No.

In the Supreme Court of the United States

HANNAH P., PETITIONER

v.

JOSEPH MAGUIRE, ACTING DIRECTOR OF THE OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Rehabilitation Act of 1973 and the Americans with Disabilities Act generally prohibit employment discrimination against qualified individuals on the basis of disability. 29 U.S.C. § 794(a) and (d); 42 U.S.C. § 12112(a). In applying these federal disability discrimination statutes, the courts of appeals have disagreed with respect to the proper treatment of employment decisions that are based on conduct caused by an employee's or applicant's disability. In such cases, which arise with some frequency, the employer will typically contend that the plaintiff's conduct—often labeled as "misconduct"—is conceptually distinct from the plaintiff's underlying disability and thus provides a lawful, non-discriminatory basis for the employment action in question. In the decision below, the Fourth Circuit endorsed that purported distinction, which also finds support in the Fifth Circuit's precedent. Four courts of appeals, however, have reached precisely the opposite conclusion.

The question presented is whether an employment decision that is based on conduct caused by a qualified individual's disability is insulated from scrutiny under the federal disability discrimination statutes on the ground that the decision is not made on the basis of disability.

PARTIES TO THE PROCEEDING

Petitioner Hannah P. was the appellant in the court of appeals. Petitioner was identified by her first name and last initial in the courts below, pursuant to a protective order entered by the district court in this case. We continue to follow that convention in this Court. See, *e.g.*, *Adoptive Couple* v. *Baby Girl*, 570 U.S. 637 (2013).

Daniel Coats, the former Director of the Office of the Director of National Intelligence, was the appellee in the court of appeals. Pursuant to Rule 35(1) of the Rules of this Court, Acting Director of National Intelligence Joseph Maguire has been substituted as the respondent in this proceeding.

RELATED PROCEEDINGS

United States District Court (E.D. Va.):

Hannah P. v. *Daniel Coats*, No. 16-CV-01030 (July 27, 2017) (granting summary judgment to the defendant)

Hannah P. v. *Daniel Coats*, No. 16-CV-01030 (July 29, 2019) (staying further proceedings pending this Court's consideration of a petition for a writ of certiorari)

United States Court of Appeals (4th Cir.):

Hannah P. v. *Daniel Coats*, No. 17-1943 (Feb. 19, 2019) (reversing in part and affirming in part)

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Petitioner Hannah P. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-62a) is reported at 916 F.3d 327. The memorandum opinion of the district court (App., *infra*, 63a-76a) is unreported but is available at 2017 WL 3202726.

JURISDICTION

The judgment of the Court of Appeals was entered on February 19, 2019. A petition for rehearing was denied on June 25, 2019 (App., *infra*, 79a-80a). On September 18, 2019, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including October 23, 2019. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are set forth at App., *infra*, 81a-90a.

STATEMENT

For years, petitioner worked a "maxi flex" schedule, with no set hours, as a term-limited employee of the Office of the Director of National Intelligence (ODNI). App., *infra*, 5a. ODNI tasked petitioner with the agency's response to Edward Snowden's leak of highly classified information, and her performance was generally viewed as "outstanding." *Id.* at 4a.

Petitioner, however, suffered from diagnosed depression. App., *infra*, 4a. As her Snowden assignment drew to a close, petitioner's supervisors began to complain about her "sad" and "almost trance like" affect. *Id.* at 6a. They began asking her to arrive at work by a specific hour and then bristled when her depression resulted in tardiness and unplanned absences. *Id.* at 6a-7a. Petitioner took a medical leave of absence to focus on treatment, and upon her return she interviewed for a permanent ODNI position. *Id.* at 9a-10a. The interview panel recommended hiring petitioner, *id.* at 10a, but an ODNI administrator torpedoed her application because of her "absences and late arrivals," *id.* at 26a.

Petitioner filed this lawsuit under the Rehabilitation Act of 1973, alleging that ODNI's failure to hire her constituted unlawful discrimination on the basis of her depression. App., *infra*, 11a. The Fourth Circuit affirmed the district court's grant of summary judgment against petitioner because, even though it had "no doubt that [petitioner's] struggle with depression was the cause of her attendance

issues," *id.* at 29a, it concluded that the adverse action against her was not taken because of her disability.

This case thus raises the important and frequently recurring question of whether federal disability discrimination law generally prohibits employers from taking adverse action against qualified employees and applicants on the basis of conduct *caused by* their disabilities. Four circuits have held that it does; two (including the Fourth Circuit in the decision below) have held that it does not. This Court should grant certiorari to review the erroneous decision of the court of appeals and resolve the circuit conflict.

1. The Rehabilitation Act of 1973 broadly prohibits disability discrimination "under any program or activity conducted by any Executive agency." 29 U.S.C. § 794(a). In cases alleging discrimination in employment, the Rehabilitation Act incorporates the standards of the Americans with Disabilities Act (ADA), 42 U.S.C § 12101 *et seq*. See 29 U.S.C. § 794(d); 29 C.F.R. § 1614.203(b). Under the ADA, an employer may not "discriminate against a qualified individual on the basis of disability." 42 U.S.C. § 12112(a). As a general matter, the term "qualified individual" means an "individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." *Id.* § 12111(8).

The ADA defines disability discrimination expansively and, in some circumstances, requires employers to make exceptions to otherwise-applicable employment standards. For example, an employer may be liable for discrimination if it fails to provide "reasonable accommodations to the known physical or mental limitations of an otherwise qualified

individual with a disability," or if it denies employment opportunities to an otherwise-qualified job applicant or employee because of "the need * * * to make reasonable accommodation to [that person's] physical or mental impairment." 42 U.S.C. § 12112(b)(5)(A) and (B). An employer may also be liable for discrimination by "using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability * * * unless the standard, test or other selection criteria * * * is shown to be job-related for the position in question and is consistent with business necessity." *Id.* § 12112(b)(6).

In certain specified circumstances, however, the ADA expressly authorizes employers to take adverse employment actions based on conduct resulting from an individual's disability, even if that conduct does not render the individual unqualified, in the sense that she cannot perform the "essential functions" of the position in question. 42 U.S.C. § 12111(8). For example, although addiction may qualify as a disability under the ADA,[1] the statute generally authorizes employers to take adverse employment actions based on conduct resulting from alcohol or drug addiction. Most directly, Congress provided that

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[1] See, *e.g.*, *Regional Econ. Cmty. Action Program, Inc.* v. *City of Middletown*, 294 F.3d 35, 46 (2d Cir. 2002); *Brown* v. *Lucky Stores, Inc.*, 246 F.3d 1182, 1187 (9th Cir. 2001); *Williams* v. *Widnall*, 79 F.3d 1003, 1005 (10th Cir. 1996); EEOC, *The Americans With Disabilities Act: Applying Performance And Conduct Standards To Employees With Disabilities*, https://www.eeoc.gov/facts/performance-conduct.html ("The ADA may protect a 'qualified' alcoholic who can meet the definition of 'disability.'").

the term "qualified individual" does not encompass "any employee or applicant who is currently engaging in the illegal use of drugs," when the employer "acts on the basis of such use." *Id.* § 12114(a). The ADA further provides that employers

> may hold an employee who engages in the illegal use of drugs or who is an alcoholic to the same qualification standards for employment or job performance and behavior that such entity holds other employees, even if any unsatisfactory performance or behavior is related to the drug use or alcoholism of such employee.

Id. § 12114(c)(4).

The ADA separately provides that "[i]t may be a defense to a charge of discrimination * * * that an alleged application of qualification standards, tests, or selection criteria" that would otherwise constitute prohibited discrimination "has been shown to be job-related and consistent with business necessity." 42 U.S.C. § 12113(a). The ADA specifically provides that the "term 'qualification standards' may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace," *id.* § 12113(b), with "direct threat" defined to mean "a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation," *id.* § 12111(3).

2. In 2011, petitioner was hired by ODNI to a five-year term of employment as an operations analyst. App., *infra*, 3a. Shortly after being hired, petitioner was diagnosed with depression. *Id.* at 4a. For a time, however, petitioner's depression did not affect her job performance. To the contrary, she "generally received glowing reviews from her supervisors," who

characterized her as an "outstanding" and "high-performing employee." *Ibid.*

In November 2013, petitioner was assigned to coordinate ODNI's response to Edward Snowden's unauthorized disclosures of classified information, a demanding assignment that required her to work long and unpredictable hours. App., *infra*, 4a-5a. During this period, petitioner worked a "maxi flex" schedule, which required her to work a certain number of hours over the course of two-week periods but did not dictate any particular working hours each day. *Id.* at 5a. In light of the nature of her assignment and the flexibility afforded by her "maxi flex" schedule, petitioner started and ended work later than traditional business hours. *Ibid.*

After petitioner completed the Snowden assignment, however, her supervisors and co-workers began to register concerns regarding her work hours and unplanned absences. App., *infra*, 5a. Petitioner's supervisors found her demeanor to be "sad, very flat, and almost trance like," and petitioner reported to them that she had recently changed the medication used to treat her depression. *Id.* at 6a.

In March 2015, petitioner and her supervisors developed a plan to reconcile petitioner's depression with ODNI's new attendance expectations for her. App., *infra*, 6a. That plan involved certain adjustments to petitioner's work hours, as well as procedures for petitioner to notify her supervisors that she would be late or absent and for her supervisors to contact her if she did not arrive by an appointed time. *Ibid.* Petitioner's supervisors nonetheless continued to claim dissatisfaction with her attendance and reporting through early May 2015, at which point petitioner took a four-week leave of absence to address

her depression. *Id.* at 8a-9a. Notwithstanding those concerns, petitioner ultimately received a performance grade of "Excellent" and was awarded a performance-based bonus for fiscal year 2015, which included the period in which her depression symptoms were at their worst. See 2 C.A. App. 406-407, 658-660.

Just before petitioner took her leave of absence, she applied for a permanent position with ODNI as a program mission manager. App., *infra*, 10a. Petitioner interviewed for the position after her return from leave, and the interview panel unanimously recommended that she be hired. *Ibid.*; 1 C.A. App. 206. When petitioner's application was forwarded to ODNI's Chief Management Officer, however, he recommended that petitioner not be selected, stating that her "recent performance [was] not consistent with a potentially good employee." App., *infra*, 10a; see also *id.* at 26a (referring to petitioner's issues with "attendance at work" and her record of "absences and late arrivals"). Petitioner was informed in July 2015 that she had not been selected for the permanent position, and she completed her five-year term as an operations analyst in March 2016. *Id.* at 10a.

3. After exhausting her administrative remedies, petitioner filed suit under the Rehabilitation Act and the Family and Medical Leave Act of 1993 (FMLA), 29 U.S.C. § 2601 *et seq.* As relevant here, petitioner alleged that ODNI's refusal to hire her for the permanent position constituted disability discrimination in violation of the Rehabilitation Act. App., *infra*, 10a.[2]

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[2] Separately, petitioner alleged that ODNI had violated the Rehabilitation Act by failing to accommodate her depression, creating a hostile work environment, requiring her to submit to a medical examination, and unlawfully disclosing her con-

The district court entered summary judgment against petitioner. App., *infra*, 82a. With respect to petitioner's Rehabilitation Act claim for hiring discrimination, the district court applied the burden-shifting framework of *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973), and held that, even if petitioner could establish a prima facie claim of discrimination, she could not "rebut the legitimate, non-discriminatory reason that ODNI declined to hire [petitioner] for the position—that [petitioner] had significant attendance and reporting problems." App., *infra*, 75a-76a.

4. A divided panel of the Fourth Circuit affirmed in relevant part. App., *infra*, 1a-36a.[3]

a. The panel majority affirmed the dismissal of petitioner's Rehabilitation Act claim for discrimination in hiring. The panel majority "assum[ed] that [petitioner] established a prima facie case of discrimination," which includes a showing that "she is disabled" and is "otherwise qualified" for the permanent position she sought. App., *infra*, 23a-24a.

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fidential medical information. App., *infra*, 10a. Petitioner further alleged that ODNI had violated the FMLA by interfering with her right to medical leave and retaliating against her for invoking that right. *Ibid.*

[3] The court of appeals also affirmed the district court's dismissal of the remainder of petitioner's claims under the Rehabilitation Act and the dismissal of her FMLA retaliation claim. App., *infra*, 36a. The court of appeals reversed and remanded for further proceedings on petitioner's claim that ODNI had unlawfully interfered with her right to medical leave under the FMLA. *Ibid.* On remand, the district court has stayed further proceedings on that claim pending this Court's disposition of this petition for a writ of certiorari. 16-cv-01030 Docket entry No. 92 (E.D. Va. July 29, 2019).

The panel majority held, however, that ODNI's "proffered explanation" for its decision—which relied exclusively on petitioner's issues with attendance and reporting—was "genuine, legitimate, and nondiscriminatory." *Id.* at 27a.

The panel majority rejected petitioner's argument that, because her attendance issues were caused by her disability, ODNI could not lawfully withhold an employment benefit on that basis. App., *infra*, 28a-29a. The panel majority stated that it had "no doubt that [petitioner's] struggle with depression was the cause of her attendance issues," *id.* at 29a, and it did not conclude that those issues rendered her unqualified for the permanent position she sought. Instead, the panel majority invoked circuit precedent holding that "the Rehabilitation Act 'does not require an employer to simply ignore an employee's blatant and persistent misconduct, even where that behavior is potentially tied to a medical condition.'" *Ibid.* (quoting *Vannoy* v. *Federal Reserve Bank of Richmond*, 827 F.3d 296, 305 (4th Cir. 2016)). The panel majority therefore held that ODNI was "permitted to take [petitioner's] attendance issues into account in its decision whether to hire her." *Ibid.*

b. Chief Judge Gregory dissented in part. App., *infra*, 37a-62a. With respect to petitioner's Rehabilitation Act claim for discrimination in hiring, Chief Judge Gregory would have held that petitioner had raised triable issues of fact sufficient to avoid summary judgment. *Id.* at 47a-53a. He did not question the panel majority's holding that, under Fourth Circuit precedent, ODNI was free to withhold an employment benefit on the basis of "misconduct" resulting from petitioner's depression. In his view, however, a reasonable factfinder could have found

that ODNI's proffered explanation for its refusal to hire petitioner was pretextual, due to conflicting evidence as to the seriousness of petitioner's attendance issues and certain inconsistences in statements made by ODNI's Chief Management Officer, who had recommended that petitioner not be hired. *Id.* at 51a-53a.

5. The court of appeals subsequently denied a petition for rehearing en banc, over the votes of Chief Judge Gregory and Judge King. App., *infra*, 79a-80a.

REASONS FOR GRANTING THE PETITION

A. The Decision Below Squarely Implicates A Conflict Among the Courts of Appeals

In addressing claims under the federal disability discrimination statutes, the courts of appeals have sharply disagreed over the proper treatment of employment decisions that are based on conduct caused by an employee's or applicant's disability. In such cases, the employer typically will contend that the plaintiff's conduct—which it will often label as "misconduct"—is conceptually distinct from the plaintiff's underlying disability and thus provides a lawful, non-discriminatory basis for the employment decision in question.

The First, Second, Ninth, and Tenth Circuits have squarely rejected that argument, holding instead that conduct caused by a disability is indistinguishable from the disability. Those courts have accordingly focused on whether the conduct at issue renders the plaintiff unqualified for the position in question or triggers an express exception to the protections afforded by statute. In the absence of such a showing, those courts have ruled, so-called "misconduct"

resulting from a disability cannot provide a lawful basis for taking an adverse employment action.

By contrast, the Fourth and Fifth Circuits have held that so-called "misconduct" caused by a disability is distinct from the underlying disability and can provide a lawful, non-discriminatory basis for taking an employment action. Thus, these courts permit an employer to justify an employment decision by pointing to "misconduct" resulting directly from a disability, thereby avoiding any inquiry into whether that "misconduct" renders the plaintiff unqualified for the position in question or triggers a statutory exception to liability.

This Court should grant review to resolve this split of authority and provide much-needed guidance on an issue that has led to substantial uncertainty in the lower courts.

1. The First, Second, Ninth, and Tenth Circuits have held that the federal disability discrimination statutes do "not contemplate a stark dichotomy between 'disability' and 'disability-caused misconduct,' but rather protect[] both." *McKenzie* v. *Dovala*, 242 F.3d 967, 974 (10th Cir. 2001); accord *McMillan* v. *City of New York*, 711 F.3d 120, 129 (2d Cir. 2013); *Dark* v. *Curry Cty.*, 451 F.3d 1078, 1084 (9th Cir. 2006); *Ward* v. *Massachusetts Health Research Inst., Inc.*, 209 F.3d 29, 38 (1st Cir. 2000).[4] Thus, when an employer seeks to justify an employment decision by pointing to conduct resulting

[4] Because the Rehabilitation Act incorporates the standards of the ADA by reference for employment cases, see 29 U.S.C. § 794(d); p. 3, *supra*, courts treat Rehabilitation Act and ADA precedents as interchangeable. *E.g.*, *Douglas* v. *California Dep't of Youth Auth.*, 285 F.3d 1226, 1229 n.3 (9th Cir. 2002); *Hainze* v. *Richards*, 207 F.3d 795, 799 (5th Cir. 2000).

from an individual's disability, those courts examine whether the conduct renders the individual unqualified for the position in question or triggers a statutory exception to liability, such as the ADA's "direct threat" defense or the specific rules governing intoxication and illegal drug use. See, *e.g.*, *McKenzie*, 242 F.3d at 974-975; *Humphrey* v. *Memorial Hosps. Ass'n*, 239 F.3d 1128, 1139 n.18 (9th Cir. 2001). If the individual is qualified and no statutory exception applies, an employer cannot take adverse employment action against that individual on the basis of conduct caused by her disability.

a. The Second Circuit's decision in *McMillan* v. *City of New York*, 711 F.3d 120 (2013), illustrates this approach. In that case, a city employee was routinely late for work due to complications associated with his schizophrenia medication. *Id.* at 123-124. The employee was terminated, and he brought suit alleging disability discrimination in violation of the ADA. *Id.* at 124. The city attempted to justify its action by asserting that the termination decision was attributable not to the plaintiff's disability, but rather to the tardiness it had caused. *Id.* at 125. The Second Circuit rejected this purported distinction, stressing that it was "undisputed that [the plaintiff] was tardy because of his disability and that he was disciplined because of his tardiness." *Id.* at 129. In these circumstances, the court explained, the plaintiff "was disciplined *because of his disability*." *Ibid.* (emphasis added). The Second Circuit therefore held that the employer had not articulated a legitimate, non-discriminatory reason for the challenged action and that the plaintiff was thus under no obligation to establish that the proffered explanation was pretextual. *Ibid.* On the employer's own account of its

decision, the plaintiff had been terminated because of his disability, and the plaintiff was required only to "demonstrate that, with reasonable accommodations, he could have performed the essential functions of his job." *Ibid.*

The Second Circuit in *McMillan* relied on the court's prior decision in *Teahan* v. *Metro-North Commuter Railroad Co.*, 951 F.2d 511 (2d Cir. 1991). *Teahan* involved an employee who had been fired for absenteeism, which he attributed to the effects of alcoholism. *Id.* at 513-514. The Second Circuit held that, if the plaintiff's absenteeism was in fact attributable to his alcoholism, then the plaintiff had been terminated by reason of his disability. *Id.* at 517. With that element established, whether the employer's decision was actionable would then turn on whether the plaintiff's absenteeism rendered him unqualified, because "[i]f the consequences of the handicap are such that the employee is not qualified for the position, then a firing because of that handicap is not discriminatory." *Id.* at 516.[5]

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[5] One year after *Teahan* was decided, the Rehabilitation Act was amended to incorporate the ADA's standards for employment discrimination cases, including the exception permitting employers to take adverse action on the basis of conduct caused by alcoholism. See Rehabilitation Act Amendments of 1992, Pub. L. No. 102-569, § 506, 106 Stat. 4344, 4428 (1992). Because the conduct at issue in *Teahan* falls within this statutory exception, that case would have resulted in a different outcome if adjudicated under the Rehabilitation Act as it stands today. Even though the case would now come out differently on its facts, *Teahan*'s holding as to the proper approach in cases of disability-caused conduct remains good law. See, *e.g.*, *Vandenbroek* v. *PSEG Power, CT LLC*, 356 Fed. Appx. 457, 459-460 (2d Cir. 2009) (noting that *Teahan* was decided

Accordingly, both *McMillan* and *Teahan* focused on the plaintiffs' qualifications to perform the positions in question. Indeed, that was the ground on which the plaintiff's claim in *Teahan* was ultimately resolved, with the Second Circuit affirming the district court's conclusion on remand that the plaintiff's alcoholism-related conduct rendered him unqualified for his position. See *Teahan* v. *Metro-North Commuter R.R. Co.*, 80 F.3d 50, 53-55 (1996). Likewise, the court in *McMillan* emphasized the "importance of a penetrating factual analysis" that takes into account "both the employer's description of a job and how the job is actually performed in practice." 711 F.3d at 126. Citing evidence in the record that the plaintiff was permitted to arrive at work late for many years and that the employer's policies contemplated flexible work schedules, the court concluded that, although timeliness would "normally" constitute an "essential function" of *most* positions, the record revealed a genuine dispute of fact as to whether the plaintiff's tardiness rendered him unqualified for *his* position. *Ibid.* Thus, the court reversed the district court's grant of summary judgment for the city and remanded for further proceedings. *Id.* at 129.

b. The First Circuit reached the same result in *Ward* v. *Massachusetts Health Research Institute, Inc.*, 209 F.3d 29 (2000), another case that involved an employee who had been terminated because of disability-caused tardiness. *Id.* at 32. The plaintiff alleged that his tardiness was caused by severe arthritis, but the district court held that "even if the

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under a superseded version of the law but nonetheless relying on its analysis).

appellant was fired because of his tardiness, it does not follow that he was fired because of the arthritis." *Id.* at 38 (internal quotation marks omitted). The First Circuit reversed, holding that, because "the tardiness flows directly from the arthritis * * *, a finding against [the plaintiff] on [the causation] element was improper." *Ibid.* The court thus rejected the defendant's proffered distinction between the plaintiff's disability (his arthritis) and conduct caused by that disability (his tardiness).

