen McLaughlin, Partner, Seyfarth Shaw LLP, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (June 8, 2011), <http://www.eeoc.gov/eeoc/meetings/6-8-11/mclaughlin.cfm>, Section F (citing Mercer Health, Productivity, and Absence Management Programs 2006 Survey Report; Mercer 2010 Survey on the Total Financial Impact of Employee Absences) [hereinafter "McLaughlin Testimony"].

³⁰ If an employer has vacancies for comparable positions, it may have a more difficult time demonstrating that permitting the employee a leave would be an undue hardship. *Cf.* Transcript of EEOC Meeting of June 8, 2011 to Examine Use of Leave as a Reasonable Accommodation (comment by Stuart Isler that asks employers whether they have vacancies when they are considering whether to terminate an employee seeking leave as an accommodation).

³¹ *See* EEOC, Reasonable Accommodation, *supra* note 16.

³² *Id.*

³³ FMLA, ADA, and Title VII, *supra* note 17, at Q&A 12.

face, *i.e.*, ordinarily or in the run of cases.”³⁴ Once that is accomplished, the employer must either grant the request, or “show special (typically case-specific) circumstances that demonstrate undue hardship in the particular circumstances.”³⁵ The EEOC has explained that:

Whether a particular accommodation will impose an undue hardship for a particular employer is determined on a case by case basis. Consequently, an accommodation that poses an undue hardship for one employer at a particular time may not pose an undue hardship for another employer, or even for the same employer at another time. Likewise, an accommodation that poses an undue hardship for one employer in a particular job setting, such as a temporary construction worksite, may not pose an undue hardship for another employer, or even for the same employer at a permanent worksite.³⁶

As noted above, the ADA does not identify any amount of leave time that would automatically be deemed an undue hardship.³⁷

B. An Inflexible Maximum Leave Policy Can Violate the ADA.

Because the employer has an obligation to assess each requested accommodation on a case-by-case basis, it may not apply a maximum leave policy (under which employees are automatically terminated after they have been on leave for a certain period of time) to an employee with a disability who needs additional leave, unless there is another effective accommodation or granting the additional leave would cause an undue hardship.³⁸ In some instances, employers may need to modify their

³⁴ U.S. Airways, Inc. v. Barnett, 535 U.S. 391, 401-02 (2002).

³⁵ *Id.* at 402. Note that if, during the interactive process, the employer determines that more than one reasonable accommodation exists that would enable the individual to perform the essential functions of his job, “the preference of the individual with a disability should be given primary consideration;” however, the employer “has the ultimate discretion to choose between effective accommodations, and may choose the less expensive accommodation or the accommodation that is easier for it to provide.” 29 C.F.R. § 1630.9.

³⁶ 29 C.F.R. § 1630.15(d).

³⁷ See *Garcia-Ayala v. Lederle Parenterals, Inc.*, 212 F.3d 638, 650 (1st Cir. 2000) (stating that “[t]hese are difficult, fact intensive, case-by-case analyses, ill-served by per se rules or stereotypes” and holding that plaintiff’s request for an additional two-month leave after 15 months of leave did not constitute undue hardship); see also East Testimony, *supra* note 10 (collecting cases with varying ranges of leave time deemed reasonable); *Written Testimony of Center, Director, Disability Rights Program, Legal Aid Society* (June 8, 2011), <http://www.eeoc.gov/eeoc/meetings/6-8-11/center.cfm> [hereinafter “Center Testimony”] (citing cases that state that lengthy leaves, including in excess of a year, may be found to be reasonable accommodations).

³⁸ See EEOC, Reasonable Accommodation, *supra* note 16.

workplace and leave policies to comply with reasonable accommodation requirements.³⁹

Even if the employer is generous in the amount of leave time it permits (for example, permitting employees on short term disability to be out on leave for a year), a maximum leave policy does not satisfy an employer's obligation to provide a reasonable accommodation to an employee who needs additional leave.

