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Accommodating Absence: Medical Leave as an ADA Reasonable Accommodation

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NOTE

ACCOMMODATING ABSENCE: MEDICAL LEAVE AS AN ADA REASONABLE ACCOMMODATION

Sean P. Mulloy*

The Americans with Disabilities Act (ADA) is widely regarded as one of the most significant pieces of civil rights legislation in American history. Among its requirements, Title I of the ADA prohibits employers from discriminating against people with disabilities and requires that employers make reasonable accommodations for qualified individuals. Many questions about the scope of the reasonable-accommodation mandate remain, however, as federal circuit courts disagree over whether extended medical leave may be considered a reasonable accommodation and whether an employee on leave is a qualified individual. This Note argues that courts should presume finite unpaid medical leaves of absence are a reasonable accommodation under certain circumstances and shift the focus of judicial inquiry to the employer's burden of showing undue hardship. Creating a presumption for medical leave is consistent with the text and purpose of the ADA, aligns with Supreme Court case law, and serves as a better framework for balancing competing policy concerns compared to existing approaches.

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INTRODUCTION

For many Americans navigating the workforce with a chronic condition or illness, the story of Raymond Severson is not particularly unusual. After years of performing his responsibilities as a supervisor at a fabricator of retail-display fixtures, he wrenched his back one day and aggravated a condition that caused him chronic back pain.¹ On the advice of his doctor, he arranged with his employer to take time off under the Family Medical Leave Act (FMLA) to receive treatment for his injury.² When his back did not respond to the initial treatment, his doctor told him he would need to take additional time off to undergo back surgery.³ When Severson communicated to his employer that he needed to take an additional unpaid two-month leave of absence, his manager informed him that his employment would end the day after his FMLA leave was exhausted.⁴ Although Severson's employer complied with its FMLA obligation to provide twelve weeks of paid leave, Severson's situation prompts the question whether employers have any obligation to provide additional unpaid medical leave as a reasonable accommodation under the Americans with Disabilities Act (ADA).⁵

This question has presented significant problems for both employers in their efforts to comply with federal law and for employees who are unsure of the options available to them when they become ill.⁶ Requests for medical leaves of absence are commonplace in the modern workplace. It is estimated that nearly one in five Americans has a disability and over half of those with disabilities have a severe disability that limits at least one major life activity.⁷

1. Severson v. Heartland Woodcraft, Inc., 872 F.3d 476, 478–79 (7th Cir. 2017), cert. denied, 138 S. Ct. 1441 (2018).

2. *Id.*

3. *Id.*

4. *Id.* at 479–80.

5. 42 U.S.C. §§ 12101–12213 (2012).

6. Jessica B. Summers, *The Shifting Law Surrounding Leave as a Reasonable Accommodation Under the ADA*, FED. LAW., Mar. 2018, at 13.

7. MATTHEW W. BRAULT, U.S. CENSUS BUREAU, AMERICANS WITH DISABILITIES: 2010, at 5 (July 2012), <https://www2.census.gov/library/publications/2012/demo/p70-131.pdf> [<https://perma.cc/P34U-K9AD>] (finding approximately 56.7 million people living in the Unit-

Over fifty million Americans suffer from chronic conditions, many of whom must seek leaves of absence in order to receive medical treatment, to heal and rehabilitate from injuries, or to undergo other types of medical care.⁸

For an employee with a disability⁹ who needs time off from work, their employer's decision to grant or reject their request for medical leave has a significant effect on their ability to keep employment.¹⁰ For shorter-term absences, the FMLA entitles employees to up to twelve weeks of unpaid leave for serious health conditions.¹¹ But beyond the twelve weeks mandated by the FMLA, employees have little guidance on whether they are entitled to additional leave.

Courts have been inconsistent and unclear regarding how extended medical leaves of absence fit into an employer's ADA obligations. Some circuit courts have held that leaves of absence may constitute a reasonable accommodation¹² depending on specific factual circumstances and so long as granting such a request would not place an undue hardship¹³ on the employer.¹⁴ The Seventh Circuit has taken the opposite position, finding that employers are never required to provide extended leave under the ADA and

ed States had some kind of disability in 2010, accounting for 18.7 percent of the population, and that 12.6 percent, or 38.3 million people, had a severe disability).

8. See Emily Ihara, *Workers Affected by Chronic Conditions: How Can Workplace Policies and Programs Help?*, GEO. UNIV. HEALTH POL'Y INST. (June 2004), <https://hpi.georgetown.edu/workplace/> [<https://perma.cc/ZZ4F-NYPA>] (finding that at least fifty-eight million adults age eighteen to sixty-five, or 34 percent, have at least one chronic condition that may require medical leave).

9. This Note uses person-first language when referring to people with disabilities in an attempt to use language that affirms the personhood, dignity, and agency of such people instead of solely identifying people with their disability or condition. See *Choosing Words for Talking About Disability*, AM. PSYCHOL. ASS'N, <https://www.apa.org/pi/disability/resources/choosing-words> [<https://perma.cc/D938-TA6B>]. It should be noted, however, that there is disagreement over language among disability rights activists and scholars, and that some groups and people within the disability community prefer identity-first language. *Id.*

10. Stephen F. Befort, *The Most Difficult ADA Reasonable Accommodation Issues: Reassignment and Leave of Absence*, 37 WAKE FOREST L. REV. 439, 445 (2002) ("A leave of absence may enable a disabled employee, through rest and/or rehabilitation, to return to productive work.").

11. 29 U.S.C. § 2612(a)(1) (2018).

12. 42 U.S.C. § 12111(9) (2012) (defining reasonable accommodations as including "making existing facilities used by employees readily accessible to and usable by individuals with disabilities" and "job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities").

13. *Id.* § 12111(10) (defining undue hardship as "an action requiring significant difficulty or expense, when considered in light of" a number of factors relating to the financial resources of the employer, the expense of the accommodation, and other factors).

14. See *infra* Section II.A.

that employees on extended leave are not qualified to receive ADA protections.¹⁵ The Supreme Court has declined to speak on the issue.¹⁶

This Note argues that courts should presume that extended medical leave is a reasonable accommodation under Title I of the ADA, subject to certain conditions. Part I describes the legal and statutory background of the ADA and its mandate that employers provide reasonable accommodations to qualified individuals. Part II explores the circuit split among courts as to whether extended medical leave may qualify as a reasonable accommodation under the statute. Finally, Part III advocates for reformulating the analysis of extended leave under the ADA to better comply with the statute's text and legislative history, Supreme Court case law, and policy objectives.

I. MEDICAL LEAVE AND THE LAW OF REASONABLE ACCOMMODATIONS

A significant question remains whether the ADA entitles employees to medical leave beyond the requirements of the FMLA. Section I.A describes the ADA's Title I regime and its reasonable-accommodation provision. It also examines a period of early judicial backlash against the ADA and Congress's response through the ADA Amendments Act. Then, Section I.B considers the Supreme Court's only precedent addressing reasonable accommodations under the ADA.

A. *The ADA and Reasonable Accommodations*

When enacted in 1990, the ADA¹⁷ was heralded by commentators and advocates as the “most important piece of federal legislation since the Civil Rights Act of 1964.”¹⁸ The purpose of the ADA was to provide equal opportunity for people with disabilities and to address the “serious and pervasive social problem” of discrimination against people with disabilities.¹⁹ Among

15. *Severson v. Heartland Woodcraft, Inc.*, 872 F.3d 476, 481 (7th Cir. 2017), *cert. denied*, 138 S. Ct. 1441 (2018); *Byrne v. Avon Prods., Inc.*, 328 F.3d 379, 381 (7th Cir. 2003) (holding that the “[i]nability to work for a multi-month period removes a person from the class protected by the ADA”).

16. *Severson*, 138 S. Ct. 1441 (denying certiorari).

17. 42 U.S.C. §§ 12101–12213.

18. LAWRENCE O. GOSTIN & HENRY A. BEYER, IMPLEMENTING THE AMERICANS WITH DISABILITIES ACT: RIGHTS AND RESPONSIBILITIES OF ALL AMERICANS, at xiii (1993); *see also* 136 CONG. REC. 21,923 (1990) (statement of Sen. Harkin) (referring to the ADA as the “emancipation proclamation for people with disabilities”); Mark C. Weber, *Unreasonable Accommodation and Due Hardship*, 62 FLA. L. REV. 1119, 1122 (2010) (likening the ADA's accommodations requirement to the Thirteenth Amendment).