Instead, as with the Second Circuit in *McMillan*, the First Circuit focused on whether the plaintiff's tardiness rendered him unqualified for his position. *Ward*, 209 F.3d at 33-37. After conducting a thorough examination of the plaintiff's position and the practices of his employer, the court determined that the record did not support the defendant's argument "that a set schedule is an essential requirement for Ward's job." *Id.* at 35. Accordingly, the court reversed the district court's grant of summary judgment for the employer. *Id.* at 37.

c. The Ninth Circuit's decision in *Humphrey* v. *Memorial Hospitals Ass'n*, 239 F.3d 1128 (2001), is of a piece. The plaintiff in *Humphrey* had been terminated due to tardiness that she attributed to the effects of her obsessive compulsive disorder. *Id.* at 1133. In reversing the district court's grant of summary judgment in favor of the employer on the plaintiff's ADA claim, the Ninth Circuit held that the plaintiff had established a triable issue of fact with respect to her assertion that her tardiness was caused by a disability. *Id.* at 1140. The Ninth Circuit concluded that this showing was, in turn, sufficient to preclude summary judgment on the plaintiff's discrimination claim because, as a general matter,

"conduct resulting from a disability is considered to be part of the disability, rather than a separate basis for termination." *Id.* at 1139-1140.[6]

d. The Tenth Circuit's decision in *Den Hartog* v. *Wasatch Academy*, 129 F.3d 1076 (1997), takes the same approach, albeit with a different bottom-line result. In that case, the plaintiff's son suffered from bipolar disorder, which caused him to engage in disruptive activity at the school where the plaintiff worked. *Id.* at 1077. As a result of his son's behavior, the plaintiff's employment contract was not renewed. *Id.* at 1080.

The Tenth Circuit first concluded that the ADA protected the plaintiff from discrimination on the basis of his son's disability. *Den Hartog*, 129 F.3d at 1082 (relying on 42 U.S.C. § 12112(b)(4), which prohibits discrimination "because of the known disability of an individual with whom the qualified individual is known to have a relationship or association"). The court then rejected the school's argument that the termination of an employee on the basis of disability-caused misconduct is insulated from scrutiny under the ADA. *Id.* at 1086. The court concluded that the ADA's carve-outs for misconduct caused by alcohol and drug-related disabilities established that there is generally no distinction between disability and conduct in other contexts. *Ibid.* Ultimately, however, the court held that the plaintiff's son was a "direct threat" to others in the

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[6] In addition to applying the express statutory exceptions for drug and alcohol use, the Ninth Circuit has posited an exception to its general rule for "egregious and criminal misconduct." *Dark* v. *Curry Cty.*, 451 F.3d 1078, 1084 n.3 (9th Cir. 2006). In *Humphrey*, the court held that these exceptions did not apply to the employee's tardiness. 239 F.3d at 1139 n.18.

workplace, see p. 5, *supra*, and that the plaintiff could thus be dismissed without violating the ADA. *Id.* at 1090; see also *Doebele* v. *Sprint/United Mgmt. Co.*, 342 F.3d 1117, 1134-1135 (10th Cir. 2003) (reversing grant of summary judgment in favor of employer where the plaintiff was not shown to be a direct threat as a matter of law).

2. The Fourth and Fifth Circuits have adopted the diametrically opposite position. For those courts, so-called "misconduct" that is caused by a disability may provide a lawful, non-discriminatory basis for taking an employment action, even if it does not rise to the level that would make the plaintiff unqualified for the position in question.

a. In the decision below, the Fourth Circuit held that "misconduct—even misconduct related to a disability—is not itself a disability, and an employer is free to fire an employee on that basis." App., *infra*, 29a (quoting *Martinson* v. *Kinney Shoe Corp.*, 104 F.3d 683, 686 n.3 (4th Cir. 1997)). It applied that rule to petitioner, despite both assuming that she was qualified and acknowledging that there was "no doubt that [her] struggle with depression was the cause of her attendance issues." *Id.* at 24a, 29a. Simply put, because the Fourth Circuit labeled petitioner's attendance issues as "misconduct," ODNI was free to reject petitioner's job application on the basis of conduct caused by her depression—even if that conduct did not render her unqualified. *Id.* at 29a.

In that crucial respect, the decision below directly conflicts with the decisions of the First, Second, Ninth, and Tenth Circuits discussed above. In those circuits, when an employer seeks to defend against a discrimination claim by pointing to so-called "misconduct" caused by a disability, the courts will

engage in a penetrating factual inquiry to determine whether the "misconduct" renders the plaintiff unqualified for the position in question or triggers a statutory defense to discrimination liability. See, *e.g.*, *McMillan*, 711 F.3d at 129; *Humphrey*, 239 F.3d at 1140; *Ward*, 209 F.3d at 38; *Den Hartog*, 129 F.3d at 1086. The Fourth Circuit's approach—under which a conclusion of "misconduct" entirely insulates the employer's decision from scrutiny—short-circuits that sort of careful, record-based inquiry with respect to analytically distinct statutory prongs.

b. The Fifth Circuit has reached the same conclusion as the decision below. In *Hamilton* v. *Southwest Bell Telephone Co.*, 136 F.3d 1047 (5th Cir. 1998), the plaintiff argued that his termination for an emotional outburst caused by post-traumatic stress disorder violated the ADA. *Id.* at 1052. The Fifth Circuit held, however, that the plaintiff's contention that the conduct stemmed from his disability was irrelevant, because an individual cannot "hide behind the ADA and avoid accountability for his actions." *Ibid.* Without even discussing whether the plaintiff remained qualified for the position, the court held that the law did not prohibit adverse employment actions on the basis of conduct "blamed on an impairment." *Ibid.*

3. The confusion in the lower courts extends well beyond the six courts of appeals that have taken a conclusive position on the circuit conflict. A number of other courts have issued decisions that are difficult to reconcile with one another or internally inconsistent decisions that seem to combine elements of both approaches. This additional confusion reinforces the need for this Court's intervention.

a. The Third Circuit offers a prime example of this confusion. On the one hand, a published decision of the Third Circuit has endorsed the reasoning of those courts that reject any distinction between disability-caused conduct and the underlying disability. See *Salley* v. *Circuit City Stores, Inc.*, 160 F.3d 977, 981 (1998). Addressing a terminated employee's ADA claim, the Third Circuit noted that "[t]he application of a facially neutral policy to a disabled employee may be an unlawful ground for termination if the employee's violation stems from his or her disability." *Ibid.* The court explained that "the employer may not use established policies regulating behavior to short-circuit the required analysis of whether the employee can perform the essential functions of the job with a reasonable accommodation." *Ibid.* Although that observation was arguably dicta—*Salley* involved an employee who was terminated for violating his employer's drug-abuse policy and thus did not directly implicate the ADA's general standards for conduct caused by disabilities other than drug addiction (*ibid.*)—the Third Circuit has reiterated the same conclusion in a more recent unpublished decision. See *Verzeni* v. *Potter*, 109 Fed. Appx. 485, 489 (2004) (stating that "the effects" of a mental illness "cannot be separated from the disability itself") (citing *Teahan*, 951 F.2d at 516).

On the other hand, in a series of unpublished decisions, the Third Circuit has endorsed the rule that "an employer is not prohibited from discharging an employee based on misconduct, even if that misconduct is related to his disability." *E.g.*, *Hoffman* v. *City of Bethlehem*, 739 Fed. Appx. 144, 149 (2018); *Sever* v. *Henderson,* 220 Fed. Appx. 159, 161-162 (2007). Indeed, at least one district court within the

Third Circuit has relied on this rule in a case that is materially indistinguishable from this one. See *Phillips* v. *Center for Vision Loss*, No. 3:15-CV-00563, 2017 WL 839465 (M.D. Pa. Mar. 3, 2017). Even after assuming that the plaintiff was disabled, that she was qualified, and that the conduct for which she was fired was caused by her bipolar disorder, the district court in *Phillips* nonetheless held that the plaintiff could not show discrimination on the basis of disability "merely by showing that her poor performance and attitude were caused by her bipolar condition." *Id.* at *10.

b. The Seventh Circuit's decisions reflect similar confusion and inconsistency. That court has conflated the Second Circuit's focus on qualification with the Fourth Circuit's rule distinguishing conduct from disability. In *Palmer* v. *Circuit Court of Cook County*, 117 F.3d 351 (7th Cir. 1997), the court addressed an ADA claim brought by an employee who was terminated after threatening her supervisor. *Id.* at 351-352. The court concluded that "[t]here is no evidence that [the plaintiff] was fired because of her mental illness," even though the "[t]he cause of the threat was * * * her mental illness." *Id.* at 352. The court broadly announced that, "if an employer fires an employee because of the employee's unacceptable behavior, the fact that that behavior was precipitated by a mental illness does not present an issue under the Americans with Disabilities Act." *Ibid.* Yet on the same page, the court arguably limited that rule by referring to the effect of disability-caused conduct on an employee's qualifications to perform the position in question: "[The ADA] protects only 'qualified' employees * * * and threatening other employees disqualifies one." *Ibid.*

Matthews v. *Commonwealth Edison Co.*, 128 F.3d 1194 (7th Cir. 1997), evinces similar confusion. In that case, the court first announced the seemingly clear rule that, "[e]ven if the individual is qualified, if his employer fires him for any reason other than that he is disabled there is no discrimination 'because of' the disability." *Id.* at 1196. The court added that this rule would apply "even if the reason" for the employer's decision "is the consequence of the disability." *Ibid.* Yet by the end of the same paragraph, the court shifted its focus to qualification: "[B]ut if [the employer] fires [a disabled employee] *because he is unable to do his job*, there is no violation, even though the diabetes is the cause of the worker's inability to do his job." *Ibid.* (emphasis added).

c. The Sixth Circuit's decisions are also difficult to square with each other. As an initial matter, the Sixth Circuit has explicitly rejected the Second Circuit's approach in *Teahan*, holding instead that there is a meaningful "distinction between discharging someone for unacceptable misconduct and discharging someone because of the disability." *Maddox* v. *University of Tenn.,* 62 F.3d 843, 846-847 (1995).

In other cases, however, the Sixth Circuit has addressed disability-caused conduct by focusing on whether that conduct renders the plaintiff unqualified for the position in question. In *Chandler* v. *Specialty Tires of America (Tennessee), Inc.*, 134 Fed. Appx. 921 (6th Cir. 2005), for example, the plaintiff alleged that she was fired because of an attempted suicide, which had been caused by her depression. *Id.* at 925. The Sixth Circuit reversed the district court's grant of summary judgment to the plaintiff's employer, determining that there was a genuine dispute of material fact as to whether the plaintiff's "suicide

attempt [limited] her ability to perform" the duties of her position "or render[ed] her unqualified for her job." *Id*. at 929; accord *Macy* v. *Hopkins Cty. Sch. Bd. of Educ.*, 484 F.3d 357, 366 (6th Cir. 2007) ("[A]n employer may legitimately fire an employee for conduct, even conduct that occurs as a result of a disability, *if that conduct disqualifies the employee from his or her job*.") (emphasis added).

Notwithstanding the Sixth Circuit's recent decisions taking a more measured approach, however, district courts within the Sixth Circuit have continued to cite *Maddox* for the proposition "that the ADA does not protect a disabled employee from adverse employment actions resulting from misconduct allegedly caused by his disability." *Seitz* v. *Lane Furniture Indus., Inc.*, No. 07CV171, 2008 WL 4346439, at *13 (N.D. Ohio Sept. 17, 2008); see also *Nusser* v. *Potter*, No. 06-12235, 2007 WL 2080424, at *7 (E.D. Mich. July 19, 2007) ("[T]he Sixth Circuit has made clear that an employer may fire a person for his conduct even if that conduct is related to the employee's disability.") (internal quotation marks omitted). In short, the proper treatment of disability-caused misconduct appears to have left courts in the Sixth Circuit bewildered.

d. Finally, although the D.C. Circuit has not yet taken a side in the circuit conflict, the District Court for the District of Columbia has issued conflicting decisions regarding disability-caused conduct. For instance, in *Miller* v. *Hersman*, 759 F. Supp. 2d 1 (D.D.C. 2010), the court concluded that, because the employer knew that the plaintiff's poor performance was related to his disabilities, a reasonable jury might find that firing him for his performance issues was pretextual. *Id*. at 16. The *Miller* court thus recognized

that an action taken against a qualified employee on the basis of disability-caused conduct can violate the Rehabilitation Act. *Ibid*. By contrast, the court in *Douglas* v. *District of Columbia Housing Authority*, 981 F. Supp. 2d 78 (D.D.C. 2013), noted that the Rehabilitation Act only forbids adverse actions taken "because of her perceived disability, rather than because of instances of misconduct that [the defendant] perceived as disability-related." *Id*. at 90 n.7. This distinction between disability and conduct caused by a disability is contrary to the holding of *Miller* and falls in line with the Fourth and Fifth Circuits. Indeed, the *Douglas* court cited Fourth Circuit precedent to support its conclusion. *Ibid.* (citing *Halpern* v. *Wake Forest Univ. Health Scis.*, 669 F.3d 454, 465 (4th Cir. 2012)).

4. The pervasive confusion in the lower courts has been documented by courts and commentators alike. The Eleventh Circuit, for example, has noted that the "circuits are split," contrasting the Fourth Circuit's rule that "misconduct—even misconduct related to a disability—is not itself a disability and may be a basis for dismissal" with the Ninth Circuit's holding that "conduct resulting from a disability is considered to be part of the disability, rather than a separate basis for termination." *Caporicci* v. *Chipotle Mexican Grill, Inc.*, 729 Fed. Appx. 812, 816 n.5 (2018). A number of academic commentators have made the same observation.[7]

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[7] See, *e.g.*, Dustin Riddle & Richard Bales, *Disability Claims for Alcohol-Related Misconduct*, 82 St. John's L. Rev. 699, 701 (2008) (detailing a split between courts that "distinguish between the disability and disability-related misconduct" and those that do not); Kelly Cahill Timmons, *Accommodating Misconduct under the Americans with Disabilities Act*, 57 Fla. L.

* * *

In sum, the decision below directly implicates an acknowledged circuit conflict that has divided six courts of appeals and generated broader confusion in the lower courts. This Court's review is accordingly warranted.

B. The Decision Below Is Incorrect

This Court's review is also warranted because the decision below is incorrect. Discrimination by reason of conduct caused by a disability *is* discrimination by reason of the disability. The Fourth Circuit's contrary conclusion is irreconcilable with the statutory text, the relevant context, and the overriding purpose of the federal disability discrimination statutes.

1. The Rehabilitation Act and the ADA prohibit employment discrimination "against a qualified individual on the basis of disability." 42 U.S.C. § 12112(a); see also 29 U.S.C. § 794(d) (incorporating the ADA's standards by reference in cases alleging employment discrimination). The decision below rests on an artificially circumscribed understanding of

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Rev. 187, 190 (2005) (noting the courts of appeals' differing "approaches to cases involving disability-related misconduct"); Brian T. Rabineau, Note, *Those with Disabilities Take Heed*, 65 Mo. L. Rev. 319, 330-331 (2000) (noting that many "circuits have utilized conflicting methods of analysis" regarding the "conduct/disability distinction"); Sarah Shaw, Comment, *Why Courts Cannot Deny ADA Protection to Plaintiffs Who Do Not Use Available Mitigating Measures for Their Impairments*, 90 Calif. L. Rev. 1981, 2023 n.260 (2002) (distinguishing between courts "hold[ing] that termination for conduct that has a strong causal connection to the underlying disability should be analyzed in the same way as termination for the disability itself" and other "courts have rejected this approach").

what it means for an employment decision to be made "on the basis of disability."

At its core, the court of appeals' error lies in elevating the concept of "misconduct" to dispositive significance. That ill-defined term, which appears nowhere in the Rehabilitation Act or the ADA, simply cannot bear the weight ascribed to it by the court of appeals. Indeed, if the court of appeals' distinction were taken seriously, it would be a rare case in which an employer's decision could not be re-cast as a reaction to an employee's or applicant's "misconduct," rather than the underlying disability, and thereby evade scrutiny under the federal disability discrimination statutes. The employer need only announce that some manifestation of the employee's or applicant's disability violated a generally applicable workplace rule or standard (like "unit cohesion," App., *infra*, 7a), and then contend that its decision was based on that violation, rather than on the disability.

The Second Circuit illustrated the perverse implications of this distinction with the example of a terminated employee who walks with a limp that causes him "to make a loud 'thump' when he takes a step." *Teahan*, 951 F.2d at 516. The Second Circuit reasoned that the employer could not escape scrutiny by contending that the termination was due to the thumping sound rather than the limp. *Ibid.* As the court explained, the "thump" is merely a "symptomatic manifestation of the handicap," and an employment decision made on the basis of the "thump" is no different from a decision made on the basis of the limp. *Id.* at 517.