In fact, the EEOC has vigorously challenged such policies. For example, Sears had a maximum one-year leave policy in which any employee who did not return to work at the end of the year was automatically terminated.⁴⁰ The EEOC filed suit against Sears in 2004.⁴¹ In 2009, after extensive litigation, the EEOC entered into a \$6.3 million consent decree with Sears, which among other things required Sears to:

- Designate a core group of individuals who would review accommodations requests and would have to approve terminations caused by exhaustion of leave;
- Change the way it communicates with employees on medical leave, including informing them by certified mail of their rights to request accommodations, and identifying accommodations options;
- Communicate directly with employees' doctors about possible accommodations; and
- Seek updates from its workers compensation carrier when medical releases are obtained.⁴²

The EEOC also sued Supervalu over a similar one-year maximum disability leave policy, and entered into a \$3.2 million dollar consent decree with the company.⁴³ The consent decree required that Supervalu hire a consultant to develop a list of accommodations for employees with common restrictions and that it hire a job descriptions consultant to review

³⁹ *Id.*; see also *U.S. Airways*, 535 U.S. at 397–98 (2002) (stating that an employer may be required to modify a disability-neutral policy so as to create a reasonable accommodation for an employee).

⁴⁰ See *E.E.O.C. v. Sears, Roebuck & Co.*, No. 04 C 7282, 2005 WL 2664367, at *2 (N.D. Ill. July 22, 2005) (granting motion for discovery).

⁴¹ *Id.*

⁴² See Meeting of June 8, 2011 - EEOC to Examine Use of Leave As Reasonable Accommodation: Written Testimony of John Hendrickson, Regional Attorney, EEOC, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (June 8, 2011), <http://www1.eeoc.gov/eeoc/meetings/6-8-11/hendrickson.cfm> [hereinafter "Hendrickson Testimony"].

⁴³ *EEOC v. Supervalu, Inc.*, 2010 WL 5071196 (N.D. Ill. Dec. 12, 2010).

the company's job descriptions to ensure that they accurately described what was actually done within each position.⁴⁴

Thus, to comply with the ADA, an employer with a maximum leave policy should amend its policy to allow an employee who needs additional leave time beyond its maximum amount to take that time so long as doing so would not create an undue hardship. In addition, employers should, throughout the leave process, communicate with employees, physicians, and others to determine whether other accommodations are needed that would enable employees to return to work.⁴⁵ Employers should be careful if they separate leave administration related to FMLA, workers compensation, or disability benefits from ADA administration because it creates a risk that there will be a lack of information flow between the two.⁴⁶

VI. A "NO FAULT" ATTENDANCE POLICY CAN VIOLATE THE ADA

Also subject to challenge are "no fault" attendance policies in which employees are subject to discipline for reaching a certain number of absences, regardless of the cause of the absences. Such policies adversely affect people with disabilities, and can evidence a failure to accommodate if they do not make exceptions for individuals whose "chargeable absences" were caused by their disabilities.⁴⁷ The EEOC's largest settlement to date has been with Verizon, which recently paid \$20 million to settle a nationwide class disability discrimination lawsuit that challenged its no-fault attendance policy.⁴⁸

VII. LEAVES OF VARYING DURATIONS HAVE BEEN DEEMED REASONABLE

As noted above, the ADA does not identify any amount of leave time that would automatically be deemed an undue hardship.⁴⁹ As the court explained in *Garcia-Ayala v. Lederle Parenterals, Inc.*,⁵⁰ "[t]hese are difficult, fact intensive, case-by-case analyses, ill-served by per se rules or stereotypes."⁵¹ While a comprehensive analysis of the case law is beyond

⁴⁴ *Id.* at *2.

⁴⁵ See Center Testimony, *supra* note 37.

⁴⁶ See Hendrickson Testimony, *supra* note 42.

⁴⁷ See East Testimony, *supra* note 10.

⁴⁸ See U.S. Equal Employment Opportunity Commission, *Verizon to Pay \$20 Million to Settle Nationwide EEOC Disability Suit* (July 6, 2011), <http://www.eeoc.gov/eeoc/newsroom/release/7-6-11a.cfm>.

⁴⁹ See Center Testimony, *supra* note 37.

⁵⁰ 212 F.3d 638 (1st Cir. 2000).

⁵¹ *Id.* at 650; see also East Testimony, *supra* note 10 (collecting appellate and district court cases with varying ranges of leave time deemed reasonable); Center Testimony,

the scope of this paper, below are examples of cases in which appellate courts addressed situations where leaves of varying durations were sought as reasonable accommodations.