19. 42 U.S.C. § 12101(a) (“Congress finds that . . . historically, society has tended to isolate and segregate individuals with disabilities, and . . . discrimination against individuals with disabilities continue to be a serious and pervasive social problem [and] . . . the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals . . .”).

its requirements,²⁰ Title I of the ADA prohibits employers from “discriminat[ing] against a qualified individual on the basis of disability” in regard to hiring and other employment privileges and actions.²¹ Discrimination by the employer includes, among other actions, failing to make reasonable accommodations.²² To bring a Title I ADA claim, the employee must show that (1) she has a disability, (2) she is otherwise able to perform the essential functions of the position,²³ and (3) the employer discriminated against her because of the disability or failed to grant her a reasonable accommodation.²⁴

In determining what constitutes a reasonable accommodation, the law remains woefully underdeveloped.²⁵ The ADA itself does not define the phrase but instead provides a nonexhaustive list of accommodations an employer may provide, including “making existing facilities used by employees readily accessible to and usable by individuals with disabilities” as well as “job restructuring, part-time or modified work schedules, [and] reassignment to a vacant position.”²⁶ As a mechanism of implementing accommodations, the ADA requires employers to engage in an interactive process with the employee.²⁷ The interactive process is the method by which an employer determines whether there is an accommodation that would enable the em-

20. Other titles of the ADA prohibit discrimination and create requirements in the areas of public programs and services (Title II) and public accommodations (Title III), which are outside of the scope of this Note. *Id.* §§ 12131–12189.

21. *Id.* § 12112 (listing various forms of discrimination).

22. *Id.*

23. *Id.* § 12111(8) (defining qualified individual as “an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position”).

24. *E.g.*, *Jones v. Nationwide Life Ins. Co.*, 696 F.3d 78, 86–87 (1st Cir. 2012).

25. *E.g.*, Jeannette Cox, *Reasonable Accommodations and the ADA Amendments’ Overlooked Potential*, 24 GEO. MASON L. REV. 147, 147 (2016) (“The ‘little precedent’ available ‘remains severely underdeveloped,’ ‘in a state of chaos,’ and leaves ‘many issues unresolved.’ Circuit splits abound.” (footnotes omitted)).

26. 42 U.S.C. § 12111(9) (listing “acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities”).

27. 29 C.F.R. § 1630.2(o)(3) (2019) (“To determine the appropriate reasonable accommodation it may be necessary for the covered entity to initiate an informal, interactive process with the individual with a disability in need of the accommodation.”); *see also* Sam Silverman, *The ADA Interactive Process: The Employer and Employee’s Duty to Work Together to Identify a Reasonable Accommodation Is More than a Game of Five Card Stud*, 77 NEB. L. REV. 281, 288 (1998) (stating that employers have “a duty to participate in an interactive process”). *But 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, 667–69 (2004) (arguing the interactive process may not be required in light of the lack of statutory language requiring it, the fact the Supreme Court has not determined the EEOC regulations and guidance should receive deference by the courts, and the permissive construction of “best determined” in the EEOC regulations).

ployee with a disability to perform the essential functions of the position.²⁸ Rather than relying on a one-size-fits-all approach, the interactive process produces an individualized assessment.²⁹ It facilitates the necessary exchange of information between the employer and employee to determine the reasonableness of an accommodation, taking into account the employee's circumstances, the specific accommodation requested, and the burden it would place on the employer.³⁰ The ADA's imposition of an affirmative obligation to accommodate individuals—rather than merely a prohibition on conduct—makes the ADA a unique statutory regime.³¹ But, this aspect of the ADA also likely prompted the Supreme Court to limit the scope of its applicability through narrowing the definition of disability as a threshold issue.³²

In early ADA cases, courts limited the law's scope by declaring many plaintiffs "not disabled enough," in what many scholars have characterized as a backlash against the ADA.³³ Commentators have speculated that this backlash was fueled by judicial discomfort with the burden the statute imposed on employers.³⁴ Disability is defined in the statute as "a physical or mental impairment that substantially limits one or more major life activities of [the] individual."³⁵ In *Sutton v. United Airlines, Inc.*, the Supreme Court significantly limited who qualified as having a disability by considering an individual's ability to mitigate their impairment through corrective measures.³⁶ A few years later, in 2002, the Court went further by holding that an individual's impairment had to restrict their ability to perform a function

28. Grant T. Collins & Penelope J. Phillips, *Overview of Reasonable Accommodation and the Shifting Emphasis from Who is Disabled to Who Can Work*, 34 *HAMLIN L. REV.* 469, 482–85 (2011).

29. See, e.g., Silverman, *supra* note 27, at 300 ("If all parties engage in an interactive process and lay all their cards on the table the process will result in accommodating those who are disabled more quickly and allow employers to weed out individuals who are not disabled or who cannot be reasonably accommodated.").

30. See Stacy A. Hickox & Joseph M. Guzman, *Leave as an Accommodation: When Is Enough, Enough?*, 62 *CLEV. ST. L. REV.* 437, 440 (2014).

31. Nicole Buonocore Porter, *The New ADA Backlash*, 82 *TENN. L. REV.* 1, 8 (2014); J.H. Verkerke, *Disaggregating Antidiscrimination and Accommodation*, 44 *WM. & MARY L. REV.* 1385, 1387 (2003).

32. Porter, *supra* note 31, at 8.

33. See, e.g., Cox, *supra* note 25, at 148; Michelle T. Friedland, Note, *Not Disabled Enough: The ADA's "Major Life Activity" Definition of Disability*, 52 *STAN. L. REV.* 171, 180 (1999).

34. Cox, *supra* note 25, at 148.

35. 42 U.S.C. § 12102(1)(A) (2012). The definition of disability also includes a "record of such an impairment" or "being regarded as having such an impairment..." *Id.* § 12102(1)(B)–(C).

36. 527 U.S. 471, 488 (1999) (holding that "disability under the Act is to be determined with reference to corrective measures"), *superseded by statute*, ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (2008).

that was of “central importance to most people’s daily lives.”³⁷ As a result of these two cases, many ADA employment claims were dismissed and the scope of the statute was narrowed.³⁸

In 2008, Congress expressly rejected both decisions when it passed the ADA Amendments Act (ADAAA).³⁹ Congress found both decisions “narrowed the broad scope of protection intended to be afforded by the ADA, thus eliminating protection for many individuals whom Congress intended to protect.”⁴⁰ To fix the problem, the ADAAA listed examples of major life activities to further clarify that the definition of disability should be broadly construed.⁴¹ Congress’s explicit rejection of the Court’s interpretation of the ADA is an extraordinary and unusual course of action and signals how strongly Congress intended the statute to be interpreted broadly.⁴²

Following the enactment of the ADAAA and its broader definition of disability, courts have turned to other language in the statute to narrow its scope.⁴³ Because the ADA protects “qualified individuals” with disabilities, courts have zeroed in on the phrase “qualified individuals,” meaning people who are able to perform the essential functions of the position, with or without an accommodation.⁴⁴ Courts have increasingly found that plaintiffs bringing Title I ADA suits, while admittedly having a disability, are insufficiently qualified for the employment they seek.⁴⁵ Scholars have argued that

37. *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 198 (2002), *superseded by statute*, ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (2008).

38. See Porter, *supra* note 31, at 11 (“Between the mitigating measures rule in *Sutton* and the more stringent test for substantially limiting a major life activity under *Toyota*, the protected class has been substantially narrowed.”); *id.* at 13 (describing a study showing that employers have prevailed in 92 percent of ADA cases filed in court); Weber, *supra* note 18, at 1119–20 (“For twenty years, judicial and scholarly attention focused on who is a person with a disability entitled to the protections of the ADA. Narrow readings of coverage kept many cases with accommodations claims from reaching a decision on the merits.”).

39. ADA Amendments Act of 2008, Pub. L. 110-325, § 2(a)(1)–(8), 122 Stat. 3553, 3553–54 (2008); see also Curtis D. Edmonds, *Lowering the Threshold: How Far Has the Americans with Disabilities Act Amendments Act Expanded Access to the Courts in Employment Litigation?*, 26 J.L. & POL’Y 1, 2 (2018) (“The purpose of the ADAAA was to restructure and clarify the definition of the legal term ‘disability’ . . .”).