The precedent upon which the court of appeals primarily relied below, *Martinson*, 104 F.3d 683, also

underscores the analytical emptiness of the Fourth Circuit's distinction between disability and disability-caused "misconduct." *Martinson* involved an employee who had been terminated from his position as a salesman at a shoe store. *Id.* at 685. The employee suffered from epilepsy, and the employer attributed its decision to terminate him to the seizures he experienced at work. *Ibid.* The district court held that this was a permissible basis for the employer's decision, because it was tied to the "specific attributes" of the employee's disability, rather than the "general disability" of epilepsy. *Id.* at 686. On appeal, the Fourth Circuit rejected that distinction, holding that it did not matter whether the employee was terminated "because he suffered from epilepsy or because of the 'specific aspects' of the disease." *Ibid.* The court reasoned that "both are disabilities and an employer may not use either to justify discharging an employee so long as that employee is qualified for the job." *Ibid.* In that respect, the court expressly *rejected* an employer's attempt to narrowly circumscribe the disability laws' protections through the use of such arbitrarily drawn distinctions.

At the same time, however, the *Martinson* court maintained "that *misconduct*—even misconduct resulting from a disability—is not itself a disability, and an employer is free to fire an employee on that basis." 104 F.3d at 686 n.3 (emphasis added). But the court did not offer any meaningful basis for distinguishing disability-caused "misconduct" from the "specific aspects" of a disability that retained protection under its decision. Nor did the court explain why the employer in that case could not convert the employee's epileptic seizures into unprotected "misconduct" by depicting them as

failures to comply with a workplace expectation that employees will remain physically composed and conscious during the work day.

This Court has previously rejected an attempt to narrow the ADA's protections through the use of a similarly artificial distinction. In *School Board of Nassau County* v. *Arline*, 480 U.S. 273 (1987), a teacher suffered a relapse of tuberculosis, and the school board fired her out of fear that she was contagious. *Id.* at 276-277. The school board argued that the teacher had been fired "not because of her diminished physical capabilities, but because of the threat that her relapses of tuberculosis posed to the health of others." *Id*. at 281. This Court held, however, that this was a distinction without a difference. *Id.* at 282. Employers are not permitted "to seize upon the distinction between the effects of a disease on others and the effects of a disease on a patient and use that distinction to justify discriminatory treatment." *Ibid.* It would be no less "unfair" (*ibid.*) to allow an employer to seize upon an artificial distinction between a disability and conduct caused by the disability in seeking to justify an adverse employment action.

At bottom, when a plaintiff's so-called "misconduct" is indisputably a manifestation of an underlying disability, no meaningful distinction can be drawn between the "misconduct" and the disability. An employment decision made on the basis of such disability-caused "misconduct" is therefore made on the basis of disability.

None of this is to deny the potential relevance of an employee's or applicant's conduct to *other elements* of a discrimination claim and, ultimately, to the disposition of such claims. The proper approach,

however, is to treat conduct caused by a disability as "a factor that bears on whether an employee is 'otherwise qualified' for the position." *Teahan*, 951 F.2d at 515-516. If an employee's disability prevents her from performing the "essential functions of the job," then the discrimination prohibition does not apply. See, *e.g.*, *Jones* v. *Walgreen Co.*, 679 F.3d 9, 18 (1st Cir. 2012). To make that qualification determination, courts engage in a "penetrating factual analysis" of both the plaintiff's disability and the "essential functions" of her job. *McMillan*, 711 F.3d at 126; see also *Southeastern Cmty. Coll.* v. *Davis*, 442 U.S. 397, 406 (1979).

The court of appeals' approach, however, "short-circuit[s] the required analysis" of whether an employee is qualified. *Salley*, 160 F.3d at 981. By upholding adverse actions taken on the basis of disability-caused conduct *regardless* of whether the employee is otherwise qualified, the approach adopted below improperly allows an employer to "avoid the burden of proving that the handicap is relevant to the job qualifications." *Teahan,* 951 F.2d at 517.

That is precisely what occurred in this case. The court of appeals assumed that petitioner was qualified for the permanent position she sought despite any attendance issues, App., *infra*, 24a, and it had "no doubt" that those issues were caused by petitioner's disability. *Id.* at 29a. It did not require her employer to show otherwise in order to obtain summary judgment. Petitioner's employer was thus excused from having to demonstrate that set working hours were an essential part of the position petitioner sought, notwithstanding her "maxi flex" schedule and years of excellent performance while working flexible hours. Rather, the court of appeals called the

attendance issues "misconduct" and avoided such thorny questions altogether. *Ibid.*

2. The statutory context reinforces the conclusion that adverse action taken because of conduct caused by disability is discrimination on the basis of disability.

As an initial matter, the ADA is clear that the discrimination it proscribes extends far beyond decisions motivated by simple animus against individuals with disabilities. To the contrary, the ADA creates an obligation on the part of employers to provide employees and applicants with reasonable accommodations to known disabilities, 42 U.S.C. § 12112(b)(5)(A) and (B), and it prohibits employers from using qualification standards that have a disparate impact on individuals with disabilities unless those standards are shown to be "job-related for the position in question and * * * consistent with business necessity," *id.* § 12112(b)(6); see also pp. 3-4, *supra.*

Thus, "[a]s a general rule, an employer may *not* hold a disabled employee to precisely the same standards of conduct as a non-disabled employee unless such standards are job-related and consistent with business necessity." *Den Hartog*, 129 F.3d at 1086. Likewise, the fact that an employer need not make an accommodation that would constitute an "undue hardship" (42 U.S.C. § 12112(b)(5)(A)) or accept behavior that poses a "direct threat" to the health or safety of others in the workplace (*id.* § 12113(b)) "establishes that there are certain levels of disability-caused conduct that need not be tolerated or accommodated by employers." *Den Hartog*, 129 F.3d at 1087. As a "necessary corollary," it follows that "there must be certain levels of disability-caused

conduct that have to be tolerated or accommodated." *Ibid.*

Under the approach adopted by the Fourth Circuit below, however, decisions that are based on disability-caused conduct escape such scrutiny entirely. Because such decisions are deemed not to be made on the basis of disability, courts would have no occasion to consider whether the conduct at issue could be accommodated without undue hardship, or whether the conduct poses a direct threat to others. The court of appeals' approach would thus effectively write these provisions out of the ADA.

The court of appeals' approach also cannot be squared with the provisions of the ADA that expressly *authorize* employers to take adverse action based on conduct resulting from an employee or applicant's disability. For instance, the statute expressly permits employers to penalize individuals addicted to alcohol or illegal drugs for violating general conduct standards "*even if* any unsatisfactory performance or behavior is related to the drug use or alcoholism." 42 U.S.C. § 12114(c)(4) (emphasis added). But this explicit exception would make no sense absent a background rule that employment decisions based on conduct caused by other disabilities come within the ADA's protections, even when that conduct violates generally applicable rules or standards and can thus be depicted as "misconduct." See *Den Hartog*, 129 F.3d at 1086.

3. The court of appeals' legal error is especially pernicious because it operates to gut federal law's protections for individuals with disabilities associated with mental health.

A key element of the American Psychological Association's definition of "mental disorder" is a

"disturbance in * * * behavior." American Psychological Ass'n, *Diagnostic and Statistical Manual of Mental Disorders* 20 (5th ed. 2013). Major depressive disorder, for example, is "characterized by discrete episodes" that involve "clear-cut changes in affect, cognition, and neurovegetative functions." *Id.* at 155; see also Kelly Cahill Timmons, *Accommodating Misconduct under the Americans with Disabilities Act*, 57 Fla. L. Rev. 187, 208-210 (2005) (describing mental impairments that "manifest themselves in the form of conduct"). As the Tenth Circuit has explained, "[m]ental illness is manifested by abnormal behavior, and is in fact normally diagnosed on the basis of abnormal behavior." *Den Hartog*, 129 F.3d at 1087; accord Susan Stefan, *Hollow Promises: Employment Discrimination Against People with Mental Disabilities* 154 (2002) ("Many disabilities manifest themselves in forms of behavior or conduct, and psychiatric disability is manifested almost completely in this way.").

Given the nature of mental impairments, it follows that "permit[ting] employers carte blanche to terminate employees with mental disabilities on the basis of any abnormal behavior would largely nullify the ADA's protection of the mentally disabled." *Den Hartog*, 129 F.3d at 1087. That result would be contrary to the disability laws' "sweeping purpose." *PGA Tour, Inc.* v. *Martin*, 532 U.S. 661, 675 (2001). No one would propose that a person who uses a wheelchair commits "misconduct" disentitling him to protection under the federal disability discrimination statutes when he cannot ascend a flight of stairs to a second-floor staff meeting. Yet the decision below countenances precisely that result for someone whose impairment is mental rather than physical.

Moreover, the Fourth Circuit's approach invites strategic behavior to avoid the prohibition on disability discrimination. When faced with an employee or applicant suffering from a disability which manifests in undesired conduct, an employer need only be careful to cite the individual's *conduct* rather than the underlying disability causing it. An interpretation of the disability statutes that creates such a loophole is demonstrably at odds both with the statutory framework and with Congress's intent.

C. The Question Presented Is Important, And This Case Presents An Excellent Vehicle To Resolve It

1. The question presented here is a recurring and important one, as demonstrated by the many cases cited above and numerous other decisions of the lower courts that have grappled with the same issue.[8] The frequency with which the issue arises is no surprise, given the volume of federal litigation under the disability discrimination statues. There were 10,773 ADA suits filed in district courts in 2017, making up four percent of the entire federal civil docket that

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[8] See, *e.g.*, *Greer* v. *Emerson Elec. Co.*, 185 F.3d 917, 922 (8th Cir. 1999); *EEOC* v. *Amego, Inc.*, 110 F.3d 135, 149 (1st Cir. 1997); *Harris* v. *Polk Cty.*, 103 F.3d 696, 697 (8th Cir. 1996); *Cushing* v. *Moore*, 970 F.2d 1103, 1109 (2d Cir. 1992); *Walton* v. *Spherion Staffing LLC*, 152 F. Supp. 3d 403, 411 (E.D. Pa. 2015); *Willis* v. *Norristown Area Sch. Dist.*, 2 F. Supp. 3d 597, 605 (E.D. Pa. 2014); *Walz* v. *Ameriprise Fin., Inc.*, 22 F. Supp. 3d 981, 986-987 (D. Minn. 2014), aff'd on other grounds, 779 F.3d 824 (8th Cir. 2015); *Valentine* v. *Standard & Poor's*, 50 F. Supp. 2d 262, 290 (S.D.N.Y. 1999); *Hogarth* v. *Thornburgh*, 833 F. Supp. 1077, 1083 (S.D.N.Y. 1993); *Guerriero* v. *Schultz*, 557 F. Supp. 511, 513 (D.D.C. 1983).

year.[9] More than twice as many ADA claims are filed with the EEOC each year.[10]

In many such cases, of course, the employer will defend on the ground that the plaintiff does not have a disability, as defined by statute, or that the decision in question was entirely unrelated to the plaintiff's claimed impairment. But a meaningful number of these cases mirror this one, where an employer seeks to defend a challenged employment decision by pointing to so-called "misconduct" caused by the plaintiff's disability. The statutory question presented here therefore arises with regularity.

More broadly, the proper scope of the federal disability discrimination statutes is an issue that affects vast swaths of the American population. By one estimate, one in four Americans—more than 61 million people—have a disability. Catherine A. Okoro, et al., *Prevalence of Disabilities and Health Care Access by Disability Status and Type Among Adults — United States, 2016*, 67 Morbidity and Mortality Weekly Report 882, 882-887 (2018). Almost 17 percent of adults of prime employment age (18 to 44) are considered disabled. *Ibid.* Moreover, mental disabilities such as depression and anxiety make up between eight and nine percent of all disabilities.[11] Studies also indicate that this number is increasing—

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[9] United States Courts, *Just the Facts: Americans with Disabilities Act* (July 12, 2018), https://www.uscourts.gov/news/2018/07/12/just-facts-americans-disabilities-act.

[10] EEOC, *Americans with Disabilities Act of 1990 (ADA) Charges FY 1997–FY 2018*, https://www.eeoc.gov/eeoc/statistics/enforcement/ada-charges.cfm.

[11] Council for Disability Awareness, *Chances of Disability* (Mar. 28, 2018), https://disabilitycanhappen.org/disability-statistic/.

for instance, the rate of young adults experiencing serious psychological distress rose 71 percent from 2008 to 2017.[12]

2. This case presents a particularly favorable vehicle for addressing the question presented. In the decision below, the panel majority explicitly assumed that petitioner's depression constituted a disability and that she was qualified for the position she sought. App., *infra,* 24a-25a. The panel majority likewise stated that it had "no doubt that [petitioner's] struggle with depression was the cause of her attendance issues." *Id.* at 29a. Thus, as the case arrives before this Court, there is no factual dispute as to any of those critical elements of petitioner's claim. The only ground for the panel majority's decision was its conclusion that, because petitioner's attendance issues constituted "misconduct," they were distinct from her disability and thus afforded a legitimate, non-discriminatory basis for ODNI's decision not to hire her. *Ibid.* This case therefore cleanly presents the legal issue that has divided the courts of appeals.

CONCLUSION

The petition for a writ of certiorari should be granted.

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[12] American Psychological Ass'n, *Mental Health Issues Increased Significantly Over Last Decade* (Mar. 14, 2019), https://www.apa.org/news/press/releases/2019/03/mental-health-adults.

Respectfully submitted.

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APPENDIX A

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 17-1943

HANNAH P.,

Plaintiff - Appellant,

v.

DANIEL COATS, Director of the Office of The Director of National Intelligence McLean, VA,

Defendant - Appellee,

and

MARK EWING, in his personal capacity McLean, VA,

Defendant.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Claude

M. Hilton, Senior District Judge. (1:16-cv-01030-CMH-IDD)

Argued: October 31, 2018
Decided: February 19, 2019

Before GREGORY, Chief Judge, THACKER and QUATTLEBAUM, Circuit Judges.

Affirmed in part, vacated in part, and remanded by published opinion. Judge Thacker wrote the opinion, in which Judge Quattlebaum joined. Chief Judge Gregory wrote a separate opinion concurring in part and dissenting in part.

ARGUED: Timothy Bosson, BOSSON LEGAL GROUP, Fairfax, Virginia, for Appellant. Caroline D. Lopez, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellee. **ON BRIEF:** Chad A. Readler, Principal Deputy Assistant Attorney General, Marleigh D. Dover, Civil Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C.; Dana J. Boente, United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Alexandria, Virginia, for Appellee.

THACKER, Circuit Judge:

Appellant Hannah P.[1] ("Hannah"), a former employee of the Office of the Director of National Intelligence ("Appellee"), asserts that Appellee discriminated against her pursuant to the Rehabilitation Act of 1973 ("Rehabilitation Act"), 29 U.S.C. § 701, *et seq.*, and violated the Family and Medical Leave Act of 1993 ("FMLA"), 29 U.S.C. § 2601, *et seq.*, by not hiring her for a permanent position. The district court granted summary judgment in Appellee's favor as to all claims.

For the reasons explained below, we affirm the district court's judgment as to the Rehabilitation Act and FMLA retaliation claims. However, because a genuine issue of material fact remains as to whether Hannah provided notice of her disability and interest in FMLA leave sufficient to trigger Appellee's duty to inquire, we hold that summary judgment as to Hannah's FMLA interference claim was not warranted. Accordingly, we vacate that part of the district court's judgment and remand Hannah's FMLA interference claim for further proceedings.

I.

A.

In March 2011, Appellee hired Hannah for a five-year term as an operations analyst. In that position, Hannah participated in "long-term, in-depth studies into issues that had particular budgetary importance

[1] Pursuant to a protective order, Hannah is identified by her first name and last initial.

for the [c]ommunity." J.A. 18.[2] Hannah generally received glowing reviews from her supervisors. *See, e.g.*, *id.* at 412 (describing Hannah's performance prior to 2015 as "outstanding" and noting her "energy/drive, technical competence, superb communication and networking skills, and superior analytic tradecraft"); *id.* at 350 (describing Hannah as "a high-performing employee"); *id.* at 391–410 (describing, repeatedly, various elements of Hannah's performance as "excellent" and "outstanding").

B.

A few months after she was hired, Hannah was diagnosed with depression. Hannah immediately informed at least two of her supervisors of her diagnosis, but she did not request any accommodations at that time. Hannah treated her depression by seeing a counselor and a psychiatrist and by taking prescribed medication.

In November 2013, Hannah was assigned to coordinate the responses of the National Intelligence Director and Principal Deputy Director to Edward Snowden's unauthorized disclosures.[3] This role was "high stress" and required "frequent long hours and weekend work coupled with meeting tight deadlines

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[2] Citations to the "J.A." refer to the Joint Appendix filed by the parties in this appeal.

[3] In 2013, National Security Agency subcontractor Edward Snowden leaked "the biggest cache of top-secret documents in history," which revealed numerous global surveillance programs run by the United States government. Ewen MacAskill & Alex Hern, *Edward Snowden: 'The People Are Still Powerless, but Now They're Aware*,' Guardian (June 4, 2018), https://www.theguardian.com/us-news/2018/jun/04/edward snowden-people-still-powerless-but-aware.

and dealing with a demanding [National Security Council] customer." J.A. 412. In fact, to accommodate the schedule change that this role required, Appellee moved Hannah to a "maxi flex" schedule. *Id.* at 350–51. A "maxi flex" schedule requires an analyst to work a certain number of hours -- 80 hours over a two-week period -- but does not dictate the exact hours that the analyst must work per day. For Hannah, that meant starting and ending work later than traditional business hours.

The Snowden assignment lasted 18 months and completed in January 2015. However, Hannah continued her atypical working hours beyond the completion of the Snowden assignment. Hannah's supervisor "was expecting" that when the Snowden assignment ended, Hannah's hours "might become more normal." J.A. 353. However, for the first few months, he did not communicate with Hannah about returning to normal business hours. Rather, he explained, he was "primarily concerned about establishing what [Hannah's] next task was going to be." *Id.*

By March 2015, Hannah's co-workers perceived her schedule to be "erratic." J.A. 413. Hannah arrived to work well after normal business hours and racked up numerous unplanned absences. On some occasions Hannah was "extremely late," sometimes arriving after 2 PM. *Id.* On other occasions Hannah was unreachable for hours, often missing and failing to return "repeated phone calls to her cell and home phone." *Id.* When Hannah's supervisors were able to reach her, they noted that she seemed "either lethargic or almost unconcerned" about her lateness and absences. *Id.* They also noted that her demeanor

was "sad, very flat, and almost trance like." *Id.* Around that time, Hannah informed her supervisors that she "had a recent change in medication." *Id.*

C.

1.

Appellee made some accommodations for Hannah following the Snowden assignment. First, after consulting with Hannah in January 2015, Appellee lightened Hannah's workload "to give her a chance to decompress" from the stress of the Snowden assignment. J.A. 413 (internal quotation marks omitted). Second, multiple of Hannah's supervisors had "informal counseling sessions" with her "to discuss any issues that she might be having" and to "urge her" to notify them if she was going to be late or absent. *Id.*

On March 19, 2015, one of Hannah's supervisors met with Hannah directly to address her attendance issues. Together, Hannah and her supervisors developed a plan to reconcile Hannah's depression with Appellee's staffing needs. According to that plan, Hannah was to arrive to work by 10 AM. If she was going to be absent or later than 10 AM, Hannah was to contact one of her supervisors in advance. If Hannah had not arrived at work or contacted a supervisor by 11 AM, a supervisor would call her to determine when she would arrive.

But, Hannah did not follow the plan. For example, the very next day after she and her supervisors developed the plan, Hannah emailed her supervisors at 11:05 AM to inform them that she would be arriving after 12 PM. Similarly, on March 31, Hannah emailed her supervisors at 11:56 AM to

inform them that she would not be coming into work at all that day. On April 1, after Hannah had not arrived to work or contacted her supervisors, Hannah's second-level supervisor called her at 12:30 PM, at which time Hannah reported "being unable to just get going." J.A. 413. Later that day, when Hannah finally arrived to work, her supervisor informed her that the plan they created was not working.