The following cases—which are by no means a comprehensive list—found that the requested leaves could be reasonable accommodations:

- In *Garcia-Ayala v. Lederle Parenterals, Inc.*, the employee was a clerical worker who took a medical leave of absence for cancer treatment.⁵² The court held that that plaintiff's request for an additional two-month leave after fifteen months of leave did not constitute an undue hardship.⁵³ The court pointed to the fact that the company had been using temporary employees to cover in her absence and there was no evidence that they cost the company more or were unsatisfactory in their performance.⁵⁴
- In *Nunes v. Wal-Mart Stores*,⁵⁵ the court reversed summary judgment in a case where the employee, who suffered from fainting episodes, had taken a two-month leave, returned to work for six months, then went out on another leave. She had been on this second leave for approximately eight months and sought an additional one to two months of leave through the holiday season as a reasonable accommodation.⁵⁶ The court noted that the defendant's own policy of allowing eligible employees up to one year of unpaid leave and its regular practice, as a large retailer, of hiring temporary workers factored into the analysis regarding whether the accommodation sought would impose an undue hardship.⁵⁷
- In *Dark v. Curry County*,⁵⁸ the court found that there was an issue of material fact regarding whether employee's use of eighty-nine days of accumulated sick leave to allow him to adjust his medication was a reasonable accommodation.⁵⁹
- In *Criado v. IBM*,⁶⁰ the employee, whose leave was approved for approximately five weeks, was terminated after employer

supra note 37 (citing cases that state that lengthy leaves, including in excess of a year, may be found to be reasonable accommodations).

⁵² *Garcia-Ayala*, 212 F.3d at 648.

⁵³ *Id.* at 648-50.

⁵⁴ *Id.*

⁵⁵ 164 F.3d 1243 (9th Cir. 1999).

⁵⁶ *Id.* at 1246.

⁵⁷ *Id.* at 1247-48.

⁵⁸ 451 F.3d 1078 (9th Cir. 2006).

⁵⁹ *Id.* at 1090.

⁶⁰ 145 F.3d 437 (1st Cir. 1998).

claimed it had not received paperwork from employee's physician requesting additional time. In affirming a jury verdict in the employee's favor, the court pointed out that the employer provides all employees with fifty-two weeks of paid disability leave, precluding it from asserting that the requested leave would have created an undue hardship.⁶¹

- In *Smith v. Diffe Ford-Lincoln-Mercury, Inc.*,⁶² the employee took a medical leave for approximately six weeks.⁶³ She was terminated thirteen days prior to her scheduled return.⁶⁴ In evaluating her ADA claim, the court determined that where the amount of leave sought by the employee fell within the FMLA leave time the employee was entitled to receive, and therefore it could not conclude that the length was unreasonable or would cause an undue hardship on the employer.⁶⁵

In contrast, the following cases rejected the requested leaves:

- In *Walton v. Mental Health Association of Southeastern Pennsylvania*,⁶⁶ the court held that it would have been an undue hardship for the employer to extend the employee's unpaid leave beyond the approximately nine weeks already given where the employee was a program director in charge of managing a program and overseeing staff.⁶⁷
- In *Byrne v. Avon Products, Inc.*,⁶⁸ the court rejected a multi-month leave as a reasonable accommodation. The court stated that extended leaves of absence are not reasonable accommodations because reasonable accommodations are intended to allow an employee to perform his essential job functions and "[n]ot working is not a means to perform the job's essential functions."⁶⁹
- In *Walsh v. United Parcel Service*,⁷⁰ the court held that where the employee had already received eighteen months of leave and was seeking additional time for medical evaluations, said request was unreasonable because the employee could not show that the delay in getting the information was due to his

⁶¹ *Id.* at 444.

⁶² 298 F.3d 955 (10th Cir. 2002).

⁶³ *Id.* at 959.

⁶⁴ *Id.*

⁶⁵ *Id.* at 960-62.

⁶⁶ 168 F.3d 661, 671 (3d Cir. 1999).

⁶⁷ *Id.*

⁶⁸ 328 F.3d 379 (7th Cir. 2003).

⁶⁹ *Id.* at 381.

⁷⁰ 201 F.3d 718 (6th Cir. 2000).

disability.⁷¹ The employee's request was deemed to be a request for indefinite leave and thus, unreasonable.⁷²

C. Uncertainty is Common When it Comes to Leave.

An employee seeking leave as a reasonable accommodation need not show that the leave is certain or even likely to be successful in proving that it is a reasonable accommodation; the employee need only show it would plausibly enable the employee to return and perform his job.⁷³ Often times, an employee (or her physician) cannot give a precise date when she will be able to return to work. An employer has no obligation to provide an indefinite leave.⁷⁴

However, an indefinite leave must be distinguished from one where an employee gives an approximate return date or where the situation changes and the original return date has been revised.⁷⁵ A leave request is not "indefinite" simply because the nature of the employee's condition is such that only an approximate return date is provided.⁷⁶ The EEOC has made the

⁷¹ *Id.* at 723, 726.