40. ADA Amendments Act of 2008 § 2(a)(4)–(5).

41. 42 U.S.C. § 12102(2)(A) (2012) (“[M]ajor life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.”).

42. See ADA Amendments Act of 2008 § 2(a)(7) (“[I]n particular, the Supreme Court, in the case of [*Toyota*] interpreted the term ‘substantially limits’ to require a greater degree of limitation than was intended by Congress . . .”); Richard L. Hasen, *End of the Dialogue?: Political Polarization, the Supreme Court, and Congress*, 86 S. CAL. L. REV. 205, 209 (2013) (showing Congress has only overridden an average of around 2.8 cases a year between 2001 and 2012).

43. See Edmonds, *supra* note 39, at 45.

44. 42 U.S.C. § 12111(8).

45. See Porter, *supra* note 31, at 69 (noting courts often rely on the qualified-individual inquiry when they prefer to grant summary judgement to the employer).

cases following the ADAAA reveal a new backlash against the ADA by courts who are hesitant to require accommodations that challenge or modify “structural norms of the workplace.”⁴⁶ These structural norms of the workplace include, among other things, employees’ accommodations for extended medical leave.⁴⁷ Whether the scope of the ADA should be expanded or restricted animates a split in lower courts over how to evaluate medical leave as an accommodation.⁴⁸

B. *The Barnett Reasonable-Accommodation Framework*

The Supreme Court has only once addressed the issue of reasonable accommodations under the ADA. In *U.S. Airways, Inc. v. Barnett*, the Court considered an employee’s request to be reassigned to a vacant position.⁴⁹ The employer denied the request on the basis that it would violate the company’s established seniority system.⁵⁰ The Court held that reassigning an employee to a position against a well-established seniority system is generally not a reasonable accommodation.⁵¹ The Court provided the caveat that this is generally the rule unless the plaintiff can show “special circumstances that make ‘reasonable’ a seniority rule exception in the particular case.”⁵²

Despite the fact that the employer prevailed, *Barnett* established three significant principles that should guide any analysis of accommodations going forward. First, *Barnett* made clear that the ADA generally does not require merely *equal* treatment of people with disabilities with regard to neutral policies but instead demands *preferential* treatment.⁵³ In support of this, the Court provided examples of office rules and policies that may re-

46. *Id.* at 5, 82 (“Although courts seem willing (in many cases) to require employers to grant accommodations to the physical functions of the job, the new backlash is revealed when we view cases where employees are requesting modifications to the structural norms of the workplace.”).

47. *See id.* at 5–6, 77–78 (listing “hours, shifts, [and] attendance policies” as part of the structural norms of the workplace).

48. *See infra* Part II.

49. 535 U.S. 391 (2002). Notably, this case was decided six years before the enactment of the ADAAA.

50. *Barnett*, 535 U.S. at 394. In *Barnett*, the plaintiff injured his back while working as a cargo-handler and requested to be transferred to a vacant mailroom position that was less physically demanding. *Id.* The employer denied his accommodation request because, under their seniority system, two other employees had priority for the position. *Id.*

51. *Id.*

52. *Id.* The Court explained that these special circumstances could be, for example, when the employer changes the seniority system frequently or regularly makes exceptions, which would “reduc[e] employee expectations that the system will be followed.” *Id.* at 405.

53. *Id.* at 397–98 (“By definition any special ‘accommodation’ requires the employer to treat an employee with a disability differently, *i.e.*, preferentially. And the fact that the difference in treatment violates an employer’s disability-neutral rule cannot by itself place the accommodation beyond the Act’s potential reach. Were that not so, the ‘reasonable accommodation’ provision could not accomplish its intended objective.”); *see also* Weber, *supra* note 18, at 1175–77.

quire modification.⁵⁴ This understanding is consistent with EEOC guidance interpreting the ADA,⁵⁵ as well as with the Court's jurisprudence on accommodations in other contexts, such as Title VII's mandate for religious accommodation.⁵⁶ The result is that neutral office policies must be flexible and adapted to accommodate people with disabilities unless doing so would place an undue hardship on the employer.⁵⁷

Second, *Barnett* established a basic burden-shifting framework that guides the analysis of whether an accommodation is reasonable. Under the *Barnett* framework, the plaintiff only needs to show that the proposed accommodation is facially reasonable "ordinarily or in the run of cases."⁵⁸ After the plaintiff meets this initial burden and survives a motion for summary judgment, the defendant then "must show special (typically case-specific) circumstances demonstrating undue hardship in the particular circumstances."⁵⁹ The Court found this burden-shifting structure to be a "practical view of the statute" that balances its different components, namely "reasonable accommodation" on one hand and "undue hardship" on the other.⁶⁰ Professor Mark Weber argues that reasonable accommodation and undue hardship are therefore best characterized as "two sides of the same coin."⁶¹ This burden shifting parallels other frameworks set forth for evaluating employment discrimination claims, most notably the *McDonnell Douglas* framework for Title VII cases.⁶²

Third, and relatedly, *Barnett* did not create a presumption that all accommodation requests that go against a company policy are per se unreasonable. Instead, *Barnett* created a relatively low burden for plaintiffs—the requested accommodation must only be reasonable "on its face or in the run

54. These examples included modifying neutral break-from-work rules to accommodate a person who needs additional breaks for medical visits, exceptions to neutral furniture rules that would prevent an individual who needs a different kind of desk or chair, and exceptions to neutral leave policies. *Barnett*, 535 U.S. at 398.

55. U.S. EQUAL EMP'T OPPORTUNITY COMM'N, EMPLOYER-PROVIDED LEAVE AND THE AMERICANS WITH DISABILITIES ACT (2016), <https://www.eeoc.gov/eeoc/publications/upload/ada-leave.pdf> [<https://perma.cc/6G8T-W7ZC>] ("The purpose of the ADA's reasonable accommodation obligation is to require employers to change the way things are customarily done to enable employees with disabilities to work." (emphasis omitted)).

56. See *EEOC v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028, 2034 (2015) (holding Title VII of the Civil Rights Act of 1964 "requires otherwise-neutral policies to give way to the need for an accommodation").

57. *Barnett*, 535 U.S. at 401.

58. *Id.* at 401–02.

59. *Id.* at 402.

60. *Id.*

61. Weber, *supra* note 18, at 1124 (arguing the employer's "statutory duty is accommodation up to the limit of hardship" and remarking "[t]here is no such thing as 'unreasonable accommodation' or 'due hardship'").

62. See *infra* Section III.C.

of cases.”⁶³ *Barnett*’s determination that the plaintiff’s requested accommodation was not reasonable should be read “narrowly,” applying in the limited circumstance of seniority systems: “*Barnett*’s language suggests that in all but seniority system cases the claimant’s burden should be light.”⁶⁴ A narrow reading finds support in the Court’s emphasis on the unique importance of employer seniority systems for “employee-management relations.”⁶⁵ Notably, the Court expressly mentioned that most reasonable accommodations require exceptions to existing company policies and procedures, such as modifications to neutral policies governing office break rules and budgeting for furniture.⁶⁶ The Court even referred specifically to medical leave beyond the company’s leave policy as one notable instance of a reasonable accommodation.⁶⁷

By emphasizing the burden on the employer to show a requested accommodation would cause undue hardship, and by lowering the claimant’s burden to show merely that the accommodation would be reasonable on its face, *Barnett* establishes a framework that presumes accommodations should be given. The plaintiff’s requested accommodation is presumed reasonable, and the defendant-employer has the burden of demonstrating that the accommodation would place an undue hardship on the employer. Despite this relatively straightforward framework, lower courts have had great difficulty in applying it to requests for medical leave.

II. THE CIRCUIT SPLIT OVER MEDICAL LEAVE AS A REASONABLE ACCOMMODATION

Against the backdrop of uncertainty surrounding the scope and applicability of the ADA, there is disagreement among circuit courts in evaluating whether specific actions are “reasonable accommodations” under the statute. Because the law surrounding the reasonable-accommodation obligation of Title I is “murky at best,”⁶⁸ there are significant discrepancies in outcomes

63. *Barnett*, 535 U.S. at 401–02; see *Weber*, *supra* note 18, at 1163 (“The Court did not impose a cost-benefit analysis on reasonable accommodations, and in all but seniority system cases, it gave respect to the trier of fact by holding that even a weak showing of reasonableness—reasonable on its face or in the run of cases—will get the claimant past a motion for summary judgment.”).