At that same time, her supervisor revised the plan to require Hannah to arrive at work by 10 AM or report to her supervisors in advance if she was going to be late or absent. This "put the onus" on Hannah to contact her supervisors, rather than asking her supervisors to contact her if she had not arrived at work by 11 AM. J.A. 90. Hannah failed to follow this modified plan as well. In fact, she failed to comply on April 2 and April 3, the two days following the meeting where the plan was modified.

According to Appellee, Hannah's timeliness and attendance issues impacted her performance, the performance of her peers, and the performance of her supervisors. Per Appellee, Hannah's "erratic" schedule was "noted by her teammates" and affected "unit cohesion." J.A. 413. Hannah's failure to report her tardiness and absences as well as her unresponsiveness required her management team to spend "significant time and energy" tracking her down. *Id.* Additionally, because of Hannah's absences, Hannah's supervisors were often forced to assign work that might have been assigned to Hannah to other analysts.

2.

On April 9, 2015, just three weeks after the initial work plan was developed to attempt to accommodate Hannah's needs, Hannah again met with her supervisors. At this meeting, Hannah's supervisors informed her that they were referring her to the Employee Assistance Program ("EAP"). EAP is a voluntary counseling service for employees and their family members that provides "free, confidential, short-term mental health[,] financial, and addictions counseling and referral to cleared community providers." J.A. 132. Hannah's supervisors made an EAP appointment for her for the following day, Friday, April 10. At that time, Hannah explained to her supervisors that her psychiatrist recommended she take four weeks of medical leave. But, Hannah's supervisors insisted that she would need to meet with EAP before they could approve her request for medical leave.

On the next business day following Hannah's EAP session -- Monday, April 13 -- Hannah's supervisor told Hannah he was willing to authorize her to take medical leave. However, at that point, Hannah informed her supervisor that her leave request was "on hold," without further explanation. J.A. 170, 178.

On April 16, Hannah's supervisor noted in an email that he had an "extended" 40 minute discussion with Hannah's EAP psychologist. J.A. 604. Hannah alleges that the EAP psychologist "shared with [Hannah's supervisor] details of what Hannah had revealed in confidence at the EAP sessions." Appellant's Br. 17. Specifically, Hannah alleges that the EAP psychologist told her supervisor that Hannah

was concerned about Appellee's records retention policies, and that Hannah's "difficulties in getting to work were the result of a lack of motivation, not related to depression." J.A. 540.

3.

Despite Hannah's participation in EAP, her attendance problems persisted. For example, on April 13, 2015, Hannah emailed her supervisors at 10:58 AM to inform them that she would arrive to work by 11:30 AM. Similarly, on April 14, Hannah emailed her supervisors at 11:08 AM to inform them that she would arrive to work by 12 PM. That day, Hannah's supervisors were not able to confirm her arrival to work until after 1:50 PM.

A week after advising her supervisors that her leave request was "on hold," on April 21, Hannah renewed her request for four weeks of medical leave. Hannah's supervisors approved that request on May 5. They required her to use her annual leave to account for four-fifths of the four week leave period, and allowed her one day of sick leave per week to make up the rest. Hannah began her leave the day it was approved.

On May 4, the day before Hannah began her leave of absence, Hannah's supervisors gave her a letter of expectations. That letter confirmed the revised attendance and reporting plan. This plan required Hannah to arrive to work by 10 AM or report to her supervisors by 9:30 AM if she was going to be late or absent.

4.

During this time, Hannah applied for three permanent positions within the Office of the Director

of National Intelligence. In February 2015, Hannah interviewed for two permanent positions for which she was not selected. Shortly before taking her leave of absence in May 2015, Hannah applied for a third full-time position, the Program Mission Manager Cyber Position ("Cyber position"). She was interviewed for the Cyber position on June 9, eight days after she returned from leave, and the interview panel recommended her for the position. Her application was then forwarded to Appellee's Chief Management Officer, Mark Ewing, who recommended that Hannah not be selected for the position "at this time," stating that Hannah's "recent performance is not consistent with a potentially good employee." J.A. 232. Hannah was informed that her application had been rejected in early July 2015, and she did not apply for any other positions. Hannah completed her five-year term with Appellee in March 2016.

D.

Hannah exhausted her administrative remedies and filed this lawsuit on August 12, 2016. She alleged that Appellee violated the Rehabilitation Act in five ways: (1) failing to accommodate her mental illness; (2) creating a hostile work environment; (3) requiring her to undergo a medical examination; (4) disclosing her confidential medical information; and (5) refusing to hire her for the Cyber position. Additionally, Hannah alleged that Appellee violated the FMLA in two ways: (1) by interfering with her ability to take medical leave; and (2) by retaliating against her when she took medical leave. After the close of discovery, Appellee moved for summary judgment on all counts. The district court granted that motion on July 27, 2017. Hannah filed this timely notice of appeal

challenging the district court's decisions on all but the hostile work environment claim.

II.

We review a district court's decision to grant summary judgment de novo. *See Vannoy v. Fed. Reserve Bank of Richmond*, 827 F.3d 296, 300 (4th Cir. 2016). In doing so, this court applies the same standard as the district court. *See id.* That standard requires the court to grant summary judgment where "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see also Vannoy*, 827 F.3d at 300. We construe the evidence in the light most favorable to Hannah, the nonmovant, and we draw all reasonable inferences in her favor. *See Vannoy*, 827 F.3d at 300.

III.

Hannah asserts that Appellee violated the Rehabilitation Act by failing to accommodate her depression, wrongfully requiring her to undergo a medical examination, unlawfully disclosing her confidential medical information, and refusing to hire her for the Cyber position. Additionally, Hannah asserts that Appellee interfered with and retaliated against her for using leave under the FMLA. We will address each of these claims in turn.

A.

Rehabilitation Act Claims

The Rehabilitation Act prohibits federal agencies from discriminating against its employees on the basis of disability. *See* 29 U.S.C. § 794. For the reasons explained below, Hannah failed to satisfy her

burden on each of her claims under the Rehabilitation Act. Specifically, Hannah failed to: (1) demonstrate that Appellee failed to accommodate her depression; (2) demonstrate that Appellee's EAP amounted to a required medical examination; (3) demonstrate that Appellee disclosed or misused confidential medical information; and (4) rebut Appellee's legitimate, nondiscriminatory reason for rejecting her application for a permanent position.

1.

Reasonable Accommodation

Turning first to Hannah's claim that Appellee failed to accommodate her depression, the district court correctly concluded that Hannah did not establish a prima facie case because Hannah failed to demonstrate that Appellee refused to make a reasonable accommodation.

To establish a prima facie claim of failure to accommodate under the Rehabilitation Act, a plaintiff must demonstrate that (1) she was a qualified person with a disability; (2) the employer had notice of the disability; (3) the plaintiff could perform the essential functions of the position with a reasonable accommodation; and (4) the employer nonetheless refused to make the accommodation. *See Reyazuddin v. Montgomery Cty.*, 789 F.3d 407, 414 (4th Cir. 2015). The district court concluded that Hannah could not establish the fourth element -- specifically, the district court determined that Appellee provided Hannah with at least two reasonable accommodations. And, on appeal, the parties dispute only the fourth element.

Here, as detailed above, Appellee provided Hannah with a reasonable accommodation. When

Hannah failed to follow that plan, Hannah's supervisors attempted a new accommodation -- referring Hannah to EAP. Yet, despite Hannah's participation in EAP, her attendance problems persisted.

Hannah argues that Appellee's accommodations were not reasonable for two reasons. First, she claims that the accommodation was improperly rescinded when her supervisors concluded that the first plan was not working. Hannah asserts that the Rehabilitation Act requires a collaborative process.

Hannah argues that rather than collaborating with her to identify a workable accommodation, Appellee unilaterally decided that the first plan was not working, then unilaterally decided that Hannah should participate in EAP counseling instead. Although employers have a duty to engage with their employees in an "interactive process to identify a reasonable accommodation," *Wilson v. Dollar Gen. Corp.*, 717 F.3d 337, 346 (4th Cir. 2013), the employer "has the ultimate discretion to choose between effective accommodations." *Reyazuddin*, 789 F.3d at 415–16 (citing *Hankins v. Gap, Inc.*, 84 F.3d 797, 800 (6th Cir. 1996)). Nonetheless, even under Hannah's view of the record, Appellee *did*, in fact, collaborate with Hannah in establishing the first accommodation and only acted unilaterally when that accommodation did not work.

Second, Hannah claims that a reasonable accommodation that she requested -- a leave of absence -- was improperly delayed. Hannah posits that she "suffered immense emotional stress during this one month lapse of [Appellee's] compliance with the law." Appellant's Br. 37. This argument is

without merit and is not supported by the record, even when viewed in the light most favorable to Hannah. Hannah first requested the leave of absence on April 9, 2015. Then, on April 13 -- just two business days later -- Hannah withdrew her request without explanation, telling her supervisor that her leave request was "on hold." J.A. 170, 178. Hannah then renewed her request for leave on April 21, and her request was approved on May 5. Thus, there was no "one month lapse," since Hannah's request was "on hold" for nine days of that time.

During the remaining gap between Hannah's request for leave and Appellee's approval of that request, Appellee referred Hannah to its counseling service. The Rehabilitation Act does not require an employer to provide the exact accommodation that an employee requests. *See Reyazuddin*, 789 F.3d at 415 ("An employer may reasonably accommodate an employee without providing the exact accommodation that the employee requested."). Further, the record demonstrates that Hannah's supervisors were actively considering her request for leave during that time, and they did ultimately approve it less than a month after she first requested leave.

For these reasons, granting summary judgment to Appellee on Hannah's reasonable accommodation claim was proper.

2.

Required Medical Examination

Under the Rehabilitation Act, an employer "shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or

severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity." 42 U.S.C. § 12112(d)(4)(A).

a.

Examination of a Job Applicant

As an initial matter, Hannah's arguments related to pre-employment medical examinations under the Rehabilitation Act[4] miss the mark because Hannah was a current employee, not a job applicant. Although Appellee knew Hannah was considering applying for permanent positions with Appellee at the time she was referred to EAP, she had not yet done so. The evidence is clear that Appellee referred Hannah to EAP in lieu of disciplining her for her attendance issues in her then-current position, rather than as a pre-employment medical examination. Moreover, the fact that Hannah's attendance issues may have been related to her stress and frustration surrounding obtaining permanent employment with Appellee does not transform her EAP referral into a preemployment medical examination.

b.

Examination of a Current Employee

Further, Hannah failed to demonstrate, much less create a genuine issue of material fact, that EAP constituted a prohibited medical examination of a current employee. We note that EAP's policies make

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[4] Subject to certain exceptions, an employer "shall not conduct a medical examination or make inquiries of a job applicant as to whether such applicant is an individual with a disability or as to the nature or severity of such disability." 42 U.S.C. § 12112(d)(2)(A).

clear that EAP is intended to be used as a voluntary counseling service, and not as a mandatory medical examination that would violate the Rehabilitation Act. *See* J.A. 130 ("[U]tilizing EAP is always voluntary and therefore the employee has the right to decline to attend treatment, even if management-referred."). Additionally, Hannah's EAP counselor repeatedly stated that she did not conduct a medical examination:

> I did not conduct a medical examination of [Hannah], and I did not conduct a mental health evaluation or diagnostic assessment because a) [Hannah] informed me she was already in treatment and b) . . . it is not in EAP's purview to conduct a medical evaluation. I did not administer any medical or mental health tests or diagnostic assessment tools for the same reason. I was [n]ot tasked to diagnose or provide a second opinion; my role was to facilitate communication between [Hannah] and Management to resolve the problem presented in the Management Referral -- namely, improving attendance and notifying management when not attending work.

Id. at 188 (emphasis omitted).

However, even if EAP constituted a mandatory medical examination under the facts of this case, summary judgment to Appellee was still appropriate on this claim because Hannah's referral to EAP was "job-related and consistent with business necessity." 42 U.S.C. § 12112(d)(4)(A). As we have stated, "whether a mental examination was 'job-related and consistent with business necessity' is an objective inquiry." *Pence v. Tenneco Auto. Operating Co.*, 169 F. App'x 808, 812 (4th Cir. 2006). "We therefore do

not resolve any dispute about what [Appellee's] subjective motivations were for having [Hannah] examined by the EAP." *Id.* An employer's request for a medical examination is job-related and consistent with business necessity when: "(1) the employee requests an accommodation; (2) the employee's ability to perform the essential functions of the job is impaired; or (3) the employee poses a direct threat to himself or others." *Kroll v. White Lake Ambulance Auth.*, 763 F.3d 619, 623 (6th Cir. 2014).

Here, the evidence, even when viewed in the light most favorable to Hannah, supports granting summary judgment because Appellee had a reasonable belief that Hannah's ability to perform the essential functions of her job was impaired by her repeated issues with attendance and timely reporting. Hannah attempts to refute this by asserting that her job performance was excellent, but job performance alone does not create a genuine issue of material fact. Attendance was also an essential function of Hannah's job, one the record amply demonstrates she was unable to fulfill when Appellee referred her to EAP. As we have stated:

> In addition to possessing the skills necessary to perform the job in question, an employee must be willing and able to demonstrate these skills by coming to work on a regular basis. Except in the unusual case where an employee can effectively perform all work related duties at home, an employee "who does not come to work cannot perform *any* of his job functions, essential or otherwise." Therefore, a regular and reliable level of attendance is a necessary element of most jobs.

Tyndall v. Nat'l Educ. Ctrs., Inc. of Cal., 31 F.3d 209, 213 (4th Cir. 1994) (quoting *Wimbley v. Bolger*, 642 F. Supp. 481, 485 (W.D. Tenn. 1986), *aff'd*, 831 F.2d 298 (6th Cir. 1987)) (emphasis in original); *see also Denman v. Davey Tree Expert Co.*, 266 F. App'x 377, 380 (6th Cir. 2007) ("Job performance is separate from the ability to show up for work, an essential function of [Hannah's] position.").

Accordingly, Appellee did not violate the Rehabilitation Act by referring Hannah to EAP, and the district court properly granted summary judgment to Appellee on this claim.

3.

Confidential Medical Information

Under the Rehabilitation Act, an employer may "conduct voluntary medical examinations, including voluntary medical histories, which are part of an employee health program" and may "make inquiries into the ability of an employee to perform job-related functions." 42 U.S.C. § 12112(d)(4)(B). Any "information obtained regarding the medical condition or history of the applicant" -- that is, medical information -- must be "collected and maintained on separate forms and in separate medical files and [must be] treated as a confidential medical record." *Id.* § 12112(d)(3)(B); *see also id.* § 12112(d)(4)(C).

Hannah alleges two separate Rehabilitation Act violations regarding her medical information: first, that Hannah's supervisors wrongfully sought and disclosed confidential medical information elicited from Hannah, and second, that the EAP psychologist wrongfully disclosed confidential medical information gathered from the EAP session to Hannah's

supervisors. In both instances, the district court correctly determined that Hannah failed to demonstrate that Appellee violated the Rehabilitation Act.

a.

Disclosures by Supervisors

Hannah asserts that her supervisors disclosed her confidential medical information by writing in her EAP referral memo, "[e]arly in her tenure . . . and reaffirmed recently, [Hannah] informed us that she was meeting with a psychiatrist and counselor and taking medication for depression." J.A. 413. Notably, Hannah voluntarily disclosed her depression diagnosis to her supervisors. The Rehabilitation Act does not protect information shared voluntarily. *See Reynolds v. Am. Nat'l Red Cross*, 701 F.3d 143, 155 (4th Cir. 2012) (finding the district court properly granted summary judgment on a confidentiality claim brought under the Rehabilitation Act because the record "clearly show[ed]" that the appellant "disclosed his medical condition voluntarily"). Indeed, Hannah voluntarily told at least four of her supervisors that she had been diagnosed with depression. *See* J.A. 179 (Hannah's interrogatory responses) ("I disclosed my diagnosis of depression to my supervisors Kelly G. in summer 2011, Ann W. in fall 2014; Art Z. in March 2015, and Roy P. in March 2015.").

Hannah argues that these disclosures were not voluntary because they were made in response to inquiries about her disability. But the evidence does not support or create a genuine issue of fact about that argument. The record indicates that only the March 2015 disclosure was made in response to an inquiry,

and that inquiry was not medical -- it was about her attendance. *See* J.A. 23 (Hannah's deposition testimony) ("[H]e was concerned about unpredictability in my schedule. . . . I told him at that time I had depression.").

Hannah asserts that this inquiry about her attendance was de facto an inquiry into her depression because (according to Hannah) the inquiring supervisor knew she was depressed and knew her attendance issues were linked to her depression. Hannah cites only out-of-circuit cases for the proposition that asking a question "likely to elicit" information about a disability amounts to a medical inquiry. *See Harrison v. Benchmark Elecs. Huntsville, Inc.*, 593 F.3d 1206, 1216 (11th Cir. 2010) (concluding that whether an inquiry following a failed drug test was likely to elicit information about a disability in violation of the Americans with Disabilities Act ("ADA")[5] presented a question of fact for a jury to resolve); *Fleming v. State Univ. of N.Y.*, 502 F. Supp. 2d 324, 338 (E.D.N.Y. 2007) (concluding the plaintiff pled facts sufficient to state a claim for failure to confidentially maintain medical information under the ADA where the plaintiff alleged that his disclosure of his sickle cell anemia was not voluntary because his supervisor called him while he was in the hospital and asked him why he was there).

First, the record does not support Hannah's argument that the supervisor in question knew about Hannah's depression before she disclosed it to him.

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[5] "To the extent possible, we construe the ADA and Rehabilitation Act to impose similar requirements." *Halpern v. Wake Forest Univ. Health Scis.*, 669 F.3d 454, 461 (4th Cir. 2012).

Hannah points to the supervisor's statement that when he spoke to Hannah on the phone before confronting her about her attendance, "she didn't sound well on the other end of the phone." J.A. 466. Hannah also points to her supervisor's statement that Hannah's "demeanor [wa]s sad, very flat, and almost trance like." *Id.* at 413. This is not enough to create a genuine issue of material fact as to whether the inquiring supervisor knew Hannah had been medically diagnosed with clinical depression, or whether by asking about her attendance, the supervisor was fishing for medical information about Hannah's illness.

Second, even if Hannah's supervisor had an inkling that Hannah may have had depression, this is not evidence that he knew asking about her repeated absences and tardiness -- indisputably bad work behavior -- would elicit medical information related to her depression. Indeed, Hannah's absences could have been the result of a world of other, nonmedical possibilities, such as transportation issues or oversleeping. Adopting Hannah's argument would require us to find that where an employer might know that a particular bad work behavior is connected to a medical condition, the employer cannot inquire into the behavior without running afoul of the ADA and Rehabilitation Act's prohibition on medical inquiries. We have held expressly the opposite: "[T]he ADA does not require an employer to simply ignore an employee's blatant and persistent misconduct, even where that behavior is potentially tied to a medical condition." *Vannoy v. Fed. Reserve Bank of Richmond*, 827 F.3d 296, 305 (4th Cir. 2016) (citing *Jones v. Am. Postal Workers Union*, 192 F.3d 417, 429 (4th Cir. 1999) (holding the ADA does not "require an employer

to ignore such egregious misconduct by one of its employees, even if the misconduct was caused by the employee's disability")).

b.