⁷² *Id.* at 727-28.

⁷³ *Humphrey v. Mem'l Hosps. Ass'n*, 239 F.3d 1128, 1136 (9th Cir. 2001) (citing *Kimbro v. Atl. Richfield Co.*, 889 F.2d 869 (9th Cir. 1989)).

⁷⁴ *See, e.g., Myers v. Hose*, 50 F.3d 278, 280 (4th Cir. 1995) (holding that employer has no obligation to provide an employee with an indefinite leave); *Peyton v. Fred's Stores of Ark., Inc.*, 561 F.3d 900 (8th Cir. 2009), *cert. denied*, 130 S. Ct. 243 (2009) (affirming summary judgment where employee requested an indefinite medical leave and could not say when, if ever, she could return to work); *Monette v. Elec. Data Sys.*, 90 F.3d 1173 (6th Cir. 1996) (holding that it would have been an undue hardship to place an employee on an indefinite leave until another position opened up where the employee had already been on eight months of leave and had not advised his employer of his desire or intentions to return to work); *see also The Ams. With Disabilities Act: Applying Performance And Conduct Standards To Employees With Disabilities* ("ADA: Performance and Conduct"), U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION <http://www.eeoc.gov/facts/performance-conduct.html> (last visited Sept. 11, 2012) (pointing out that indefinite leave, as well as an incorrect return date, are distinct from indefinite leave). *But see Cehrs v. Ne. Ohio Alzheimer's Research Ctr.*, 155 F.3d 775, 782 (6th Cir. 1998) (quoting *Norris v. Allied-Sysco Food Servs. Inc.*, 948 F. Supp. 1418, 1439 (N.D. Cal. 1996)) ("Upon reflection, we are not sure that there should be a *per se* rule that an unpaid leave of indefinite duration (or a very lengthy period, such as one year) could never constitute a 'reasonable accommodation' under the ADA."). Further, an employer may be hard-pressed to explain why it would be an undue hardship to allow an employee an indefinite leave if the person is working in a position where she has numerous peers and where there is extremely high turnover and/or the role has little specialization.

⁷⁵ *See* ADA: Performance and Conduct, *supra* note 74.

⁷⁶ *See Garcia-Ayala v. Lederle Parenterals, Inc.*, 212 F.3d 638, 648-50 (1st Cir. 2000) (discussing difference between indefinite leave and one with approximate or revised return dates); *see also East Testimony*, *supra* note 10 (citing cases holding that a probable return date is adequate for reasonable accommodation purposes). Other cases have also found that approximate return to work dates do not make the leave request

same point: “In certain situations, an employee may be able to provide only an approximate date of return. Treatment and recuperation do not always permit exact timetables. Thus, an employer cannot claim undue hardship solely because an employee can provide only an approximate date of return.”⁷⁷ The EEOC gives the example of an employee who, while originally scheduled for an eight-week leave for surgery, develops complications that then require an anticipated additional ten to fourteen weeks of leave. That additional time would be deemed a reasonable accommodation unless it would cause an undue hardship.⁷⁸

VIII. “INTERMITTENT” LEAVES AND MODIFIED SCHEDULES CAN BE REASONABLE ACCOMMODATIONS

Sometimes, employees with disabilities seek “intermittent” medical leaves or modified schedules as a reasonable accommodation for their disabilities. These situations are among the toughest for employers to assess, particularly when the leave sought is unplanned.⁷⁹ Again, the analysis is a fact-specific one, and there are no bright-line rules that can be followed. Certainly, some positions are much better suited to flexible hours and schedule than others are.

Ward v. Massachusetts Health Research Institute, Inc.,⁸⁰ is a prime example of a situation where flexible hours/schedules appear reasonable. In

indefinite. For example, in *Haschmann v. Time Warner Entm’t Co.*, 151 F.3d 591 (7th Cir. 1998), the court rejected the employer’s contention that an it would be an undue hardship to give an employee an additional two to four weeks of medical leave on the grounds that the approximate return to work date would create uncertainty. The court pointed out that the employer had not made any inquiry about what accommodations might be needed, and did not make any efforts to independently assess the employee’s prognosis and the reasonableness of the request for leave. The court also highlighted evidence that the job had been vacant for many months before the employee had been hired, that the company took almost six months to fill her position after her discharge, and that subordinates handled the job in the interim. Similarly, in *Graves v. Finch Pruyn & Co.*, 457 F.3d 181 (2d Cir. 2006), the court held that a where an employee already on a medical leave asked for “more time” to schedule an appointment with a specialist and said it would take “maybe a couple of weeks,” the request was not one for an indefinite leave.