64. *Weber*, *supra* note 18, at 1163–64 (“[*Barnett*] should be read extremely narrowly as to the burden placed on claimants to show reasonableness of an accommodation: simply that there is no obvious undue hardship caused by the accommodation. This is hardly unrealistic.”)

65. *Barnett*, 535 U.S. at 403–06.

66. *Id.* at 398.

67. *Id.* (describing *García-Ayala v. Lederle Parenterals*, 212 F.3d 638, 648 (1st Cir. 2000), as “requiring leave beyond that allowed under the company’s own leave policy” as an example of lower courts rejecting “that the presence of . . . neutral rules would create an automatic exemption”).

68. Carolyn A. Davis & Devin M. Spencer, *Is a “Long-Term Leave of Absence” a Reasonable Accommodation?*, A.B.A. (Mar. 7, 2018) <https://www.americanbar.org/groups>

for employees bringing claims of discrimination based on a failure to grant a reasonable accommodation.⁶⁹ One of the critical battlegrounds in the fight to clarify what accommodations are “reasonable” is claims for extended medical leave.

Most recently, the Seventh Circuit split from other circuits, holding that “[a] long-term leave of absence cannot be a reasonable accommodation.”⁷⁰ This categorical holding contrasts with other circuits that have generally sided with plaintiffs after performing a case-by-case, fact-specific inquiry to determine whether a specific request for leave is reasonable. Section II.A analyzes the case-by-case approach endorsed by most circuits, and Section II.B discusses the categorical ban adopted by the Seventh Circuit.

A. *The Case-by-Case Approach*

In evaluating the reasonableness of an employee’s request for extended medical leave, all circuit courts but the Seventh Circuit have adopted a case-by-case approach. Early decisions interpreting the scope of the ADA’s reasonable-accommodation mandate looked to previous case law addressing medical leave under the Rehabilitation Act,⁷¹ a statute enacted before the ADA that only covered entities receiving federal funding.⁷² In those cases, most circuits held that medical leave may be a reasonable accommodation based on the circumstances.

For example, in *Nunes v. Wal-Mart Stores, Inc.*, the Ninth Circuit held that unpaid medical leave may be a reasonable accommodation and that extended leave may be reasonable “if it does not pose an undue hardship on the employer.”⁷³ The court clarified that this determination “requires a fact-specific, individualized inquiry.”⁷⁴ Likewise, in *Cehrs v. Northeast Ohio Alzheimer’s Research Center*, the Sixth Circuit found that if the employer cannot show that an accommodation unduly burdens it, “there is no reason to deny the employee the accommodation” of unpaid medical leave.⁷⁵

In *García-Ayala v. Lederle Parenterals*, the First Circuit rejected a lower court’s finding that “an extension of a leave on top of a medical leave of fif-

/litigation/committees/commercial-business/articles/2018/winter2018-is-a-long-term-leave-of-absence-a-reasonable-accommodation/ (on file with the *Michigan Law Review*).

69. See Hickox & Guzman, *supra* note 30, at 452.

70. Severson v. Heartland Woodcraft Inc., 872 F.3d 476, 481 (7th Cir. 2017), *cert. denied*, 138 S. Ct. 1441 (2018).

71. 29 U.S.C. §§ 701, 704 (2018).

72. See, e.g., Nunes v. Wal-Mart Stores, Inc., 164 F.3d 1243, 1247–48 (9th Cir. 1999) (applying existing case law on the Rehabilitation Act to evaluate an ADA claim); see also Beafort, *supra* note 10, at 452 (providing an example of a court applying a Rehabilitation Act rule to an ADA case to hold that the ADA does not require reassignment to a vacant position).

73. 164 F.3d at 1247 (citations omitted).

74. Nunes, 164 F.3d at 1247 (citing Hall v. U.S. Postal Serv. (*Rehabilitation Act Case*), 857 F.2d 1073, 1080 (6th Cir. 1988)).

75. 155 F.3d 775, 782 (6th Cir. 1998).

teen months was per se unreasonable.”⁷⁶ This was because the lower court applied a “per se rule[] . . . rather than an individualized assessment of the facts.”⁷⁷ In applying this individualized assessment, the court looked to factors such as whether the employer suffered a financial burden or other hardship in replacing the employee temporarily, the leave was indefinite or fixed, the absences were erratic or unexplained, the employee would be qualified to work upon return, and the employee was hired to perform a specific task.⁷⁸ As recently as 2017, the First Circuit considered the reasonableness of leave a foregone conclusion, stating, “First things first: *All* agree that a leave of absence or a leave extension can constitute a reasonable accommodation under the ADA ‘in some circumstances.’”⁷⁹

In addition to recognizing that leave can be a reasonable accommodation, most of these circuits have also rejected the corollary argument that the employee requesting medical leave is not a “qualified individual” under the statute—that is, a person able to perform the essential functions of the position with or without accommodations.⁸⁰ In *Nunes*, the court found the district court misapplied the ADA’s “qualified individual” requirement by focusing on the employee’s disability *during her period of medical leave*.⁸¹ Likewise, in *Cehrs*, the Sixth Circuit found that a presumption that an employee requiring leave is not able to perform the essential functions of the job “eviscerates the individualized attention that the Supreme Court has deemed ‘essential’ in each disability claim.”⁸² The presumption also “leads to an illogical consequence,” the court argued, because it would allow regular employees to take leave while forbidding that benefit to employees with disabilities trying to take leave as an accommodation, which “would result in employees with disabilities being treated differently and worse than other employees.”⁸³ In other words, all other employees are permitted to take leave from work and are still regarded as able to complete the tasks of their job.

But the inquiry to determine in *what* circumstances leave is reasonable requires a hyperindividualized, fact-intensive approach that presents obvious benefits and disadvantages as a workable standard. The obvious upside is that it provides flexibility in determining whether granting leave should be required. An individualized approach preserves the prevailing understanding that the ADA requires individualized assessment and interactive process that promotes information sharing and collaboration between an employee

76. 212 F.3d 638, 647 (1st Cir. 2000).

77. *García-Ayala*, 212 F.3d at 647.

78. *See id.* at 648–50.

79. *Delgado Echevarría v. AstraZeneca Pharm. LP*, 856 F.3d 119, 128 (1st Cir. 2017) (emphasis added) (quoting *García-Ayala*, 212 F.3d at 647).

80. 42 U.S.C. § 12111(8) (2012).

81. *Nunes v. Wal-Mart Stores, Inc.*, 164 F.3d 1243, 1247 (9th Cir. 1999).

82. *Cehrs v. Ne. Ohio Alzheimer’s Research Ctr.*, 155 F.3d 775, 782 (6th Cir. 1998) (citing *Sch. Bd. of Nassau Cty. v. Arline*, 480 U.S. 273, 287 (1987)).

83. *Id.* at 783.

and employer.⁸⁴ If applied correctly, this approach provides protections to employees specific to their circumstances and takes into account the burden they would place on their employer, rather than imposing a one-size-fits-all approach.⁸⁵

However, placing this much emphasis on the factual circumstances overindividualizes the inquiry. Because there is little guidance regarding which factors are most important or how to properly balance the factors at play, this case-by-case approach generates unpredictability and inconsistency among the courts.⁸⁶ Perhaps this is why a study of more than 350 ADA claim decisions between 1992 and 2012 revealed “wide variation in the treatment of cases depending on the Circuit Court in which the claims arose” and inconsistency in which factors are determinative in the analysis.⁸⁷ Due to the wide variation in outcomes, the predominant case-by-case approach fails to provide guidance for employers in making decisions about whether to grant a request for leave as well as a predictable basis for plaintiffs considering whether to file suit against their employer.⁸⁸ Courts’ failure to coalesce around a single, clear standard for this area of Title I law impedes the signaling function of decisions and increases costs to all parties involved.⁸⁹

A second drawback to the case-by-case approach is that such an open-ended analysis frequently does not conform to the burden-shifting framework set forth by *Barnett*. Notably, *Barnett* had little to no impact in assisting courts in determining when leave is reasonable.⁹⁰ Because *Barnett* is the only Supreme Court opinion that interprets the ADA’s reasonable-accommodation mandate, its reasoning should guide the analysis of leave as

84. See *supra* notes 28–30 and accompanying text.

85. Megan G. Rosenberger, *Absenteeism and the ADA: The Limits and the Loopholes*, 50 CATH. U. L. REV. 957, 975 (2001).

86. See Hickox & Guzman, *supra* note 30, at 452 (“Neither the Supreme Court nor the appellate courts have provided a formula for determining what accommodations are reasonable. Instead, these different approaches lead to significantly different outcomes for employees seeking leave as an accommodation.” (footnote omitted)).