Disclosures by EAP Psychologist

Hannah also argues that, in addition to her supervisors disclosing her depression diagnosis internally, the EAP psychologist disclosed "additional, unique information from what Hannah had already told her supervisors." Appellant's Br. 51. Specifically, Hannah alleges that the EAP psychologist told her supervisor that Hannah was concerned about Appellee's records retention policies, and that Hannah's "difficulties in getting to work were the result of a lack of motivation, not related to depression." J.A. 540.

Perhaps that is true. The record does indicate that the EAP psychologist shared some information with Hannah's supervisors and maybe it was unique information. *See* J.A. 192 (EAP psychologist statement) (noting that the psychologist provided Hannah's supervisors updates regarding Hannah's "EAP attendance" and "cooperation and progress toward resolving the referral issues"). But there is no evidence that the EAP psychologist shared *medical information*. To the contrary, the EAP psychologist insisted, again and again, that she did not share any confidential medical information. *See id.* at 190 (noting that the psychologist, who is not a doctor, "did not disclose any confidential medical information" to anyone). Of note, Hannah did not point to any evidence in the record contradicting the psychologist's assertions.

Therefore, the information shared by the EAP psychologist did not trigger the Rehabilitation Act's confidentiality protections because the record indicates that the EAP psychologist shared only nonmedical information.

c.

Non-Reliance on Medical Information

Finally, even if either Hannah's supervisors or the EAP psychologist disclosed Hannah's medical information, Appellee still did not violate the Rehabilitation Act because Appellee did not rely on Hannah's depression diagnosis or any other medical information in deciding not to hire Hannah for the Cyber position. Rather, the record overwhelmingly indicates that Appellee's decision was based on Hannah's attendance issues. Accordingly, Hannah has not demonstrated that Appellee violated the Rehabilitation Act by disclosing or misusing confidential medical information.

4.

Discrimination

Rehabilitation Act claims for discrimination are reviewed under the *McDonnell Douglas* burden-shifting framework. *See Laber v. Harvey*, 438 F.3d 404, 430 (4th Cir. 2006) (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973)); *Perry v. Comput. Scis. Corp.*, 429 F. App'x 218, 219–20 (4th Cir. 2011). Under that framework, Hannah has the initial burden of establishing a prima facie case of discrimination. *See Perry*, 429 F. App'x at 220. To establish this prima facie case, Hannah must show that: (1) she is disabled; (2) she was otherwise qualified for the position; and (3) she suffered an

adverse employment action solely on the basis of her disability. *See id.* (citing *Constantine v. Rectors & Visitors of George Mason Univ.*, 411 F.3d 474, 498 (4th Cir. 2005)).

If Hannah establishes a prima facie case, the burden shifts to Appellee to provide a legitimate, nondiscriminatory reason for its conduct. *See Perry*, 429 F. App'x at 220. If Appellee provides such a reason, Hannah "bears the ultimate burden of persuasion" and "must show by a preponderance of the evidence that the proffered reason was a pretext for discrimination." *Id.*

a.

Establishing Pretext

Even assuming that Hannah established a prima facie case of discrimination (which Appellee disputes), she cannot succeed on her claim that Appellee discriminated against her by not hiring her for a permanent position because she did not sufficiently rebut Appellee's proffered reason for rejecting her application, as required under the final step of the *McDonnell Douglas* burden-shifting framework. *See Perry*, 429 F. App'x at 220.

Appellee presented evidence demonstrating that Hannah's perpetual issues with attendance, timeliness, and reporting absences to her superiors were the bases of its decision not to hire her for the permanent position. Attempting to expose that explanation as a ruse, Hannah pointed to a purported inconsistency between the sworn statement that Mark Ewing provided during the Equal Employment Opportunity Commission ("EEOC") investigation of Hannah's case and an email he sent more than a year

earlier. In the sworn statement, signed on April 26, 2016,[6] Ewing asserts he "had no knowledge of [Hannah's] disability." J.A. 650. But in the email, sent on June 30, 2015, Ewing references two memos that he received from Hannah's supervisors, both of which note Hannah's depression. *See id.* at 413 (April 9, 2015 memo) ("Early in her tenure . . . and reaffirmed recently, [Hannah] informed us that she was meeting with a psychiatrist and counselor and taking medication for depression."); *id.* at 606 (April 23, 2015 memo) ("While . . . medical considerations (i.e., depression and/or ADD) do make this situation worse, these factors are under her control based upon treatment plans with her psychologist and psychiatric care providers."). Underscoring the significance of this inconsistency, Hannah argues, is the fact that Ewing did not provide the June 30, 2015 email to the EEOC. Hannah argues that the inconsistency, coupled with Ewing's failure to disclose the email evidencing the inconsistency, illustrates "clear pretext." Appellant's Br. 27.

Despite Hannah's arguments to the contrary, this apparent discrepancy does not create a genuine issue of material fact that Appellee's proffered reason for rejecting Hannah's application is pretextual. First, nothing in the record indicates that Ewing had first-hand knowledge of Hannah's disability. Although the memos mention that Hannah self-reported that she had depression, the second memo also describes Hannah's depression as "under her control." J.A. 606. Indeed, Ewing's email suggests that he did not know

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[6] The excerpt of the statement that is included in the J.A. does not include the date. This date comes from Hannah's brief. *See* Appellant's Br. 26.

that Hannah had an ongoing disability. *See* J.A. 635 ("I am informed that EAP concluded that [Hannah] does not have a medical problem, rather she is a disciplinary problem.").

More significantly, Hannah's asserted contradiction between Ewing's EEOC statements and his June 30, 2015 email do not create a genuine issue of material fact about pretext because Ewing's email and the memos written by Hannah's supervisors focus on Hannah's attendance problems, not on her disability. *See* J.A. 413 (April 9, 2015 memo) (noting that "[Hannah's] schedule has become increasingly erratic" and that "frequent absences and late arrivals [have begun] to affect her assigned unit and individual performance"); *id.* at 606 (April 23, 2015 memo) (describing Hannah's history of attendance issues and Appellee's attempts to accommodate Hannah and noting that, despite those attempts, "[Hannah's] late attendance has continued"); *id.* at 635–36 (Ewing's June 30, 2015 email) (detailing Hannah's problem with "attendance at work," noting that Hannah's "absences and late arrivals were affecting her assigned staff element and her individual performance," and concluding that Hannah's "recent performance is not consistent with a potentially good employee.").

Accordingly, Hannah did not point to any genuine issue of material fact that Appellee's purported basis for not hiring her was merely a pretext for discriminating against her on the basis of her depression.

b.

Appellee's Nondiscriminatory Explanation

i.

Moreover, the record indicates that Appellee's proffered explanation for not hiring Hannah for the Cyber position is genuine, legitimate, and nondiscriminatory.

As the district court concluded, a continuous attendance issue is a legitimate reason for withholding an employment benefit. *See Tyndall*, 31 F.3d at 213 (finding an employee who cannot satisfy their employer's attendance policy cannot be considered "qualified" for the purposes of the ADA). Hannah might have been exceptionally talented and substantively good at her job, but as noted above, "[i]n addition to possessing the skills necessary to perform the job in question, an employee must be willing and able to demonstrate these skills by coming to work on a regular basis." *Id.*

Hannah asserts that "serious questions of fact exist as to whether Hannah even had 'significant attendance and reporting problems.'" Appellant's Br. 28. But the record evidences no less than 13 attendance issues that occurred in the 46 days between Appellee's first attempt to accommodate Hannah on March 19, 2015, and the revised plan made on May 4, 2015. *Compare* J.A. 114, 174 (noting Appellee's March 19, 2015 meeting with her supervisor and original accommodation asking her to arrive at work by 10 AM or report to a supervisor), *with id.* at 556 (indicating four unexcused absences and nine late arrivals between March 19 and April 29

that Appellee failed to timely report).[7] In light of Hannah's failure to arrive or call in before 10 AM 13 times in 46 days, there is no genuine issue of material fact about Hannah's significant attendance and reporting problem.

ii.

Hannah also argues that because her disability was the cause of her attendance issues, Appellee could not withhold an employment benefit from her on that

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[7] The record reflects the following late arrivals and absences for Hannah between March 19, 2015, and May 4, 2015: (1) April 2: Hannah emailed at 11:02 AM indicating she would arrive to work by 12 PM; (2) April 8: Hannah emailed at 11:05 AM indicating she would arrive to work by 12 PM; Hannah emailed again at 1:55 PM indicating she would not be coming in that day; (3) April 9: Hannah emailed at 11:11 AM indicating her car was towed and she would arrive at work by 1 PM; (4) April 13: Hannah emailed at 10:58 AM indicating she would arrive at work by 11:30 AM; (5) April 14: Hannah emailed at 11:08 AM indicating she would arrive at work by 12 PM; (6) April 16: Hannah's supervisor emailed Hannah at 10:18 AM looking for her; when Hannah was reached at 11 AM, she indicated she would arrive to work by 12 PM; (7) April 20: Hannah emailed at 10:45 AM indicating she would arrive to work by 11:30 AM; Hannah's supervisor confirmed her arrival at 12:50 PM; (8) April 22: Hannah emailed at 11:01 AM indicating she would arrive at work after 12 PM; Hannah emailed again at 12:41 PM indicating she would arrive at 1 PM due to traffic; (9) April 23: Hannah emailed at 10:59 AM indicating she would arrive at work by 12 PM; Hannah emailed again at 12:56 PM indicating she would not be coming in that day due to a migraine; (10) April 24: Hannah emailed at 11:02 AM indicating she would arrive at work in the afternoon; Hannah later called at 3:24 PM indicating she would not be coming in that day; (11) April 27: Hannah's supervisor emailed indicating Hannah arrived at work by 11 AM; (12) April 28: Hannah emailed at 10:52 AM indicating she would arrive at work by 11:30 AM; (13) April 29: Hannah emailed at 11:49 AM indicating she would not come in to work that day. See J.A. 556.

basis. We have no doubt that Hannah's struggle with depression was the cause of her attendance issues, and we are sympathetic to the toll this condition took on a highly talented employee. However, Appellee was nevertheless permitted to take Hannah's attendance issues into account in its decision whether to hire her for the Cyber position. To reiterate, the Rehabilitation Act "does not require an employer to simply ignore an employee's blatant and persistent misconduct, even where that behavior is potentially tied to a medical condition." *Vannoy*, 827 F.3d at 305; *cf. Martinson v. Kinney Shoe Corp.*, 104 F.3d 683, 686 n.3 (4th Cir. 1997) ("Misconduct -- even misconduct related to a disability -- is not itself a disability, and an employer is free to fire an employee on that basis.").

iii.

Finally, Hannah argues that by the time Appellee made the decision not to hire her, her attendance had improved. She asserts that between returning from her leave of absence on June 1, 2015, and learning that she was not selected for the permanent position on June 17, 2015, she "had shown she was able to perform the essential functions of the job and had no current attendance issues." Appellant's Br. 32.

Hannah is correct that in a failure to hire case, the relevant inquiry is the candidate's performance "at the time of the employment decision or in the immediate future." *Lamb v. Qualex, Inc.*, 33 F. App'x 49, 57 (4th Cir. 2002). However, Appellee was not required to consider the two weeks before the decision was made in a vacuum. Moreover, it is not the job of this court to decide whether Appellee made the right choice by not hiring Hannah for the Cyber position. Rather, our job is simply to decide whether Appellee

made an *illegal* choice. *See Feldman v. Law Enf't Assocs. Corp.*, 752 F.3d 339, 350 (4th Cir. 2014) (explaining that we do not "sit as a kind of super-personnel department weighing the prudence of employment decisions").

Because Hannah not did demonstrate that Appellee's purported basis for not hiring her was merely a pretext for discriminating against her on the basis of her depression, and because Hannah's attendance problem was a legitimate and nondiscriminatory reason to not hire her, we conclude that summary judgment was appropriate on her Rehabilitation Act discrimination claim.

B.

FMLA Claims

The FMLA gives employees with qualifying medical conditions the right to take up to 12 weeks of leave during a 12-month period "[b]ecause of a serious health condition that makes the employee unable to perform the functions of" her job. 29 U.S.C. § 2612(a)(1)(D). "The employee has an accompanying right to return to the same or an equivalent position at the conclusion of the leave period." *Reed v. Buckeye Fire Equip.*, 241 F. App'x 917, 923 (4th Cir. 2007) (citing 29 U.S.C. § 2614(a)(1)).

As discussed below, as to Hannah's FMLA interference claim, Hannah illustrates a genuine issue of material fact regarding the notice of her depression and her desire to take a leave of absence. But, for the same reasons Hannah's Rehabilitation Act discrimination claim fails, Hannah's FMLA retaliation claim fails as well.

1.

Interference

a.

The district court incorrectly concluded that Hannah's disclosure of her depression was not sufficient to put Appellee on notice that Hannah could have qualified for FMLA protections. Accordingly, summary judgment was not warranted as to Hannah's FMLA interference claim.

"An employee is mandated to provide notice to her employer when she requires FMLA leave." *Brushwood v. Wachovia Bank, N.A.*, 520 F. App'x 154, 157 (4th Cir. 2013) (quoting *Rhoads v. FDIC*, 257 F.3d 373, 382 (4th Cir. 2001)). That said, an employee need not specifically invoke the FMLA to benefit from its protections. *See Dotson v. Pfizer, Inc.*, 558 F.3d 284, 295 (4th Cir. 2009). Proper notice does not require "any magic words." *Id.* Indeed, "[w]hen an employee seeks leave for the first time for a[n] FMLA-qualifying reason, the employee need not expressly assert rights under the FMLA or even mention the FMLA." 29 C.F.R. § 825.302. Proper notice merely "makes the employer aware" that the employee needs potentially FMLA-qualifying leave. *Brushwood*, 520 F. App'x at 157. And once the employer is on notice of the employee's need to take potentially FMLA-qualifying leave, "the responsibility falls on the employer to inquire further about whether the employee is seeking FMLA leave." *Dotson*, 558 F.3d at 295.

A reasonable jury could find that Hannah's disclosure of her depression and her April 9, 2015 request for psychiatrist-recommended leave was sufficient to trigger Appellee's responsibility to

inquire further about whether Hannah was seeking FMLA leave. We have held that disclosure of a potentially FMLA-qualifying circumstance and an inquiry into leave options is sufficient to create a material question of fact regarding whether an employee triggered her employer's FMLA obligations. *See Dotson*, 558 F.3d at 291, 295 (finding that an employee informing his employer that he was adopting a child and speaking to a human resources representative about "taking leave during the adoption process" was sufficient to create a question of fact as to whether the employer's FMLA-inquiry duties had been triggered).

b.

Here, Hannah informed her supervisors of her depression on multiple occasions. *See, e.g.*, J.A. 413 (April 9, 2015 memo from Hannah's supervisors) ("Early in her tenure . . . and reaffirmed recently, [Hannah] informed us that she was meeting with a psychiatrist and counselor and taking medication for depression.").[8] And on April 9, 2015, Hannah explained to her supervisors that her psychiatrist recommended that she take four weeks of medical leave. Hannah's disclosures about her depression and her psychiatrist's recommendation could lead a reasonable jury to find that Appellee was on notice that Hannah was inquiring about potentially FMLA-qualifying leave, triggering Appellee's responsibility

[8] Indeed, Hannah's supervisors had "grown increasingly alarmed at the overall change in [Hannah's] demeanor." J.A. 413.

to inquire further about whether Hannah was seeking FMLA leave.[9]

c.

Appellee argues that Hannah's interference claim fails because Hannah cannot demonstrate that her depression was "a serious health condition." Appellee's Resp. 40–41; *see also* 29 U.S.C. § 2612(a)(1)(D). But that argument is premature. Appellee has not shown that it made any inquiry into whether Hannah's depression was an FMLA-qualifying serious health condition. Appellee's argument "would allow it to use its own failure to determine whether leave should be designated as FMLA-protected to block liability." *Dotson*, 558 F.3d at 295. We have refused "to allow an employer to take advantage of its own lapse in such a way." *Id.*

d.

Additionally, Appellee's failure to provide notice of the availability of FMLA leave prejudiced Hannah because if she had been aware of the availability of FMLA leave, she could have structured her leave differently. The FMLA "provides no relief unless the employee has been prejudiced by the violation." *Vannoy*, 827 F.3d at 302 (citing *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 89 (2002)). "Prejudice may be gleaned from evidence that had the plaintiff received the required (but omitted) information regarding his FMLA rights, he would have structured his leave differently." *Id.*

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[9] It is undisputed that Appellee did not inquire about whether the leave should be classified as FMLA-protected.

Here, the record contains evidence that if Hannah had known that the FMLA protected her position, she would have used only sick leave for her leave of absence. *See* J.A. 664 (Hannah's declaration) ("Had I known I could have chosen to take sick leave for the entire period, I would have elected to do so."). Instead, she used a combination of sick leave and annual time to take four weeks off. According to Hannah, "[u]nlike annual leave, sick leave is not paid out at the end of an employee's service, resulting in a loss of a benefit worth at least $20,000." *Id.* Based on Hannah's testimony, a jury could find that Hannah was prejudiced by Appellee's failure to inquire into the availability of FMLA leave and thus interfered with her FMLA rights.

For these reasons, Hannah has demonstrated a genuine issue of material fact that should have precluded summary judgment on her FMLA interference claim.

2.

Retaliation

As for Hannah's FMLA retaliation claim, however, the district court correctly concluded that like her discrimination claim brought pursuant to the Rehabilitation Act, Hannah did not sufficiently rebut Appellee's legitimate, nonretaliatory reason for not hiring Hannah for the Cyber position.

The FMLA prohibits employers from discriminating against an employee for exercising her FMLA rights. *See* 29 U.S.C. § 2615(a)(2). As relevant here, "employers cannot use the taking of FMLA leave as a negative factor in employment actions." 29 C.F.R. § 825.220(c). Courts analyze FMLA retaliation

claims, like discrimination claims brought pursuant to the Rehabilitation Act, under the *McDonnell Douglas* burden-shifting framework. *See Laing v. Fed. Express Corp.*, 703 F.3d 713, 717 (4th Cir. 2013). To establish a prima facie case of FMLA retaliation, a plaintiff must demonstrate that "(1) she engaged in a protected activity; (2) her employer took an adverse employment action against her; and (3) there was a causal link between the two events." *Adams v. Anne Arundel Cty. Pub. Schs.*, 789 F.3d 422, 429 (4th Cir. 2015) (internal quotation marks omitted). If the plaintiff establishes a prima facie case, the burden shifts to the defendant to provide a legitimate, nonretaliatory reason for taking the employment action at issue. *Id.* If the defendant does so, the burden shifts back to the plaintiff to demonstrate that the defendant's proffered reason is pretextual. *Id.*

Even assuming Hannah demonstrated a prima facie case of FMLA retaliation, summary judgment was proper because she failed to rebut Appellee's legitimate, nonretaliatory reason for not hiring her for the Cyber position. Appellee asserts that it relied on Hannah's attendance issues in deciding not to hire her for the position, and the evidence in the record supports that assertion. *See* J.A. 635–36 (Ewing's June 30, 2015 email expressing concerns about Hannah's application for the Cyber position) (noting, "despite some apparently solid performance while on the Snowden project," Appellee had "a consistent history of issues with [Hannah] over many months" regarding Hannah's "attendance at work and attitude"); *id.* at 219 (Ewing's deposition testimony) ("The primary reason that I was concerned [about Hannah's application] was the fact that her conduct was extremely negative at the point of time we were

making a hiring decision for permanent employment status."). Hannah points to no evidence that adequately undermines Appellee's proffered nonretaliatory reason for not hiring her.[10]

Accordingly, the district court properly granted summary judgment on Hannah's FMLA retaliation claim.

IV.