⁷⁷ See EEOC, Reasonable Accommodation, *supra* note 16.

⁷⁸ See *id.* (stating that in the event that the employee’s return date changes, “the employer may seek medical documentation to determine whether it can continue providing leave without undue hardship or whether the request for leave has become one for leave of indefinite duration.”).

⁷⁹ See *Meeting of June 8, 2011 - EEOC to Examine Use of Leave As Reasonable Accommodation: Written Testimony of Edward Isler, Partner, Isler Dare Ray Radcliffe & Connolly, P.C.*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, <http://www.eeoc.gov/eeoc/meetings/6-8-11/isler.cfm> [hereinafter “Isler Testimony”]; McLaughlin Testimony, *supra* note 29.

⁸⁰ 209 F.3d 29 (1st Cir. 2000).

Ward, the employee was a lab assistant/data entry assistant.⁸¹ He was often late to work due to arthritis, but each day he put in a full day of work.⁸² He sought a flexible schedule that allowed him an exception to the employer's policy that work must begin at 9 a.m. each day.⁸³ The request was rejected and the employee was terminated for tardiness.⁸⁴ The court reversed summary judgment in favor of the employer, refusing to hold that a flexible schedule is per se unreasonable or that a modified schedule must be regular or predictable.⁸⁵ An employer must show evidence of undue hardship, such as that accommodating the employee would have required shifting duties to a colleague or keeping the lab open at significant cost.⁸⁶

However, a number of cases have determined that specific requests for leave taken on an as-needed basis would create an undue hardship for employers.⁸⁷ Undue hardship is often found where the absenteeism is excessive or where jobs require physical presence at set times:

- In *EEOC v. Yellow Freight System, Inc.*, the court determined that where the employee was a dockworker—a position that required him to be present at the worksite—and where he had significant absenteeism that was erratic and unpredictable, attendance was an essential function of his job.⁸⁸ The court noted that the employee had rejected the ninety-day leave of absence offered to him, and had instead sought unlimited absences on an as-needed basis.⁸⁹
- In *Wood v. Green*, the employee suffered from cluster headaches.⁹⁰ He was routinely granted discretionary leaves over the course of several years (usually of one to three month durations) and missed substantial amounts of work throughout

⁸¹ *Id.* at 31.

⁸² *Id.*

⁸³ *Id.* at 32.

⁸⁴ *Id.*

⁸⁵ *Id.* at 33.

⁸⁶ *Id.* at 37; *see also* *Ralph v. Lucent Techs., Inc.*, 135 F.3d 166, 171-72 (1st Cir. 1998) (stating that allowing an employee to return to work on provisional, part-time basis for four weeks, even after the employer gave him a year of leave with pay and changed his work assignment and supervisor, was a reasonable accommodation under the ADA).

⁸⁷ *See, e.g.*, *E.E.O.C. v. Yellow Freight Sys., Inc.*, 253 F.3d 943 (7th Cir. 2001); *Wood v. Green*, 323 F.3d 1309 (11th Cir. 2003); *Maziarka v. Mills Fleet Farm, Inc.*, 245 F.3d 675 (8th Cir. 2001); *Corder v. Lucent Technologies Inc.*, 162 F.3d 924 (7th Cir. 1998); *Buckles v. First Data Res., Inc.*, 176 F.3d 1098 (8th Cir. 1999); *Pickens v. Soo Line R.R. Co.*, 264 F.3d 773 (8th Cir. 2001).

⁸⁸ 253 F.3d at 957-58.

⁸⁹ *Id.* at 946, 950.