87. See *id.* at 478, 483 (showing, for example, that the length of prior leave or its unscheduled use and the indefiniteness of the leave were not determinative of outcomes).

88. See Befort, *supra* note 10, at 470 (“[T]he lack of predictability flows less from deep legal fissures than from a lack of predictable rules for determining the reasonableness of individual leave requests.”); Patrick Dorrian, *Employers Get ‘Holy Grail’ Ruling on Leave as Job Accommodation*, BLOOMBERG BNA (Oct. 26, 2017), <https://fmlainsights.lexblogplatformthree.com/wp-content/uploads/sites/311/2017/10/Severson-decision-BNA-write-up.pdf> [https://perma.cc/CU5K-SAJJ] (“‘Courts have danced around the issue of leave as a reasonable accommodation for a long time’ and previously had failed to provide ‘clear parameters’ for granting or denying extended leave requests.”).

89. See Hickox & Guzman, *supra* note 30, at 483 (“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.”); *infra* Section III.D.

90. Hickox & Guzman, *supra* note 30, at 478.

an accommodation. Under *Barnett*, the plaintiff need only meet the low burden of showing that the requested accommodation, here medical leave, “seems reasonable on its face . . . or in the run of cases”—that is, “‘at least on the face of things,’ the accommodation will be feasible for the employer.”⁹¹ This structure does not require the plaintiff to provide a fact-intensive, individualized assessment to show their leave request is reasonable.⁹² Instead, it creates a presumption of reasonableness and places a burden on the employer to demonstrate hardship on a case-by-case basis.⁹³ To date, the free-wheeling approach to evaluating leave as an accommodation does not conform with *Barnett*’s framework, and its unpredictability adversely affects both employers and employees.

B. *The Seventh Circuit’s Categorical Ban*

The Seventh Circuit has taken a different approach, holding that a “long-term leave of absence cannot be a reasonable accommodation” because it renders the employee “unable to perform their job duties” and thus not qualified under the statute.⁹⁴ To reach this conclusion, the court construed the phrases “reasonable accommodation” and “perform the essential functions of the employment position” in the statute as “interlocking definitions.”⁹⁵ The court reasoned that “an extended leave of absence does not give a disabled individual the means to work; it excuses his not working.”⁹⁶ Because the ADA only applies to accommodations that enable the employee to work, extended leave cannot be an accommodation. The Seventh Circuit distinguished between the ADA, which applies to employees with disabilities who can work, and the FMLA, which provides federally mandated leave to those who cannot work for up to twelve weeks.⁹⁷ A contrary interpretation would “transform [the ADA] into a medical-leave statute—in effect, an open-ended extension of the FMLA.”⁹⁸ Notably, the court interpreted the phrase “may include” in the statutory definition of “reasonable accommoda-

91. *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 401–02 (2002) (quoting *Reed v. LePage Bakeries, Inc.*, 244 F.3d 254, 259 (1st Cir. 2001)).

92. *See Weber*, *supra* note 18, at 1164 (“[*Barnett*] should be read extremely narrowly as to the burden placed on claimants to show reasonableness of an accommodation: simply that there is no obvious undue hardship caused by the accommodation.”).

93. *Barnett*, 535 U.S. at 402; *see also Hickox & Guzman*, *supra* note 30, at 486 (arguing there are other reasons to place the burden of showing that the accommodation is not reasonable on the defendant “since a uniform policy against use of leave could well have a disparate impact on employees with disabilities”); *Weber*, *supra* note 18, at 1131 (“The text and structure of the statute suggest a substantial obligation to provide accommodation up to the limit of hardship demonstrated by the employer.”).

94. *Severson v. Heartland Woodcraft, Inc.*, 872 F.3d 476, 481 (7th Cir. 2017), *cert. denied*, 138 S. Ct. 1441 (2018) (emphasis omitted).

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.* at 482.

tion” to mean that the listed accommodations in the statute are not required but are merely illustrative examples.⁹⁹

The appeal of the Seventh Circuit’s bright-line rule is that it creates predictability by clearly establishing that extended leave is never a reasonable accommodation.¹⁰⁰ The opinion resolves the present uncertainty by eliminating claims relating to denied leave requests and thereby saving resources for courts and the parties.¹⁰¹ But while the predominant approach of analyzing leave as an accommodation may be too open-ended, the Seventh Circuit’s categorical ban is too restrictive.

For one, an absolute ban on extended leave as an accommodation forecloses any possibility of an individual assessment and interactive process as required by the ADA. *Barnett* rejects per se rules and “automatic exemption[s]” that do not engage in a “case specific” analysis that takes into account “undue hardship in the particular circumstances.”¹⁰² By enabling employers to reject all requests for extended medical leave, *Severson* hinders any individual assessment of the employee’s circumstances. It also eradicates the burden that would otherwise be placed on the employer to engage in the interactive process with their employee.¹⁰³ In doing so, the court renders hollow ADA protection for thousands of American workers who can no longer count on federal protection if their disability forces them to take medically necessary leaves of absence.¹⁰⁴

Moreover, the Seventh Circuit ignored Supreme Court dicta that listed “requiring leave beyond that allowed under the company’s own leave policy” as an example of the ADA requiring employers to modify their neutral rules to provide people with disabilities equal opportunity in the workplace.¹⁰⁵ Though the Supreme Court has never ruled directly on this issue, the Court clearly understood there to be some circumstances when granting additional leave may constitute a reasonable accommodation under the statute, a position foreclosed by *Severson*’s strict interpretation.

99. *Id.* at 481.

100. See Carol A. Poplawski, *The ADA Is Not a Medical Leave Entitlement, Seventh Circuit Declares*, OGLETREE DEAKINS (Sept. 21, 2017), <https://ogletree.com/shared-content/content/blog/2017/september/ada-is-not-a-medical-leave-entitlement-seventh-circuit-declares> [<https://perma.cc/9VT5-MEXA>] (“This decision provides a breath of fresh air in an area that often paralyzes many employers when managing employee leave situations.”).

101. See Braden Campbell, *7th Circ. Ruling on ADA Leave Limits Touted as ‘Holy Grail,’ LAW 360* (September 27, 2017, 9:08 PM), <https://www.law360.com/articles/968647> (on file with the *Michigan Law Review*) (“The decision is a boon for employers because a request for leave as an ADA accommodation is ‘one of the most difficult issues that HR professionals have to face’ . . . The Severson ruling simplifies this issue by clarifying that a worker who requests months of leave is disqualified from the get-go.”).

102. *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 402 (2002).

103. See *supra* notes 28–32 and accompanying text (discussing the ADA’s required interactive process).

104. See *supra* notes 8, 10, 19 and accompanying text.

105. *Barnett*, 535 U.S. at 398 (citing *Garcia-Ayala v. Lederle Parenterals, Inc.*, 212 F.3d 638, 648 (1st Cir. 2000)).

Third, the interpretation is at odds with the text of the ADA. *Severson* skirted the reality that the drafters expressly included “job restructuring” and “part-time or modified work schedules” in the statutory definition of “reasonable accommodation.”¹⁰⁶ The Seventh Circuit’s suggestion that these are merely illustrative examples supports the idea that covered accommodations are broader than those explicitly listed, including additional modifications like medical leave.¹⁰⁷

Lastly, the court’s reasoning rests on flawed assumptions about the purpose and scope of and interactions between the ADA and FMLA.¹⁰⁸ The Seventh Circuit’s attempt to distinguish the two statutes ignores the ways in which the obligations each place on an employer may overlap and interact. In light of these differences, the court’s hesitancy in allowing the ADA to extend into providing leave simply because another statute separately provides employees with medical leave is misguided. Because neither method for evaluating leave as an accommodation is satisfactory, courts should recalibrate their analysis to better preserve the purpose of the ADA, meet the demands of *Barnett*, and balance competing policy concerns.