For these reasons, we affirm the judgment of the district court as to Hannah's Rehabilitation Act claims and FMLA retaliation claim. We vacate the grant of summary judgment as to Hannah's FMLA interference claim because there is a genuine issue of fact as to whether Hannah's disclosure of her depression was sufficient to put Appellee on notice that Hannah could have qualified for FMLA protections. Accordingly, we remand for further proceedings as to that claim.

AFFIRMED IN PART, VACATED IN PART, AND REMANDED

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[10] Hannah again argues, as she did in the context of her claim of discrimination under the Rehabilitation Act, that the "inconsistency" between the sworn statement Ewing provided during the EEOC investigation of Hannah's case and an email he sent more than a year earlier exposes Appellee's proffered reason for not hiring her for the permanent position as pretextual. For the same reasons explained above, that argument fails.

GREGORY, Chief Judge, concurring in part and dissenting in part:

Hannah P. was undisputedly an excellent intelligence officer. The Office of the Director of National Intelligence ("ODNI") entrusted her with the high-stress, high-profile Edward Snowden case. She worked tirelessly and impeccably on that assignment, and ODNI praised her performance. For the duration of that assignment, Hannah kept nonconventional work hours with the knowledge and consent of her supervisors, and her attendance was not considered a problem.

It was only after the Snowden project ended, and Hannah's depression worsened, that her supervisors found fault with her work hours, though she remained formally on a flexible schedule. When Hannah requested an accommodation for her depression—a leave of absence recommended by both of her medical professionals—Hannah's supervisors refused to timely grant the request. This was despite the fact that her supervisors had offered to grant her leave just a few months earlier—before her depression was triggered.

The result of this was tragic. Hannah was denied a permanent position for which it is undisputed that she was exceptionally qualified and for which the interview panel unanimously selected her. ODNI concedes that Hannah's depression qualifies as a disability protected by the Rehabilitation Act. Yet, the employer denied Hannah, a dedicated and valuable employee, the protection that the law requires.

The majority mistakenly fails to see the force of Hannah's claims. Though the majority cites repeatedly to our decision in *Vannoy v. Federal Reserve Bank of Richmond*, it fails to grapple with the stark distinctions between the "blatant and persistent misconduct" by the employee in that case and Hannah's cooperative attempts to satisfy her supervisors' expectations, despite the increasingly severe symptoms of her disability. 827 F.3d 296, 300 (4th Cir. 2016).

While I concur in Parts III.A.2.a, III.A.3, and III.B.1 of the Court's opinion, I cannot agree that no genuine issue of material fact exists with respect to Hannah's claims that ODNI violated the Rehabilitation Act and Family and Medical Leave Act ("FMLA") when it discriminated against her on the basis of her disability, failed to reasonably accommodate her depression, wrongfully required a medical examination of her as a current employee, and chose not to hire her for permanent employment in retaliation for her FMLA-qualifying leave. I believe that several disputes of fact exist and that Hannah is entitled to her day in court. Therefore, I respectfully dissent with respect to those claims.

I.

Hannah's supervisors were informed early in her employment that she suffered from depression. She was under the treatment of a psychiatrist and a licensed clinical social worker and did not initially request any work accommodations because she "was adequately handling [her] depression at the time with medication and counseling." J.A. 19–20.

Despite her depression, Hannah excelled at her job. In her position as the disclosures coordinator for the Edward Snowden project, her "leadership, poise, and performance were impeccable." J.A. 412. She was described by her supervisors as "an outstanding employee combining energy/drive, technical competence, superb communication and networking skills, and superior analytic tradecraft." *Id.* In short, Hannah was considered "an invaluable intelligence officer and a future [Intelligence Community] leader." *Id.*

The high-profile Snowden project required long work hours, and Hannah was not required to maintain an established "core" hours schedule. Instead, she worked a "maxi flex" schedule, which permitted her to vary her schedule so long as she put in 80 hours of work in each two-week period. J.A. 492–93. She often came in later than other ODNI employees (around noon), but stayed later as well. J.A. 494.

In November or December 2014, as the Snowden project was coming to a close, Hannah's supervisors encouraged her to take leave, a common practice for ODNI employees "after finishing a burn-out job." J.A. 173. Hannah did not take her supervisors up on the offer, however, not only because she was interviewing for permanent employment, but also because "there was still ambiguity over whether the [Snowden] disclosures responsibilities had truly finished." *Id.*

During this time, Hannah's depression became more serious. She had trouble arriving at work before noon and had unscheduled absences. Hannah remained on a maxi flex schedule, however, and it was not until March 19, 2015, that she was informed that

her attendance and arrival time were problematic. J.A. 461, 495. In fact, her first-line supervisor had no concerns about her attendance or work hours in early 2015 and asked Hannah to fill in as acting chief of their division while he was out of the office in late February. J.A. 494–95, 498.

When Hannah's supervisor spoke with her about her work hours on March 19, 2015, Hannah was not told that she was required to return to a "core" schedule. Rather, Hannah and her first-line supervisor agreed that Hannah would either arrive at work by 10:00 a.m. or contact her supervisors if she was unable to arrive by that time; if she neither arrived at work nor contacted the office by 11:00 a.m., her supervisor would reach out to her by phone. J.A. 114. Hannah's second-line supervisor had no objection to the arrangement; he "wanted to see what would happen." J.A. 345.

The day after making this arrangement, Hannah did not report for work by 10:00 a.m. When she did not arrive by 11:00 a.m., her supervisors did not call her. Instead, she emailed them at 11:05 a.m., advising she would be in around 12:30 p.m. J.A. 118.

After that work day, Hannah began a pre-scheduled week-long leave during which she was preoccupied with home renovations. J.A. 114. At the end of the week, she emailed her supervisors to inform them she would not be in Monday, the next business day, because of the renovations. J.A. 120. On Tuesday, Hannah emailed her supervisors notifying them that she would not be in that day either. J.A. 122.

On Wednesday, when Hannah did not come in by 10:00 a.m., Hannah's second-line supervisor called her. J.A. 174. According to Hannah, her supervisor was "angry" and demanded to know why Hannah had not arrived. *Id.* Hannah apologized, explained she was having trouble getting out of bed, and indicated that she would be in as soon as possible. *Id.* When she arrived at work, her supervisor told her that the arrangement they had made "was not working." J.A. 175. She was told that she was solely responsible for contacting the office in the event she would be late or absent, and that her supervisors would not be contacting her. J.A. 90. The arrangement had been in place for a total of four days on which Hannah was scheduled to work.

Hannah asked that her supervisors "give the current accommodation more time to work." J.A. 175. Her supervisor, who was aware of Hannah's depression, insisted that Hannah propose an alternative plan "right then." *Id.* She was ultimately given "a day or two" to propose an alternative. *Id.*

The next day, on April 2, 2015, Hannah emailed her supervisors at 11:02 a.m., notifying them that she would be in by noon. J.A. 124. That day, Hannah's supervisors met with ODNI's Employee Management Relations Officer, the head of ODNI's Equal Employment Opportunity and Diversity Office, and the head of ODNI's Human Resources Division to discuss how to best address Hannah's attendance and reporting. J.A. 66, 128, 149. They collectively decided to refer Hannah to the Central Intelligence Agency's Employee Assistance Program ("EAP").[1] J.A. 326–29.

[1] Hannah was referred to the CIA's EAP program because ODNI did not have one of its own. The EAP provides employees with

Although Hannah's supervisors were well aware of her depression, she was referred to the EAP to "help identify what her challenges were and provide her any support she needed," such as "accommodation with work hours, . . . counseling or any other type of support." J.A. 139–40.

Hannah's supervisors drafted a memorandum, which they dated April 9, 2015, referring Hannah to the EAP. The memo outlined Hannah's "impressive capabilities" and her work with ODNI, commented on her recent attendance, and explained that Hannah had disclosed to her supervisors that she was meeting with a psychiatrist and counselor and taking medication for depression. J.A. 412–13. The memo also noted:

> Hannah has indicated that she is struggling to get out of bed in the morning and admits to feeling almost paralyzed. She has also indicated that she had a recent change in medication and that the upheaval in her living arrangements negatively impacted some of her physical coping mechanisms.

J.A. 413. The memo explained that "as senior intelligence officials," Hannah's supervisors "ha[d] a duty to identify and if possible help vulnerable employees." J.A. 414.

Meanwhile, Hannah met with her psychiatrist and counselor. Both professionals agreed that Hannah should take four weeks of leave. J.A. 175. Accordingly, Hannah met with her supervisors on

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"free, confidential, short-term mental health[,] financial, and addictions counseling and referral to cleared community providers." J.A. 132.

April 9, 2015 and requested a four-week leave of absence. J.A. 424, 449, 468. Her supervisors did not ask her for any medical documentation to support the leave request because they expected to receive a "quick answer" from EAP. J.A. 95. They also believed that Hannah's medical providers did not have "the expertise to provide" an opinion on "all of the items" that they were planning to submit to EPA. *Id.*

Hannah's supervisors denied her leave request; they had already determined before meeting with Hannah that if Hannah asked for leave, they would "defer that decision until after meeting with EAP." J.A. 422. One of Hannah's supervisors explained in her deposition that she "wanted to get a sense [Hannah] was in a good place." J.A. 431. According to that supervisor, the "rationale" of the group that decided to refer Hannah to EAP first was:

> If this were . . . a bad behavior problem, there would be no need to grant immediate leave.
>
> If it were a medical mental health problem, the thought was, granting leave and isolating [Hannah] from day-to-day contact with her coworkers and her managers when we didn't know her state of mind and how much medical care she was receiving could, potentially, be dangerous.

J.A. 422–23. Hannah's second-line supervisor told her that the decision was made because of concern that "since [Hannah] was a single woman if [she] took leave [she] would be home by [herself] and that could make [her] depression worse." J.A. 176. It was made clear that Hannah was required to attend EAP counseling; if she refused, her temporary position

would be deemed "as excess" and she would lose her job "immediately." *Id.*

Hannah's first-line supervisor disagreed with the others' proposed course of action; he believed that the supervisors should not "substitute [their] judgment for [Hannah's] doctor's." J.A. 504. Nonetheless, Hannah signed the memo to EAP and attended an appointment with an EAP counselor the next day, April 10, 2015.

On Monday, April 13, 2015, Hannah met again with one of her supervisors to discuss her leave request. Her supervisor told her that her leave request was approved but "was pushing" her to take only two weeks off, not the four she had requested. J.A. 524, 528. He explained that Hannah would have to submit to a medical evaluation if she wished to take leave beyond the two weeks. J.A. 524. Hannah felt uncomfortable with her supervisor's pushiness and confused about the status of her leave request so she responded that her request was "on hold." *Id.* She wanted to figure out what the EAP counselor had told her supervisor and to confirm her legal options. *Id.*

Hannah continued to arrive at work later than 10:00 a.m. during April 2015. During that month, Hannah also continued attending the EAP sessions. In those sessions, Hannah testified, she was questioned about her medical history, her family's medical history, and the medication she was taking and its dosage. J.A. 531–32. In the third session, Hannah was given a diagnostic questionnaire "to assess depression or severity of those sorts of things." J.A. 534.

On April 16, 2015, the EAP counselor had an extended forty-minute discussion with Hannah's second-line supervisor. During that discussion, the counselor disclosed that Hannah's "lack of motivation/inability to come to work" was primarily influenced by feelings of frustration over not securing a permanent position at ODNI. J.A. 604. At some point, the counselor also indicated that Hannah was not cooperating with the EAP process because she was spending "more than half the session at times" expressing concerns over the record retention policy. J.A. 192.

A week later, Hannah's second-line supervisor circulated a status update via email to ODNI leadership outlining the information shared by the EAP counselor. That information included Hannah's explained reasons for her inability to arrive punctually for work, as well as Hannah's concerns that the EAP process would "create a paper trail that [would] adversely impact her future employment and career." J.A. 606. The email also indicated that the EAP counselor had identified "non-medical" factors as the primary cause of Hannah's attendance problems. J.A. 607.

On April 28, 2015, Hannah met with one of her supervisors and reiterated her request for four weeks of leave. J.A. 41. She was told that her leave request would be approved if she met with the EAP counselor once more on May 1, 2015 and signed a Letter of Expectations. J.A. 42. Hannah attended the May 1 appointment and signed the Letter of Expectations on May 4, 2015. J.A. 43. The Letter of Expectations provided that, "[e]ffective immediately," Hannah would begin work by 10:00 a.m. and would contact her

office no later than 9:30 a.m. in the event she would be late. J.A. 614.

Beginning on May 5, 2015, Hannah took a four-week leave of absence. She returned to work on June 1, 2015 and was immediately tasked with leading a significant study. J.A. 44–45. Her attendance problem "largely disappeared as Hannah responded to the need for daily meetings all over the community." J.A. 612.

On June 9, 2015, Hannah interviewed for a permanent position with ODNI—Program Mission Manager Cyber ("Cyber"), a job she had applied for at the end of April or beginning of May 2015. J.A. 620–21. She was unanimously selected by the interview panel as the most qualified candidate for the position. J.A. 206, 625. A week later, the interview panel forwarded its recommendation to ODNI's Chief Management Officer, Mark Ewing. J.A. 206–07. Ewing was already aware of the decision to refer Hannah to the EAP and had been consulted in that decision-making process. J.A. 216. As Ewing testified, the EAP referral was intended not only to address Hannah's issues with the temporary job she had at the time; Ewing's "concern was her conduct in relationship to being selected for a permanent government position." J.A. 217, 585.

Hannah's application for the Cyber position stalled for several weeks, despite the fact that the approval process typically only took a few days. J.A. 443, 630. On June 25, 2015, members of the interview panel began questioning the holdup. J.A. 633. In response, Ewing sent an email to the Principal Deputy Director of National Intelligence ("PDDNI") recommending that Hannah not be approved for the

Cyber position based on her recent attendance history. J.A. 635–36. Ewing also represented that the EAP counselor had concluded that Hannah did not have a medical problem, "rather she is a disciplinary problem." J.A. 635.

The PDDNI shared that email with the Director of National Intelligence ("DNI"). Neither the PDDNI nor the DNI approved Hannah for the permanent position. J.A. 722. On July 7, 2015, Hannah was notified that she was not selected for the position. J.A. 638. Hannah completed her temporary term at ODNI on March 27, 2016 as a high performer, yet did not secure a permanent position with the department.

II.

A.

I first take issue with the Court's treatment of Hannah's discrimination claim under the Rehabilitation Act. The majority concludes that Hannah's 13 "attendance issues" between March 19, 2015 and May 4, 2015 constituted a "significant attendance and reporting problem." Maj. Op. at 27–28. Accordingly, the majority credits this proffered legitimate, non-discriminatory reason for ODNI's failure to hire Hannah for the permanent Cyber position.[2] The majority also concludes that Hannah has failed to satisfy her burden at this stage of presenting sufficient evidence that ODNI's explanation for rejecting her application is pretext for disability discrimination. Maj. Op. 24–26.

[2] ODNI does not dispute that Hannah's depression qualifies as a disability under the Rehabilitation Act.

I disagree with the majority's conclusions for several reasons. Fundamentally, ODNI's proffered reason for not hiring Hannah reflects a misunderstanding of Hannah's disability. Among the most typical symptoms of depression are a loss of interest in nearly all activities, decreased energy, disturbed or irregular sleep, and an impaired ability to function in one's daily activities, including communicating with others. Jerry Von Talge, Ph. D., *Major Depressive Disorder—Essential Features*, 26 Am. Jurisprudence Proof of Facts 1, § 12 (3d ed. 1994); *Spangler v. Fed. Home Loan Bank of Des Moines*, 278 F.3d 847, 853 (8th Cir. 2002) ("A jury could consider the difficulty one suffering from depression has with communications . . . ."). "Even the smallest tasks seem to require substantial effort." VonTalge, *Major Depressive Disorder—Essential Features*, 26 Am. Jurisprudence Proof of Facts 1, § 12. In Hannah's case, although she was taking medication to treat her depression, she was "unable to just get going." J.A. 413. She was "lethargic or almost unconcerned." *Id.* Her demeanor was "sad, very flat, and almost trance like." *Id.* Yet, Hannah came to work, and her job performance remained "excellent." J.A. 408.

In light of the nature of Hannah's disability and the record evidence, I am baffled by the majority's conclusion that her conduct amounted to a "significant attendance and reporting problem" as a matter of law. Maj. Op. at 28; *see Vannoy v. Fed. Reserve Bank of Richmond*, 827 F.3d 296, 300 (4th Cir. 2016) ("Summary judgment is appropriate if there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." (internal citations and quotation marks omitted)). Hannah's behavior is far from the "blatant and

persistent misconduct" that we have found to be lawful grounds for adverse employment actions in this context. *Vannoy*, 827 F.3d at 305. In *Vannoy*, for example, the employee, like Hannah, suffered from depression. *Id.* at 299. We found that Vannoy's employer had a legitimate, nondiscriminatory reason to terminate his employment, despite his disability, when Vannoy had several unscheduled absences from work; drove an employer vehicle for a three-day, out-of-state work assignment and stayed at a hotel paid for by his employer, yet did not once report for duty; refused to complete his portion of a performance improvement plan; and left work without authorization. *Id.* at 299–300, 305. It was in that context that we explained that the Americans with Disabilities Act ("ADA") "does not require an employer to simply ignore an employee's *blatant and persistent misconduct*, even where that behavior is potentially tied to a medical condition." *Id.* at 305 (emphasis added); *see also* 29 U.S.C. § 791(f) (incorporating ADA employment standards into section 501 of the Rehabilitation Act).

Unlike in *Vannoy*, the record here does not paint a picture of Hannah as an insubordinate employee who refused to cooperate with her employer and blatantly misused department resources. To the contrary, Hannah openly communicated with her supervisors, even if she did so later in the day than they had expected. She informed her supervisors of her depression and cooperated by attending the sessions with the EAP counselor. During the 46-day period between the first accommodation and Hannah's written agreement to begin work at a specified time, she had four unscheduled absences and came into work after 10:00 a.m. nine times. J.A. 556.

On all but two occasions she communicated her anticipated schedule to ODNI. And on one of those two occasions, Hannah arrived by 11:00 a.m., the time after which her supervisors were to contact her. *Id.* During this time she actively worked with her medical professionals to design an alternative solution, and she requested, on more than one occasion, that ODNI grant the recommended leave of absence. In fact, Hannah was absent only once and arrived after 10:00 a.m. only twice before her initial leave request was denied. *See id.* Had her supervisors granted her leave of absence on April 9 when she first requested it, many of her attendance issues would have been avoided. A jury could reasonably conclude that Hannah's late arrivals to work continued only because her depression was not effectively accommodated. *See* J.A. 175 (both medical professionals recommended four-week leave); J.A. 612 (noting Hannah's attendance problem "largely disappeared" upon her return from leave). On this record, I find unfounded the characterization of Hannah's conduct as blatant and persistent as a matter of law.

Furthermore, Hannah has sufficiently shown that ODNI's proffered reason for not hiring her—her attendance problems—may be pretext for disability discrimination. At the summary judgment stage, Hannah need not conclusively prove discrimination. But she must proffer sufficient evidence from which a reasonable jury could conclude that she was in fact the victim of intentional discrimination by ODNI. *Reyazuddin v. Montgomery Cty., Md.*, 789 F.3d 407, 419 (4th Cir. 2015). I would find that she has met this burden for two reasons.