⁹⁰ 323 F.3d at 1311.

that time.⁹¹ He was later terminated one month into a discretionary leave with no termination date.⁹² The court held that indefinite leaves are not reasonable accommodations.⁹³ The court looked to the employee's history of repeated requests for leaves as evidence that there was no indication that he would be able to return to work within a reasonable time period.⁹⁴ The court also held that the fact that he received prior accommodations did not make the accommodation sought reasonable.⁹⁵

- In *Maziarka v. Mills Fleet Farm, Inc.*, the court determined that the accommodation sought by an employee with irritable bowel—the ability to be absent from his position as receiving clerk and to be allowed to make up the time later—would constitute an undue hardship, as the unpredictability interfered with employer's ability to schedule employees to efficiently receive and process merchandise.⁹⁶
- In *Corder v. Lucent Technologies, Inc.*, an employee who had repeated, extended, and unpredictable absences due to depression and anxiety over the course of several years was ultimately terminated by her employer.⁹⁷ The employer had previously given her numerous extended leaves, adjusted her schedule, and made other work accommodations.⁹⁸ The employee requested further leave as needed; the court found this to be an indefinite leave that the employer did not need to provide.⁹⁹
- In *Buckles v. First Data Resources, Inc.*, the court reversed a denial of judgment as a matter of law following a jury verdict in the employee's favor where the employee, who had acute recurrent rhinosinusitis, had sought a workplace free of irritants and unlimited leave so that he could leave work whenever he thought he would be exposed to potential irritants.¹⁰⁰ The court rejected these requests as causing an undue hardship.¹⁰¹
- In *Pickens v. Soo Line Railroad Co.*, the employee repeatedly exercised his right to withdraw his name from the list of employees available for job assignments twenty-nine times

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.* at 1312-14.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Maziarka v. Mills Fleet Farm, Inc.*, 245 F.3d 675, 681 (8th Cir. 2001).

⁹⁷ *Corder v. Lucent Technologies Inc.*, 162 F.3d 924, 925-27 (7th Cir. 1998).

⁹⁸ *Id.*

⁹⁹ *Id.* at 928.

¹⁰⁰ *Buckles v. First Data Res., Inc.*, 176 F.3d 1098, 1101-02 (8th Cir. 1999).

¹⁰¹ *Id.*

within a ten month period.¹⁰² The court held that he was not a qualified individual, and his request to work at his discretion was not reasonable.¹⁰³

IX. HELP MAY BE ON THE WAY WITH FURTHER GUIDANCE FROM THE EEOC EXPECTED

The requirement that each determination regarding whether to provide leave as a reasonable accommodation be individualized and fact-specific has led to much uncertainty. Employers often struggle to determine whether requested leaves must be granted or whether they may, in fact, be denied as undue hardships. This is particularly so when the leave sought is intermittent and unplanned.¹⁰⁴

As a result, on June 8, 2011, the EEOC held a public meeting to discuss the subject.¹⁰⁵ Written and oral testimony were provided by EEOC attorneys and counsel representing both employees and employers (this testimony has been cited extensively in this paper).¹⁰⁶ Comments were also solicited from the general public. A written guidance is expected at some point.¹⁰⁷

CONCLUSION

Even in the absence of further guidance from the EEOC, an employer must be sure to assess a request for a medical leave under all of the applicable statutes, determining which statutes cover the employee and the benefits to which he is entitled. The employer must provide the employee with the greater protections of each applicable statute. As soon as there is a triggering event (e.g., a request for leave), the employer must engage in the interactive process with the employee, taking steps to determine whether any accommodations exist that would enable the employee to perform the essential functions of his job.

The employer and employee must both recognize that determination of whether a requested leave must be granted as a reasonable accommodation

¹⁰² *Pickens v. Soo Line R.R. Co.*, 264 F.3d 773, 775-76 (8th Cir. 2001).

¹⁰³ *Id.* at 778.

¹⁰⁴ See Isler Testimony, *supra* note 79.

¹⁰⁵ See *Meeting of June 8, 2011- EEOC to Examine Use of Leave As Reasonable Accommodation*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, <http://www.eeoc.gov/eeoc/meetings/6-8-11/>.

¹⁰⁶ See East Testimony, *supra* note 10; Center Testimony, *supra* note 37; Kuczynski Testimony, *supra* note 27; McLaughlin Testimony, *supra* note 29; Hendrickson, *supra* note 42; Isler Testimony, *supra* note 79.

¹⁰⁷ See *supra* note 105.

or whether it can be denied because it would cause an undue hardship is one which requires a fact-intensive inquiry. Finally, employers must think twice about having “leave policies that terminate employees once they have exhausted a maximum, pre-determined amount of leave. The fact that the leave time allowed by the policy is generous does not provide a defense where the employer cannot establish that additional leave sought by an employee would create an undue hardship.