III. ADJUSTING THE ACCOMMODATION ANALYSIS

Courts should adopt a new approach to evaluating medical leave as an accommodation under Title I of the ADA. Such an approach must strike the proper balance of providing individualization and flexibility while also being predictable and consistent. This Part proposes a presumption of reasonableness for certain leave accommodations. Rather than a categorical ban or an overly fact-specific inquiry, this Note argues that courts should establish a presumption that extended medical leave is a reasonable and required accommodation under the ADA, provided that certain conditions are met. Section III.A argues for establishing this presumption and provides the schematics for how leave accommodations would fit within the existing burden-shifting framework. Section III.B discusses how this approach is supported by the text and legislative history of the ADA, while Section III.C situates it in the context of existing case law. Finally, Section III.D argues that a presumptive framework provides unique policy benefits compared to the approaches adopted in the existing circuit split.

A. Presuming Medical Leave as a Reasonable Accommodation

To establish a workable framework to evaluate requests for extended medical leave, courts should hold that an employee’s request for extended

106. 42 U.S.C. § 12111(9) (2012).

107. See *Weber*, *supra* note 18, at 1131–32 (“The text and structure of the statute suggest a substantial obligation to provide accommodation up to the limit of hardship demonstrated by the employer. . . . Congress intended to incorporate the section 504 regulations’ standards for reasonable accommodation and undue hardship into the ADA.”).

108. See *infra* notes 124–134 and accompanying text.

medical leave for a fixed period of time is presumed to fall within the ADA's reasonable-accommodation mandate. The defendant-employer would then have the burden of showing special circumstances that make the requested leave unreasonable and outside the scope of the statute—namely by demonstrating that the plaintiff has failed to satisfy the *prima facie* conditions or that the requested leave would place an undue hardship on the employer.¹⁰⁹

The presumption of reasonableness for medical leave requests would be triggered if the plaintiff is able to satisfy a set of *prima facie* requirements—none of which would be overly onerous. For example, a court could presume that a period of leave is a reasonable accommodation if the plaintiff can show that the request for leave was (1) made in advance, (2) for a fixed duration with a proposed end date, (3) documented as necessary by a medical professional, and (4) likely to result in the employee's ability to perform the essential functions of their job upon return.¹¹⁰ These criteria include common reasons that courts have previously considered and align with the EEOC's recommendations for determining when a leave request is reasonable.¹¹¹ They have the benefit of excluding requests that courts have determined to be unreasonable or overly burdensome, such as requests for indefinite leave.¹¹² Additionally, the fourth requirement would properly shift the focus of the qualified-individual inquiry to the employee's ability to perform the functions of the position upon return, rather than improperly asking if they are able to perform the tasks while on leave.¹¹³ Otherwise, persons requesting leave would never be qualified individuals because they cannot perform the

109. This structure combines the EEOC's recommended approach with the basic burden-shifting structure established under *Barnett*. See *infra* note 110 and Section III.C.

110. These are the criteria put forward by the EEOC as constituting a reasonable leave request. See Brief of the EEOC as *Amicus Curiae* in Support of Plaintiff-Appellant and Reversal at 21, *Severson v. Heartland Woodcraft, Inc.*, 872 F.3d 476 (7th Cir. 2017) (No. 15-3754) [hereinafter EEOC Amicus Brief] (“[L]eave is widely recognized as a facially feasible or plausible form of accommodation under the ADA. In particular, leave generally is reasonable where it is of definite, time-limited duration, requested in advance, and likely to enable the employee to perform the essential job functions when he or she returns.” (citation omitted)); see also EQUAL EMP’T OPPORTUNITY COMM’N, EMPLOYER-PROVIDED LEAVE AND THE AMERICANS WITH DISABILITIES ACT (2016), <https://www.eeoc.gov/eeoc/publications/upload/ada-leave.pdf> [<https://perma.cc/XR5E-UXG5>].

111. See *supra* note 78 and accompanying text (listing factors considered by courts in the case-by-case approach).

112. See EEOC Amicus Brief, *supra* note 110, at 21 (citing *Nowak v. St. Rita High Sch.*, 142 F.3d 999, 1004 (7th Cir. 1998) (holding the ADA does not require accommodation of “an indefinite leave of absence”)).

113. See *id.* at 11–12 (“The accommodation of leave is only fully achieved at the end of the leave period. Thus, with a leave request, the relevant inquiry is whether the employee would be able to perform the essential job functions at the end of the leave, if the time off were granted.”).

functions of the position during leave—a result that would functionally end leave as an accommodation altogether.¹¹⁴

B. *The ADA's Text and Purpose Support a Presumption*

Establishing a presumption in favor of accommodating medical leave requests has many benefits. First, such a presumption is more consistent with the statutory text and legislative purpose of the ADA. The use of “may” in the reasonable-accommodations provision indicates that the list of potential accommodations is nonexhaustive and many of the listed examples, such as modified schedules, support the idea that the law covers potential lapses in work.¹¹⁵ The plain meaning of the text suggests that medical leave is a reasonable accommodation in certain circumstances. Additionally, consideration of leave as an accommodation requires some sort of an individual assessment, which forecloses a categorical ban.¹¹⁶ The presumptive framework allows for individual assessment as part of the defendant’s burden to rebut the presumption by demonstrating undue hardship.

The legislative history and purpose of the ADA also support a broader interpretation of reasonable accommodations. The Act was, by design, ambitious: it aimed to combat deeply entrenched stigmas and ensure that people with disabilities would be able to work despite temporary or long-term chronic conditions or impairments.¹¹⁷ To accomplish this goal, Congress imposed a strong obligation on employers to provide accommodations.¹¹⁸ A presumption of reasonableness would orient the case law toward this goal, tipping the scale in favor of accommodations for employees whose disabilities require treatment or rehabilitation. Prohibiting leave as an accommodation, on the other hand, drastically reduces the effectiveness of the ADA and hinders the statute from achieving its desired outcome: long-term employment and continued opportunity for people with disabilities.¹¹⁹ The congressional record also suggests that requests for “additional unpaid leave days” were considered reasonable so long as they would not impose an undue

114. *Id.* at 12–13, 18 (explaining that the question of the reasonableness of a specific leave request “would never be reached” resulting in the “exclusion of leave as a possible accommodation under the ADA” even where an employer could readily extend it).

115. 42 U.S.C. § 12111(9)(B) (2012) (listing possible accommodations that “[t]he term ‘reasonable accommodation’ may include”); 29 C.F.R. § 1630.2(o)(2) (2019) (stating “reasonable accommodation” is not limited to the accommodations listed); *see also* James A. Passamano, *Employee Leave Under the Americans with Disabilities Act and the Family Medical Leave Act*, 38 S. TEX. L. REV. 861, 867–68 (1997).

116. *See supra* text accompanying notes 92–93.

117. *See supra* note 19.

118. *See* Lisa J. Gitnik, Note, *Will the Interaction of the Family and Medical Leave Act and the Americans with Disabilities Act Leave Employees with an “Undue Hardship?”*, 74 WASH. U. L.Q. 283, 293–95 (1996); Weber, *supra* note 18, at 1150–51.

119. *See* Hickox & Guzman, *supra* note 30, at 487.

hardship.¹²⁰ By focusing courts' analysis on the undue-hardship inquiry rather than on the reasonableness of a leave request, the presumption would further define the meaning of undue hardship, place the bulk of the evidentiary burden on the defendant, and better fulfil the purposes of the ADA.¹²¹

Enactment of the ADAAA provides further evidence that Congress intended courts to interpret the ADA broadly. Congress specifically rejected the Supreme Court's attempts to place technical restrictions on plaintiffs demonstrating that they have a disability and instead directed courts to focus on the merits of the claim itself.¹²² Likewise, by presuming requests for leave are reasonable and shifting the burden to the defendant to demonstrate an undue hardship, courts would be better able to further Congress's clear mandate to provide an equal opportunity for people with disabilities in the workplace.