First, as Hannah argues, questions of fact exist as to whether her attendance was a serious problem, or whether her attendance even violated any work-hours policy. The record suggests that it was not until May 4, 2015 that Hannah was given a formal time by which to arrive at work. *See, e.g.*, J.A. 108 ("[D]ifferent people had different schedules . . . ."); *id.* (explaining that while most employees arrived at work around 9:00 a.m., there was no "explicit" requirement to do so); J.A. 518 (denying that a "core hours expectation" existed before September or October 2015). Although her supervisors told her on March 19, 2015 that she was to report by 10:00 a.m., they also initially agreed to contact her if she did not report by 11:00 a.m. Had the 10:00 a.m. start time been deemed a requirement, it would make little sense to have made any further arrangements. When one of her supervisors attempted to unilaterally change that arrangement, he acceded to Hannah's request for time to propose an alternative. Hannah requested the doctor-recommended leave of absence as an alternative, but she was never told that she was required to work specific hours; she remained formally on a maxi flex schedule. It was not until the Letter of Expectation on May 4, 2015 that a formal start time was imposed. The department itself did not move to "core" hours until October 2015. J.A. 518. Therefore, Hannah's work schedule during the relevant time may have been "erratic," but a reasonable jury could conclude that it did not violate any established work-hours requirement.[3]

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[3] Hannah's supervisors testified that, because she arrived later than other employees, they were forced to reassign work that would have fallen to her. There is evidence that the work

Second, I would find that Mark Ewing's inconsistent statements regarding his knowledge of Hannah's disability, coupled with the above evidence, are sufficient evidence of pretext to survive summary judgment. The majority emphasizes that Ewing did not have first-hand knowledge of her condition and that he was informed that her depression was under control. Maj. Op. 25. But depression is not like physical illnesses; it does not simply dissipate overnight. Its symptoms may be under control one day yet triggered the very next. *See* Sidney H. Kennedy, M.D., *A Review of Antidepressant Therapy in Primary Care: Current Practices and Future Directions*, Primary Care Companion for CNS Disorders, vol. 15(2), PCC.12r01420 (Apr. 11, 2013) (noting that major depressive disorder, the disease with which Hannah was diagnosed, is "chronic and episodic" in nature). Indeed, Hannah was able to control her symptoms for years while working at ODNI. Ewing was consulted by Hannah's supervisors in connection with their decision to refer Hannah to EAP. J.A. 216. The EAP memo, a copy of which Ewing possessed, explicitly stated: "[Hannah] informed us that she was meeting with a psychiatrist and counselor and taking medication for depression." J.A. 413. And the memo implicitly made the connection between Hannah's "struggling to get out of bed in the morning" and recent upheavals in her life that "negatively impacted some of her physical coping mechanisms." *Id.* In fact, it noted that Hannah

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assignments were made around 9:00 or 9:30 a.m. J.A. 108–09. Had Hannah's supervisors truly been concerned about being able to assign her work, one would expect the accommodation they offered to Hannah to have required her to come into the office by 9:00. No such requirement was ever made of her.

"appear[ed] to gain more energy and become aware as the day progress[ed] into early evening." *Id.* On this evidence, a reasonable jury could determine that Ewing was aware that Hannah's depression affected her ability to get to work by 10:00 a.m. and required medical intervention and that Ewing's initial statement that he was unaware of her condition was intended to cover up the true reason for his desire not to hire her: her disability.

In sum, because a reasonable jury could conclude on this record that Hannah's attendance issues were far from "blatant and persistent misconduct," *Vannoy*, 827 F.3d at 305, and that ODNI's proffered reason for failing to hire Hannah for the Cyber position was pretext for discrimination on the basis of her disability, I would reverse the district court's grant of summary judgment on the discrimination claim.

B.

I also take issue with the Court's conclusion that no question exists as to the reasonableness of the accommodations made by ODNI. The reasonableness of an accommodation depends "on a good-faith effort to assess the employee's needs and to respond to them." *Feliberty v. Kemper Corp.*, 98 F.3d 274, 280 (7th Cir. 1996). Importantly, "a 'reasonable accommodation' is one that '*effectively* accommodates the disabled employee's limitations.'" *Bellino v. Peters*, 530 F.3d 543, 549 (7th Cir. 2008) (emphasis added) (citation omitted). In identifying a reasonable accommodation, employers are required to engage in an interactive process with the disabled employee. *See* 29 C.F.R. § 1630.2(o)(3); *Jacobs v. N.C. Administrative Office of the Courts*, 780 F.3d 562, 581 (4th Cir. 2015) ("The ADA imposes upon employers a

good-faith duty 'to engage [with their employees] in an interactive process to identify a reasonable accommodation.'" (quoting *Wilson v. Dollar Gen. Corp.*, 717 F.3d 337, 346 (4th Cir. 2013))); *Bellino*, 530 F.3d at 548–50 (discussing ADA's interactive-process requirement in the context of claim brought under section 501 of the Rehabilitation Act). It is only if an employer provides a reasonable accommodation that the employer's failure to engage in an interactive process will not sustain a failure-to-accommodate claim. *Jacobs*, 780 F.3d at 581.

The majority finds that ODNI provided Hannah with two accommodations: (1) the March 19, 2015 agreement that Hannah would report for work by 10:00 a.m., and (2) the referral to EAP. Maj. Op. 12. I submit that questions of fact exist with respect to whether ODNI made a good-faith effort to respond to Hannah's needs and whether either of these accommodations was effective, *i.e.*, whether the accommodations were reasonable. And because a question of fact exists as to that issue, I agree with Hannah that a question also exists as to whether her employer engaged in the required interactive process.

Hannah argues that her supervisors' initial commitment to contact her if she did not contact them or arrive by 11:00 a.m. was the *sine qua non* of the first accommodation. But Hannah's supervisors allowed that accommodation to remain in place for only four working days before unilaterally modifying it and, according to Hannah, angrily pressuring her to propose an alternative accommodation on the spot.

When Hannah did propose an alternative—four weeks of leave, as recommended by both of her treating medical professionals—her supervisors

denied the request because they had already decided that EAP counseling was more appropriate. Speculating that they knew better than both of Hannah's medical professionals, her supervisors believed that her medical providers lacked "the expertise to provide" an opinion on "all of the items" they wanted to submit to the EAP. J.A. 95. And while Hannah's supervisors had suggested that she take leave a few months earlier, prior to any signs that Hannah's disability would affect her ability to get into work in the morning, J.A. 173, they threatened to terminate her employment if she did not first attend EAP sessions after she requested medically recommended leave to cope with her depression, J.A. 176. On this evidence, the question of whether the first accommodation and the decision to require EAP counseling before granting medically recommended leave were made in good faith and were effective to address Hannah's disability should be submitted to the jury, as reasonable minds could conclude that they were not.

Likewise, the reasonableness of ODNI's delay in granting Hannah leave should be decided by a jury. Concededly, the short duration of the delay (from April 9, 2015 to May 4, 2015) undercuts Hannah's argument of unreasonableness. *See Terrell v. USAir*, 132 F.3d 621, 628 (11th Cir. 1998) (finding that delay of three months in providing accommodation was reasonable). However, Hannah's attendance—and the manifestation of her depression—was negatively impacted during the delay period; ODNI purposefully delayed her leave while she attended required EAP

sessions[4]; ODNI would have terminated Hannah's temporary position if she failed to attend the EAP counseling[5]; and Mark Ewing intended to use the EAP sessions to gather information regarding Hannah's suitability for future employment.[6] Presented with this evidence, a reasonable jury could conclude that the delay was the result of ODNI's bad faith. *Feliberty*, 98 F.3d at 280. Thus, I would reverse the grant of summary judgment on Hannah's reasonable accommodation claim.

C.

I would also reverse summary judgment on Hannah's claim that she was subjected to an unlawful medical examination as a current employee.

Under the Rehabilitation Act, "[a] covered entity shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature and severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity." 42 U.S.C. § 12112(d)(4)(A); 29 U.S.C. § 791(f).

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[4] *See* J.A. 422 ("The recommendation of the group was if Hannah were to ask for leave, we should defer that decision until after meeting with EAP."); J.A. 176 ("EAP was concerned that since I was a single woman if I took leave I would be home by myself and that could make my depression worse.").

[5] *See* J.A. 176 (Hannah's statement that she was told she had "no choice" but to attend the EAP sessions or her job would be terminated immediately).

[6] *See* J.A. 584–85 (Mark Ewing's deposition testimony that EAP referral "wasn't initially just about" Hannah's temporary position but also because Ewing "knew she was looking for permanent employment").

First, a clear dispute exists as to whether the EAP sessions constituted a required medical examination under the Rehabilitation Act. Despite the voluntary nature of EAP counseling highlighted by the majority, Maj. Op. 15, two of Hannah's supervisors testified that the sessions were in fact "mandatory." J.A. 448, 474. As Hannah explained, she was told by her supervisor that she had "no choice" in the matter and that if she did not participate in the EAP counseling, her temporary position with ODNI would be declared "as excess" and she "would be out of a job immediately." J.A. 176.

The majority emphasizes the EAP counselor's testimony that she did not conduct a medical examination. Yet, the Court's opinion says nothing about Hannah's testimony regarding the substance of her sessions with the counselor. According to Hannah, she was asked for a family medical history, questioned about her medication and dosage, and even administered a diagnostic tool used to assess depression. J.A. 531–32, 534.

In light of this testimony, a reasonable jury could conclude that the EAP sessions were in fact required and that the diagnostic tool constituted a "procedure or test that seeks information about an individual's physical or mental impairments or health." E.E.O.C., *Enforcement Guidance: Disability–Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act (ADA)* (EEOC Notice 915.002) (July 27, 2000). Likewise, a jury could determine that the questions asked during the sessions amounted to a "series of questions . . . likely to elicit information about a disability" and the scope of Hannah's disability. *Id.*; *Grenier v. Cyanamid*

Plastics, Inc., 70 F.3d 667, 677 (1st Cir. 1995). As Hannah's supervisors explained, the decision to refer her to EAP was to determine whether her attendance was due to "a medical mental health problem." J.A. 422. Their decision was predicated on a concern that granting Hannah the doctor-recommended leave could "make [her] depression worse" and could even "be dangerous." J.A. 176, 422–23. After meeting with Hannah, the EAP counselor even suggested that Hannah could have bipolar disorder. J.A. 601–02. If faced with this evidence, a reasonable jury could easily find that the EAP sessions were in fact required medical examinations or disability-related inquiries.

With respect to the second prong of our inquiry—whether the EAP sessions were job-related and consistent with business necessity—questions of fact also preclude summary judgment. "[W]hether a mental examination was 'job-related and consistent with business necessity' is an objective inquiry." *Pence v. Tenneco Auto. Operating Co., Inc.*, 169 F. App'x 808, 812 (4th Cir. 2006) (citing *Tice v. Centre Area Transp. Auth.*, 247 F.3d 506, 518 (3d Cir. 2001)). It is the employer who bears the burden of proving this prong. *Kroll v. White Lake Ambulance Auth.*, 763 F.3d 619, 623 (6th Cir. 2014). "A business necessity must be based on more than 'mere expediency,' and will be found to exist where the employer can 'identify legitimate, non-discriminatory reasons to doubt the employee's capacity to perform his or her duties.'" *Coursey v. Univ. of Md. E. Shore*, 577 F. App'x 167, 173 (4th Cir. 2014) (citing *Conroy v. N.Y. State Dep't of Corr. Servs.*, 333 F.3d 88, 97–98 (2d Cir. 2003); *Thomas v. Corwin*, 483 F.3d 516, 527 (8th Cir. 2007)). A business necessity may also exist if a medical examination is necessary to determine "whether an

employee's absence or request for an absence is due to legitimate medical reasons, when the employer has reason to suspect abuse of an attendance policy." *Thomas*, 483 F.3d at 527 (citing *Conroy*, 333 F.3d at 98).

I would find that ODNI is not entitled to summary judgment because a reasonable jury could conclude that the employer lacked a "reasonable belief based on objective evidence that [Hannah] was unable to perform the essential functions of her job or that she posed a threat to herself or to others based on a medical condition." *Wright v. Ill. Dep't of Children and Family Servs.*, 798 F.3d 513, 524 (7th Cir. 2015); *see also Kroll*, 763 F.3d at 623 ("[T]he individual who decides to require a medical examination must have a reasonable belief based on objective evidence that the employee's behavior threatens a vital function of the business." (citing *Pence*, 69 F. App'x at 812) (other citation omitted)). It is undisputed that Hannah's supervisors, as well as Mark Ewing, were involved in the decision to refer Hannah to the EAP. Therefore, the question is whether those supervisors had objective evidence that Hannah was unable to perform an essential function of her job. For the period including Hannah's "egregious" attendance issues, she received an overall performance rating of 4.53 out of 5.00—a rating of "Excellent." J.A. 406–10. Yet the majority concludes that her poor attendance precluded her from performing an essential function of her job.

I submit that this conclusion cannot be reached as a matter of law on this record, a record that seriously calls into question ODNI's sincerity in its assertion that Hannah was unable to perform an

essential function of her job. For the entirety of Hannah's time as the disclosures coordinator on the Snowden project, she started work and left work later than other ODNI employees. J.A. 25, 494. Although she came in later, she got the job done, and she did it "impeccabl[y]." J.A. 412. She was able to manage her depression and worked long hours in a stressful environment while excelling. J.A. 19–20, 412. Her supervisors had no qualm with her attendance, and aside from the maxi flex schedule, there was no formal work-hours requirement in place. J.A. 492–94, 518. When that project winded down in late 2014 and early 2015, Hannah's supervisors did not institute "core" hours or otherwise formally remove Hannah from the maxi flex schedule. J.A. 461, 518. In light of Hannah's ODNI-sanctioned history of beginning her work day later than others (a practice which simply continued into April 2015), the apparent lack of any formal policy requiring that her schedule be otherwise, and her consistent "excellent" performance reviews, there is at the very least a question of fact regarding ODNI's "reasonable belief based on objective evidence that [Hannah] was unable to perform the essential functions of her job." *Wright*, 798 F.3d at 524.

This is not to say that the essential functions of Hannah's job did not include regular attendance. *See Tyndall v. Nat'l Educ. Ctrs., Inc. of Cal.*, 31 F.3d 209, 213 (4th Cir. 1994). However, as discussed above, a jury could reasonably conclude that ODNI had no "reason to suspect abuse of an attendance policy," *Thomas*, 483 F.3d at 527 (citation omitted), when no such policy formally existed and when Hannah had been allowed for over a year to begin work later than other department employees. And although Hannah

requested leave, her supervisors had decided before Hannah's request that they would defer a decision on any leave request until after the EAP referral because they expected a "quick answer" from EAP. J.A. 95. But "mere expediency" is insufficient to establish business necessity. *Coursey*, 577 F. App'x at 173.

In light of these considerations, I would submit the issue of whether the EAP sessions were job-related and consistent with business necessity to the jury for resolution.

D.

Finally, I would reverse the district court's grant of summary judgment on Hannah's FMLA retaliation claim. ODNI argues that Hannah cannot prove this claim because her non-selection for the Cyber position was due to "her significant attendance and reporting problems prior to her first leave request." Resp. Br. 48. For largely the same reasons that I would reverse with respect to Hannah's discrimination-in-hiring claim, I would find that there is sufficient evidence in the record to create a material issue of fact for the jury to decide on this claim.

Hannah suffered from a disability, one that could effectively be accommodated with leave. Unfortunately, her leave was granted only after she struggled to manage her disability—a struggle which a reasonable jury could readily conclude did not violate any attendance policy. Despite Hannah's rebound upon her return, ODNI used her late arrivals during the time for which she requested but was denied leave as grounds for denying her a permanent position, a position for which it is undisputed that she was exceptionally qualified. J.A. 623–25, 635–36. In

essence, ODNI assigned Hannah to a high-stress position after which her depression worsened; delayed her request for FMLA-qualifying leave to accommodate her depression, thereby intensifying her symptoms; then refused to hire her for a permanent role when she returned from leave. Because of this, and for the reasons I articulate above, a jury could reasonably conclude that ODNI's rejection of Hannah's application for permanent employment was based on the exercise of her FMLA rights in requesting and taking a qualifying leave of absence to accommodate her disability.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

HANNAH P.,	)	
Plaintiff,	)	
v.	)	
DANIEL COATS, Director of the Office of The Director of National Intelligence,	)	Civil Action No. 1-16-cv-1030
Defendant.	)	

MEMORANDUM OPINION

THIS MATTER comes before the Court on a Motion for Summary Judgment by Defendant Daniel Coats, Director of the Office of The Director of National Intelligence ("Defendant" or "ODNI") and on a Cross-Motion for Partial Summary Judgment filed by the Plaintiff, Hannah P.[1] Plaintiff Hannah P. ("Plaintiff") worked at ODNI for a five-year term,

[1] Pursuant to a protective order entered in this case, Plaintiff is identified by her first name and the first initial of her last name.

during which time she was diagnosed with Major Depressive Disorder. Plaintiff alleges that ODNI violated the Rehabilitation Act of 1973, 29 U.S.C. § 791, *et seq.*, in refusing to hire her for a permanent position; failing to accommodate her; creating a hostile work environment; wrongfully requiring a medical examination; and unlawfully disclosing confidential medical information (Count I). Plaintiff also alleges that ODNI interfered with and retaliated against her for using leave under the Family and Medical Leave Act ("FMLA"), 39 U.S.C. § 2601, *et seq*. (Count II). Upon consideration of the memoranda filed in support of and in opposition to Defendant's motion and the Plaintiff's cross-motion, the Court concludes that Defendant is entitled to summary judgment on Counts I and II.

Plaintiff was hired by ODNI in March 2011 for a five-year term working in the Systems and Research Analysis unit. In the summer of 2011, Plaintiff was diagnosed with recurrent Major Depressive Disorder ("depression"). Around the time she was diagnosed with depression, Plaintiff informed her then supervisor of her diagnosis. She did not, however, request an accommodation at that time.

In early 2015, after Plaintiff had finished working on an 18-month long investigation that had required extensive overtime, Plaintiff began arriving to work late and missed several days of work. In March 2015, Plaintiff's supervisors approached her with concerns about her schedule and her work absences. Plaintiff told her supervisors that she was experiencing acute bouts of depression, and that she was having trouble getting to work. On March 19, 2015, Plaintiff met with one of her supervisors, and

the two agreed upon a plan to make Plaintiff's schedule more regular. The plan stated that Plaintiff was expected to arrive at work by 10 a.m., and if Plaintiff was not going to be in by that time, she was to call or email her supervisors. If Plaintiff had not arrived at work or communicate with her supervisors by 11 a.m., a supervisor would call her to determine when she would arrive.

Over the next week, Plaintiff did not consistently follow through with the plan. For example, on March 20, 2015, Plaintiff did not email her supervisors until 11:05 a.m. to advise that she would be in after 12 p.m. because she was running errands for a house that she had recently purchased. On March 31, Plaintiff emailed her supervisors at 11:56 a.m. to inform them that she would not be coming to work that day. On April 1, by 12:30 p.m., Plaintiff had not arrived or communicated when she would arrive, so her second-level supervisor called Plaintiff. When Plaintiff arrived at work later that day, the second-level supervisor told Plaintiff that the plan they had created was not working.

Days later, Plaintiff met with her psychiatrist, who recommended that Plaintiff take four weeks of leave to address her depression. Around the same time, on April 2, 2015, Plaintiff's supervisors met and decided to refer Plaintiff to the Employee Assistance Program ("EAP"). The EAP is a voluntary counseling service that assists employees in accessing resources and services that can help them address problems that are affecting their work. On April 9, Plaintiff's supervisors met with Plaintiff and presented her with a management referral memorandum they had drafted to the EAP setting forth Plaintiff's attendance

and reporting problems. In the memorandum, Plaintiff's supervisors explained that Plaintiff had disclosed to them that she was seeing a psychiatrist and taking medications for depression. They also informed Plaintiff that they had scheduled an appointment for her to meet with an EAP counselor the following day. Plaintiff told her supervisors that her psychiatrist had recommended that she take leave. Her supervisors responded that they wanted her to keep her appointment with the EAP counselor and would discuss her leave request the following week.