Some have argued that the FMLA allocation of twelve weeks of unpaid leave should serve as the upper limit of reasonable leave for ADA compliance purposes.¹²³ The *Severson* court stated that "[l]ong-term medical leave is the domain of the FMLA" and resisted the EEOC's interpretation on the basis that it would transform the ADA into a medical leave statute.¹²⁴ But such a proposition misunderstands the independent and separate purposes and requirements of these different statutes, which Congress intended as establishing distinct rights and obligations.¹²⁵ For example, the statutes have different policy objectives: the ADA focuses on ending disability discrimination while the FMLA seeks to establish minimum labor standards for family and medical leave.¹²⁶ They also have major structural differences. The ADA provides employers an undue-hardship defense¹²⁷ while the FMLA does not. The FMLA also prohibits employers from retaliating against employees for exercising their rights to twelve weeks of medical leave.¹²⁸ All of these differences have led many scholars to the conclusion that rights under each statute

120. See H.R. REP. NO. 101-485, pt. 2, at 63 (1990), as reprinted in 1990 U.S.C.C.A.N. 303, 345 ("Reasonable accommodation may also include providing additional unpaid leave days, if such provision does not result in an undue hardship for the employer.").

121. See *Weber*, *supra* note 18, at 1163 (discussing how the Court in *Barnett* "followed congressional instruction by placing the emphasis on the undue hardship test, where the employer has the burden, but the Court did not have any occasion to discuss what level of hardship must occur before it becomes undue").

122. See *supra* Section I.A.

123. See *Gitnik*, *supra* note 118, at 301 & n.86 (explaining that the U.S. Chamber of Commerce has argued that providing FMLA leave should satisfy an employer's ADA obligations).

124. *Severson v. Heartland Woodcraft, Inc.*, 872 F.3d 476, 481 (7th Cir. 2017), *cert. denied*, 138 S. Ct. 1441 (2018).

125. *Gitnik*, *supra* note 118, at 303-06; see also *Hickox & Guzman*, *supra* note 30, at 472-73.

126. *Gitnik*, *supra* note 118, at 305-06.

127. 42 U.S.C. § 12112(b)(5)(A) (2012).

128. See 29 C.F.R. § 825.200(a), 825.220(c) (2019).

should be analyzed separately and that the ADA's accommodation mandate may provide leave in addition to the FMLA allocation.¹²⁹ This position is also supported by the text of FMLA,¹³⁰ EEOC guidance on the ADA,¹³¹ regulations interpreting the ADA,¹³² and the ADA's legislative history, which shows Congress intended the ADA to provide medical leave in circumstances when doing so would not impose an undue hardship.¹³³ Courts should not conflate the distinct obligations the FMLA and ADA place on employers, but rather should do an analysis of appropriate leave under each statute.¹³⁴ Under the presumption framework, the previous use of FMLA leave might be a factor in the undue-hardship assessment, but it has no place as an automatic bar to additional leave as an accommodation.¹³⁵

C. A Presumption Complies with Existing Judicial Precedent

The proposed presumption is also more compatible with existing Supreme Court jurisprudence. *Barnett* establishes that the plaintiff need only show the requested accommodation is "reasonable . . . in the run of cases."¹³⁶ Medical leaves of absence are ordinarily considered reasonable in the workplace as demonstrated by most companies' sick-leave policies.¹³⁷ Presuming leave requests are reasonable when they meet the basic conditions described

129. See Gitnik, *supra* note 118, at 306, 313 ("[I]t is unnecessary for an employer to consider previous FMLA leave in an ADA undue hardship analysis."); Hickox & Guzman, *supra* note 30, at 472–73 (describing all the reasons why "FMLA should not be seen as the upper limit on leave provided as an accommodation" in light of the structure of each statute and concluding that "[c]ourts have failed to recognize that leave as an accommodation may exceed the amount of leave available under the FMLA").

130. See 29 U.S.C. § 2653 (2018) ("Nothing 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 . . .").

131. *Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, at Question 21 (2002), <https://www.eeoc.gov/policy/docs/accommodation.html> [<https://perma.cc/5KWU-KK4H>] ("An employer should determine an employee's rights under each statute separately . . .").

132. See 29 C.F.R. § 825.702(a)–(b) (explaining that FMLA and ADA rights "must be analyzed separately").

133. See *supra* note 120 and accompanying text (discussing legislative history supporting leave as a reasonable accommodation if it does not impose an undue hardship); see also Gitnik, *supra* note 118, at 309 (explaining that the text of the ADA does not include considering past accommodations in its list of factors for an undue-hardship analysis).

134. Hickox & Guzman, *supra* note 30, at 473.

135. Notably, some scholars take the position that previous FMLA leave could not be considered at all (even in an undue-hardship assessment) without violating the FMLA. See, e.g., Gitnik, *supra* note 118, at 306–07 ("Counting FMLA leave in an undue hardship evaluation discourages the use of such leave and is likely to constitute an interference with FMLA rights.").

136. *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 401 (2002); see *supra* Section I.B.

137. See *supra* note 83 and accompanying text.

by the EEOC would be consistent with *Barnett's* burden-shifting framework.¹³⁸

The Supreme Court has favored a presumptive burden-shifting framework in other antidiscrimination contexts, most notably Title VII employment discrimination claims. In *McDonnell Douglas Corp. v. Green*, the Court established an analogous burden-shifting framework for evaluating race and sex discrimination claims, motivated in part by evidentiary concerns and a desire to place more of the burden on the defendant.¹³⁹ Adopting a burden-shifting framework for leave accommodations would situate the ADA against a familiar jurisprudential backdrop. While some may argue this framework is unique to the evidentiary issues associated with race and sex discrimination, the burden-shifting format also makes sense in the context of the ADA, which was modeled heavily on the structure of Title VII and prior civil rights laws.¹⁴⁰

Other existing antidiscrimination case law supports interpreting the statute to include medical leave as an accommodation. In the context of Title VII's requirement that employers provide religious accommodations,¹⁴¹ the Court found that the accommodation mandate "requires otherwise-neutral policies to give way to the need for an accommodation."¹⁴² This same logic should apply to grants of medical leave that would fall outside of a company's leave policy. Even if extended medical leave is not expressly included in the text of the reasonable-accommodation provision, the Court has found that "statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils."¹⁴³ Here, the denial of a fixed term of medical leave is a comparable evil to denying a disabled employee a modified work

138. According to the *Barnett* framework, after the plaintiff shows the requested accommodation is "reasonable on its face," the burden should then shift to the defendant to show that the leave was unreasonable, typically by making a showing that the accommodation would place an undue hardship on the employer.

139. See 411 U.S. 792, 802 (1973); Gitnik, *supra* note 118, at 296 n.59 (discussing how the traditional disparate treatment framework creates a rebuttable presumption in favor of the plaintiff and how this framework may be applicable in the ADA context).

140. See Verkerke, *supra* note 31, at 1395 ("The drafters of the ADA borrowed quite self-consciously from the provisions of prior civil rights laws. Enacted in 1990, the statute's core definition of 'discrimination' derives directly from the language of Title VII and case law interpreting it. Accordingly, the ADA incorporates both of the earlier law's broad doctrinal approaches to establishing liability—disparate treatment and disparate impact." (footnotes omitted)). When a legislature enacts statutes that address related issues, the *in pari materia* canon of statutory construction directs that the statutes should be interpreted and construed similarly. See e.g., *Erlenbaugh v. United States*, 409 U.S. 239, 243–44 (1972) (explaining that this canon assumes that "whenever Congress passes a new statute, it acts aware of all previous statutes on the same subject").

141. See 42 U.S.C. §§ 2000e-2(a), 2000e(j) (2012).

142. *EEOC v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028, 2034 (2015).

143. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998) (finding that Title VII's prohibition of discrimination on the basis of sex applies to sexual harassment of men even though the statute's primary purpose was to address discrimination against women).

schedule or other accommodation expressly listed in the statute, as each affects the continued employment of persons with disabilities.

Some have argued for a presumption that leave accommodations are unreasonable.¹⁴⁴ In criticizing the *Severson* holding for going “too far,” some commentators have argued that the court should have deemed extended leaves of absence presumptively unreasonable unless the plaintiff could satisfy a burden showing “special circumstances.”¹⁴⁵ This Note argues it should be the opposite. Creating a presumption that leave is unreasonable is incorrect for two reasons. First, it misunderstands *Barnett*, which ordinarily places the burden of showing special circumstances on the defendant, not the plaintiff. When the plaintiff requests an accommodation that is reasonable in the ordinary run of cases,¹⁴⁶ the burden to show special circumstances is on the defendant. Leave has been largely regarded as an accommodation that is reasonable in the run of cases.¹⁴⁷ Second, the argument that courts should presume leave is an unreasonable accommodation inappropriately analyzes leave in the same way *Barnett* analyzed reassignment against a company seniority policy.¹⁴⁸ The *Barnett* Court’s determination that violation of a seniority policy was unreasonable was a narrow exception related to the unique importance of seniority policies and is not applicable to company leave policies.¹⁴⁹ Overall, the text of the ADA, its purpose and legislative history, and the Supreme Court’s interpretation of the ADA in *Barnett* all support a presumption in favor of leave as a reasonable accommodation, not against it.

D. A Presumption Better Balances Competing Policy Concerns

A presumption would also better balance the competing policy concerns of ensuring predictability and consistency with ensuring an individualized application of the law. The current circuit split reflects different attempts to balance these competing concerns, yet each approach goes too far in one di-

144. E.g., Recent Case, *Employment Law — Extended Leave and the ADA — Seventh Circuit Rules that a Multimonth Leave of Absence Cannot Be a Reasonable Accommodation*. — *Severson v. Heartland Woodcraft, Inc.*, 872 F.3d 476 (7th Cir. 2017), cert. denied, No. 17-1001, 2018 WL 489210 (U.S. Apr. 2, 2018), 131 HARV. L. REV. 2463, 2469 (2018).

145. *Id.* at 2467–69 (arguing a multimonth leave of absence should be presumptively unreasonable unless the plaintiff can prove special circumstances that justify overcoming the presumption).

146. The initial showing of an accommodation that is reasonable in the ordinary run of cases should not be a difficult burden for the plaintiff to meet. See *supra* note 63.

147. See *supra* Section II.A (showing it has been regarded as reasonable in the run of cases in all circuits outside of the Seventh Circuit); *supra* Section III.B (showing leave is regarded as a reasonable accommodation by Congress and the EEOC); see also EEOC Amicus Brief, *supra* note 110, at 14–15 (chronicling Seventh Circuit case law before *Severson* that regarded leave as a reasonable accommodation).

148. See Recent Case, *supra* note 144, at 2469 (applying the “special circumstances” approach to *Severson*).

149. See *supra* notes 63–66 and accompanying text.

rection.¹⁵⁰ Excluding extended medical leave as an accommodation, as the Seventh Circuit does, cuts against the ADA's goal of creating more inclusive workplaces.¹⁵¹ On the other hand, the other circuits' approach is too free-wheeling and unpredictable because it overparticularizes the reasonableness inquiry for each case.¹⁵² Creating a presumption provides the best solution to address both pitfalls.

First, permitting extended medical leave in a larger number of cases would ensure that employees keep their jobs in the increasingly common situations of an employee's chronic illness, cancer treatment, other medical care, or rehabilitation that restricts their ability to work for a period of time.¹⁵³ Studies show that accommodations that enable employees to return to work also benefit employers by allowing them to retain qualified and knowledgeable employees and reducing costs associated with turnover.¹⁵⁴ Of course, accommodating employees on leave does impose costs on employers.¹⁵⁵ But some increased costs on employers in exchange for integration of people with disabilities into the workforce is the bargain that Congress struck in the ADA.¹⁵⁶ Furthermore, employers are still protected by the undue-hardship limitation that takes account of the firm's resources to ensure a leave accommodation would not cause extreme financial strain.¹⁵⁷

Second, the framework's clear criteria for a plaintiff's *prima facie* case would create more predictable and consistent law. The two current positions taken by the circuit courts exemplify the ongoing debate between rules and standards. Rules are rigid and overinclusive, while standards lack predictability because they require *ex post* determinations of the law's content.¹⁵⁸ While a standard may be desirable in the ADA context because of its flexibility and individualization, it is also more costly for involved parties because of

150. See *supra* Part II.

151. See *supra* Section II.B.

152. See *supra* Section II.A.

153. See Wullianallur Raghupathi & Viju Raghupathi, *An Empirical Study of Chronic Diseases in the United States: A Visual Analytics Approach to Public Health*, INT'L J. ENVTL. RES. & PUB. HEALTH (Mar. 1, 2018), <https://www.mdpi.com/1660-4601/15/3/431/htm> [<https://perma.cc/PD4F-FKJL>] (“Trends show an overall increase in chronic diseases.”).

154. Hickox & Guzman, *supra* note 30, at 447–48 (discussing how accommodations benefit both employees and employers, which are able to retain members of their internal labor market; preserve productivity-enhancing, firm-specific skills and knowledge; and avoid transactions costs associated with replacing employees).

155. *E.g.*, Befort, *supra* note 10, at 448–49 (describing how leave burdens the employer by potentially requiring “reshuffling” of employees, reallocation of duties, and identifying and training new employees).

156. See Weber, *supra* note 18, at 1132 (explaining how “[t]he ADA’s congressional supporters recognized that the costs of accommodations might be high” and noted that “expensive accommodations” would be required in some circumstances).

157. See *id.* at 1133, 1136 (describing how the drafters of the ADA rejected a cost-benefit analysis in favor of a “cost-total budget comparison”).

158. See generally Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992) (providing background on legal rules compared to standards).

the ex post determination it requires.¹⁵⁹ A presumptive rule, however, is a desirable “mixed type”—a middle ground between a rule and standard.¹⁶⁰ The proposed presumptive rule would encourage employers to accommodate leave requests except when uniquely burdensome or costly to the employer. This approach would resemble a rule more than the current reasonableness standard does, with an exception when the defendant can demonstrate an undue hardship. At the same time, the rebuttable presumption allows for the necessary individualization in the undue-hardship analysis that has been stifled in part because there has been so much emphasis on the reasonableness question.

Additional potential concerns include the notions that a presumption in favor of employees could lead to abuse of the ADA’s protection or chill employers from challenging meritless ADA claims. First, employees likely lack the incentives to abuse the system because long-term leaves of absence under both the FMLA and ADA are unpaid.¹⁶¹ Despite concern about a chilling effect, data currently show that employers overwhelmingly win in ADA cases, and so adjusting the balance would probably lead to more just outcomes.¹⁶² Additionally, the presumption structure has built-in checks to deter abuse: in order to secure the presumption, an employee must satisfy several prime facie conditions, including the need to communicate the specific circumstances of the requested leave and secure written confirmation of its medical necessity from a doctor.¹⁶³ Furthermore, courts have developed checks to protect against abuse, such as prohibiting requests for indefinite leaves of absence¹⁶⁴ as well as the undue-hardship defense.¹⁶⁵ While there may be unforeseen downsides to adopting a presumption, its overall benefits likely outweigh potential costs.

CONCLUSION

For Raymond Severson and others similarly situated, an extended leave of absence may be the only means to keeping the financial security and dignity a job provides. But the availability of medical leave as an ADA reasonable accommodation is uncertain as this area of law has been historically

159. See *id.* at 562–63 (“Rules are more costly to promulgate than standards because rules involve advance determinations of the law’s content, whereas standards are more costly for legal advisors to predict or enforcement authorities to apply because they require later determinations of the law’s content.”).

160. *Id.* at 562 n.6. (noting in applying a presumptive rule that “a rule applies unless there appears to be sufficient reason not to apply it”).

161. See 29 U.S.C. § 2612(c) (2018) (FMLA); *Nunes v. Wal-Mart Stores, Inc.*, 164 F.3d 1243, 1247 (9th Cir. 1999) (ADA).

162. See *Porter*, *supra* note 31, at 11 (finding employers have prevailed in 92 percent of ADA cases filed in court).

163. See *supra* notes 110–111 and accompanying text.

164. See *supra* note 112 and accompanying text.

165. *Gitnik*, *supra* note 118, at 299.

underdeveloped. In light of the existing circuit split, courts should rethink their approach with an eye toward providing more consistency and predictability, as well as fulfilling the original purpose of the ADA to support people with disabilities in securing long-term employment. This Note has advocated for a presumption that extended medical leave constitutes a reasonable accommodation under the statute unless such proposed absences would impose an undue financial burden on the employer. A presumption would maintain the necessary flexibility and individualization required by the ADA, while also providing better clarity on what is legally required of employers when their employees inevitably must take time off of work because of a medical condition.