Plaintiff met with the EAP counselor on April 10, 2015. On April 13, 2015, Plaintiff told her supervisor that she was putting her plan to take lave on hold. Plaintiff continued to meet with the EAP counselor through July 17, 2015. Plaintiff claims that during her EAP sessions, she was questioned regarding her mental health history and diagnoses, her past and current medications and dosages, and her family medical history. Plaintiff also alleges that the EAP counselor discussed Plaintiff's mental health history with Plaintiff's second-level supervisor.

Plaintiff's attendance and reporting issues continued through the month of April 2015. In late April 2015, Plaintiff renewed her leave request. Plaintiff's leave request was approved and began on May 5, 2015. Plaintiff used annual leave, except for once a week, when she used sick leave for her regularly scheduled counseling appointments. Prior to her departure, on May 4, Plaintiff's supervisors presented Plaintiff with a Letter of Expectations that documented her past attendance issues and set forth ODNI's expectations of Plaintiff when she returned

from leave, which included arriving at work by 10 a.m. and notifying a supervisor by 9:30 a.m. if she was going to be late to work.

Shortly before going on leave, Plaintiff had submitted an application for the Program Mission Manager Cyber Position ("the Cyber position"). Plaintiff returned to work on June 1, and on June 9, she interviewed for the Cyber position. Plaintiff learned after her interview that the interview panel had recommended her for the position. On June 17, the interview panel's recommendation was forwarded to ODNI's Chief Management Officer Mark Ewing. Mr. Ewing recommended that Plaintiff not be hired. Plaintiff was informed that she was not selected for the Cyber position on July 7, 2015. Plaintiff completed her five-year term at ODNI in March 2016.

After having exhausted administrative remedies, Plaintiff filed this action on August 12, 2016. In Count I of the operative complaint,[2] Plaintiff alleges that ODNI violated the Rehabilitation Act of 1973, 29 U.S.C. § 791, *et seq.*, in refusing to hire her for a permanent position; failing to accommodate her; creating a hostile work environment; wrongfully requiring a medical examination; and unlawfully disclosing confidential medical information. In Count II, Plaintiff alleges that ODNI interfered with and

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[2] The operative complaint is the Second Amended Complaint. Upon being granted leave from the Court, Plaintiff amended her original on April 18, 2017. Defendant filed the instant Motion for Summary Judgment on May 12, 2017. On June 10, 2017, with authorization from the Court, Plaintiff amended her complaint for a second time to clarify that her Rehabilitation Act claims were brought under both Sections 501 and 504 of the Rehabilitation Act.

retaliated against Plaintiff for her use of leave under the Family and Medical Leave Act ("FMLA"), 39 U.S.C. § 2601, *et seq*. Following the close of discovery, Defendant moved for summary judgment on all counts, and Plaintiff responded by filing an opposition and cross motion for partial summary judgment.

Under Federal Rule of Civil Procedure 56, summary judgment is appropriate if the pleadings and evidence before the Court show no genuine dispute as to any material fact, and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); see Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). In reviewing a motion for summary judgment, the Court views the facts in the light most favorable to the non-moving party. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). Once a motion for summary judgment is properly made, the opposing party has the burden of showing that a genuine dispute of material fact exists. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586–87 (1986).

The Rehabilitation Act prohibits federal agencies from discriminating against qualified employees based on a disability, and it provides the exclusive avenue for remedying such discrimination. See 29 U.S.C. § 791, 794(a). A plaintiff alleging violations of the Rehabilitation Act may prove her case by using either direct or circumstantial evidence of discrimination, or the burden-shifting approach under the McDonnell Douglas "pretext" framework. See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973); Luther v. Gutierrez, 618 F. Supp. 2d 483, 491–93 (E.D. Va. 2009) (applying *McDonnell Douglas* to a Rehabilitation Act claim).

Under *McDonnell Douglas*, a plaintiff must first state a prima facie case of discrimination. See McDonnell Douglas, 411 U.S. at 802. To state a claim of disability discrimination, a plaintiff must show that: (1) she is an individual with a disability within the statute's definition; (2) she is qualified for the position; and (3) she suffered an adverse employment action that was motivated by her disability status. Doe v. Univ. of Md. Med. Sys. Corp., 50 F.3d 1261, 1265 (4th Cir. 1995). If the plaintiff succeeds in stating a prima facie case, the burden of production shifts to the defendant to articulate a legitimate, non-discriminatory reason for its adverse employment decision. Id. If the defendant satisfies this showing, the plaintiff must show that the articulated reason is a pretext for discrimination. Id. at 430-31.

In Count I of the complaint, Plaintiff claims that Defendant violated the Rehabilitation Act's prohibition against disability discrimination when Defendant did not hire Plaintiff for the Cyber position, when it failed to accommodate Plaintiff's disability, when it created a hostile work environment, when it utilized the Employee Assistance Program as a "medical examination," and when it wrongfully used confidential medical information.

With respect to Defendant's decision not to hire Plaintiff for the Cyber position, even if Plaintiff could establish a prima facie case of discrimination, she cannot rebut the legitimate, non-discriminatory reason that ODNI declined to hire Plaintiff for the position—that Plaintiff had significant attendance and reporting problems. "It is hardly controversial that attendance is an essential function of most employment positions." Vanyan v. Hagel, 9 F. Supp.

3d 629, 638 (E.D. Va. 2014) (citing Tyndall v. Nat'l Educ. Ctrs., 31 F.3d 209, 213 (4th Cir. 1994)). The record reflects that Plaintiff applied for and interviewed for the Cyber position soon after an extended period of time in which she had significant attendance and reporting problems. The evidence also shows that ODNI's Chief Management Officer, Mr. Ewing, was aware of these issues when he decided not to select Plaintiff for the Cyber position. Mr. Ewing testified that he declined to hire Plaintiff at that time, but stated that he would have considered Plaintiff's subsequent applications for permanent employment had Plaintiff demonstrated improved performance for a longer period of time. Plaintiff cannot establish that this explanation was a pretext for discrimination.

To the extent Plaintiff's attendance problems were caused by her disability, an employer need not ignore an employee's problematic conduct, even if that behavior is potentially tied to a medical condition. See Vannoy v. Fed. Reserve Bank of Richmond, 827 F.3d 296, 305 (4th Cir. 2016); see also Martinson v. Kinney Shoe Corp., 104 F.2d 683, 686 n.3 (4th Cir. 1997) ("Misconduct—even misconduct related to a disability—is not itself a disability, and an employer is free to fire an employee on that basis.").

Thus, even if Plaintiff's attendance problems were related to her depression, ODNI was free to not hire Plaintiff on the basis of her attendance problems. The Court need not second guess ODNI's decision not to hire Plaintiff given that Defendant has presented a legitimate, non-discriminatory reason for its decision. See DeJarnette v. Corning Inc., 133 F.3d 293, 298-99 (4th Cir. 1998) (stating that courts do not sit "as a kind of super-personnel department weighing the prudence

of employment decisions made by [employers] charged with employment discrimination"). As a result, Defendant is entitled to summary judgment on Plaintiff's discrimination in hiring claim.

Regarding Plaintiff's claim that ODNI failed to accommodate her disability, Plaintiff cannot make out a prima facie case. To establish a failure to accommodate claim under the Rehabilitation Act, Plaintiff must show that: (1) she was a qualified person with a disability; (2) the employer had notice of the disability; (3) the Plaintiff could perform the essential functions of the position with a reasonable accommodation; and (4) the employer refused to make such an accommodation. Reyazuddin v. Montgomery Cty., Md., 789 F.3d 407, 414 (4th Cir. 2015) (citing Wilson v. Dollar Gen. Corp., 717 F.3d 337, 345 (4th Cir. 2013)).

Plaintiff cannot establish the elements of a prima facie case because the record reflects that ODNI provided her with at least two reasonable accommodations. First, Plaintiff did not request an accommodation until her supervisors approached her to address her attendance problems. When Plaintiff disclosed to her supervisors that she had depression, her supervisors proposed a plan that required that Plaintiff arrive at work by 10 a.m. If she had not arrived to work by that time, Plaintiff's supervisor would call her at 11 a.m. to determine her arrival time. Although Plaintiff claims that this accommodation appeared to be working and that it was Defendant who abandoned the plan, the record shows that Plaintiff failed to adequately communicate with her supervisors during the first few weeks of the plan's execution. Furthermore, Plaintiff was

ultimately provided an accommodation that Plaintiff admits was effective—four weeks of leave in May 2015. Plaintiff cannot prove that ODNI refused to provide her an accommodation. As a result, Defendant is entitled to summary judgment on Plaintiff's failure to accommodate claim.

With respect to Plaintiff's hostile work environment claim, Plaintiff must establish that she: (1) is a qualified individual with a disability; (2) was subject to unwelcome harassment; (3) the harassment was based on her disability; (4) the harassment was sufficiently severe or pervasive to alter a term, condition, or privilege of employment; and (5) there is some factual basis for imputing liability to the employer. Edmonson v. Potter, 118 F. App'x 726, 730 (4th Cir. 2004) (citing Fox v. GMC, 247 F.3d 169, 177 (4th Cir. 2001)). Plaintiff must demonstrate that her employer's conduct was objectively hostile, such that a reasonable person would so perceive it as such. Id.

The Court finds no evidence here that could support a finding that Plaintiff was harassed, that any alleged harassment that Plaintiff suffered was based on her disability, or that any harassment was severe or pervasive such that it created an abusive work environment. The record does not reflect that Plaintiff was subject to any threatening or intimidating treatment, offensive language, or insult based on her disability. On the contrary, the evidence shows that Plaintiff's supervisors were willing to help Plaintiff when she experienced acute bouts of depression and that they were open to finding an accommodation that would help Plaintiff. As a result, Defendant is entitled to summary judgment on Plaintiff's hostile work environment claim.

Plaintiff also alleges that Defendant violated the Rehabilitation Act by using the EAP referral process as a medical examination. An employer shall not require a medical examination "unless such examination or inquiry is shown to be job-related and consistent with business necessity." 42 U.S.C. § 12112(d)(4)(A). However, Plaintiff's EAP counseling sessions were not medical examinations. The EAP counselor with whom Plaintiff met testified that she was not a medical doctor or a nurse, and that Plaintiff was not subjected to a mental health evaluation or a diagnostic assessment. The counselor also testified that she did not ask Plaintiff about family medical history or genetic information. Thus, Plaintiff cannot prove a wrongful medical examination claim, and Defendant is entitled to summary judgment on this claim.

Finally, Plaintiff alleges that ODNI unlawfully disclosed her confidential medical information when Plaintiff's supervisors informed the EAP counselor that Plaintiff had been meeting with a psychiatrist and was taking medication for depression. An employer is prohibited from making medical inquiries from an employee and disclosing an employee's medical information, but if the employee voluntarily discloses her medical condition to her employer, the employer is not obligated to keep that information confidential. See Reynolds v. Am. Nat'l Red Cross, 701 F.3d 143, 155 (4th Cir. 2012).

In this case, the record reflects that Plaintiff voluntary disclosed to her supervisors that she had been diagnosed with depression and was taking medication. Plaintiff did not disclose this information in response to a medical inquiry from her employer;

rather, she did so voluntarily. As a result, this information was not subject to protection. Furthermore, Plaintiff has not shown that ODNI disclosed any medical information outside of the group of people who were working with Plaintiff to find a reasonable accommodation. Thus, Defendant is entitled to summary judgment on Plaintiff's confidentiality claim.

In Count II of the complaint, Plaintiff claims that ODNI violated her rights under the FMLA. The FMLA provides eligible employees the right to take up to 12 weeks of leave during any 12-month period for a qualifying medical reason. 29 U.S.C. § 2612(a). Plaintiff claims that Defendant interfered with her rights under the FMLA and then did not hire her for the Cyber position in retaliation for Plaintiff taking FMLA-qualifying leave. Even assuming that Plaintiff was entitled to FMLA leave in the first place, the evidence does not show that ODNI interfered with Plaintiff's FMLA rights or retaliated against her.

First, Plaintiff did not request FMLA leave or put her supervisors on notice that her leave would be for an FMLA-qualifying reason. When an employee requests FMLA leave, or when the employer knows that an employee's leave may be for a FMLA-qualifying reason, the employer must notify the employee that she is eligible to take FMLA leave within five business days. 29 C.F.R. § 825.300(b)(1). However, Plaintiff has not presented evidence that she ever requested FMLA leave or provided any medical documentation to support a request for FMLA leave. Instead, she asked for, and received, approximately four weeks of annual leave, using sick leave for one day of each week.

Furthermore, Plaintiff's supervisors could not have been on notice that Plaintiff was requesting leave for an FMLA-qualifying reason. The FMLA entitles an employee to leave for a "serious health condition that makes the employee unable to perform [her job functions.]" 29 U.S.C. § 2612(a)(1)(D). The record reflects that Plaintiff's psychiatrist recommended that she take time off to cope with burnout, and that Plaintiff told her supervisor she could come to work if something important came up. This information was not sufficient for her supervisors to know that Plaintiff's leave was for an FMLA-qualifying reason. Thus, Plaintiff's supervisors were not required to notify Plaintiff of her right to take FMLA leave. Moreover, Plaintiff was not prejudiced by the lack of notice. Instead, she was granted her request—four weeks of leave. As a result, Plaintiff cannot prove that ODNI interfered with her right to take FMLA leave.

Plaintiff also claims that ODNI did not select her for the Cyber position in retaliation for her taking FMLA leave. To establish a prima facie case of retaliation, Plaintiff must prove that: (1) she engaged in a protected activity; (2) her employer took an adverse employment action against her; and (3) there was a causal link between the two events. Adams v. Anne Arundel Cty. Pub. Sch., 789 F.3d 422, 429 (4th Cir. 2015). If Plaintiff makes this prima facie showing, the burden shifts to ODNI to articulate a legitimate, non-retaliatory explanation for its decision to not hire Plaintiff for the Cyber position. See id. If ODNI meets its burden, the burden shifts back to Plaintiff to establish that ODNI's explanation is a pretext for retaliation. See id.

As with Plaintiff's discrimination in hiring claim, even if Plaintiff could make a prima facie case, she cannot establish that ODNI's explanation for not hiring her was pretextual. As explained above, Plaintiff applied for the Cyber position shortly after a period of time in which she demonstrated attendance and reporting problems. Mr. Ewing, who ultimately decided not to hire Plaintiff, was aware of these issues with Plaintiff's performance. Plaintiff has not established that Mr. Ewing's decision not to select her was motivated by any retaliatory animus. Because Plaintiff cannot establish that Mr. Ewing's explanation was a pretext for retaliation, Plaintiff's FMLA retaliation claim fails as well.

For the aforementioned reasons, this Court finds that summary judgment should be granted in favor of the Defendant on Counts I and II. An appropriate order shall issue.

/s/ CLAUDE M. HILTON
CLAUDE M. HILTON
UNITED STATES DISTRICT JUDGE

Alexandria, Virginia
July 27, 2017

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

HANNAH P.,	)	
Plaintiff,	)	
v.	)	
DANIEL COATS, Director of the Office of The Director of National Intelligence,	)	Civil Action No. 1-16-cv-1030
Defendant.	)	

ORDER

In accordance with the accompanying Memorandum Opinion, it is hereby

ORDERED that Defendant Daniel Coats's Motion for Summary Judgment is GRANTED,

ORDERED that Plaintiff Hannah P.'s Cross Motion for Summary Judgment is DENIED, and this case is DISMISSED.

/s/ CLAUDE M. HILTON
CLAUDE M. HILTON
UNITED STATES DISTRICT JUDGE

Alexandria, Virginia
July 27, 2017

APPENDIX D

FILED: June 25, 2019

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 17-1943
(1:16-cv-01030-CMH-IDD)

HANNAH P.,

Plaintiff - Appellant,

v.

DANIEL COATS, Director of the Office of The Director of National Intelligence
McLean, VA,

Defendant - Appellee,

and

MARK EWING, in his personal capacity McLean, VA,

Defendant.

ORDER

The Court denies the petition for rehearing en banc.

A requested poll of the Court failed to produce a majority of judges in regular active service and not disqualified who voted in favor of rehearing en banc. Chief Judge Gregory and Judge King voted to grant rehearing en banc. Judges Wilkinson, Niemeyer, Motz, Agee, Keenan, Wynn, Diaz, Floyd, Thacker, Harris, Richardson, Quattlebaum, and Rushing voted to deny rehearing en banc.

Entered at the direction of Judge Thacker.

For the Court

/s/ Patricia S. Connor, Clerk

APPENDIX E

THE REHABILITATION ACT OF 1973, 29 U.S.C. § 701 *ET SEQ.*

§ 794. Nondiscrimination under Federal grants and programs

(a) Promulgation of rules and regulations

No otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.

* * * * *

(d) Standards used in determining violation of section

The standards used to determine whether this section has been violated in a complaint alleging

employment discrimination under this section shall be the standards applied under title I of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111 et seq.) and the provisions of sections 501 through 504, and 510, of the Americans with Disabilities Act of 1990 (42 U.S.C. 12201 to 12204 and 12210), as such sections relate to employment.

THE AMERICANS WITH DISABILITIES ACT, 42 U.S.C. § 12101 *ET SEQ.*

§ 12111. Definitions

As used in this subchapter:

* * * * *

(3) Direct threat

The term "direct threat" means a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation.

* * * * *

(8) Qualified individual

The term "qualified individual" means an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purposes of this subchapter, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.

(9) Reasonable accommodation

The term "reasonable accommodation" may include—

(A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and

(B) 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.

(10) Undue hardship

(A) In general

The term "undue hardship" means an action requiring significant difficulty or expense, when considered in light of the factors set forth in subparagraph (B).

(B) Factors to be considered

In determining whether an accommodation would impose an undue hardship on a covered entity, factors to be considered include—

(i) the nature and cost of the accommodation needed under this chapter;

(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; the effect on expenses and resources, or the impact

otherwise of such accommodation upon the operation of the facility;

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

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

§ 12112. Discrimination

(a) General rule

No covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

(b) Construction

As used in subsection (a), the term "discriminate against a qualified individual on the basis of disability" includes—

(1) limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee;

(2) participating in a contractual or other arrangement or relationship that has the effect of subjecting a covered entity's qualified applicant or employee with a disability to the discrimination prohibited by this subchapter (such relationship includes a relationship with an employment or referral agency, labor union, an organization providing fringe benefits to an employee of the covered entity, or an organization providing training and apprenticeship programs);

(3) utilizing standards, criteria, or methods of administration—

(A) that have the effect of discrimination on the basis of disability; or

(B) that perpetuate the discrimination of others who are subject to common administrative control;

(4) excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association;

(5)(A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity; or

(B) denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial

is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant;

(6) using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity; and

(7) failing to select and administer tests concerning employment in the most effective manner to ensure that, when such test is administered to a job applicant or employee who has a disability that impairs sensory, manual, or speaking skills, such test results accurately reflect the skills, aptitude, or whatever other factor of such applicant or employee that such test purports to measure, rather than reflecting the impaired sensory, manual, or speaking skills of such employee or applicant (except where such skills are the factors that the test purports to measure).

* * * * *

§ 12113. Defenses

(a) In general

It may be a defense to a charge of discrimination under this chapter that an alleged application of qualification standards, tests, or selection criteria that screen out or tend to screen out or otherwise deny a job or benefit to an individual with a disability has been shown to be job-related and consistent with

business necessity, and such performance cannot be accomplished by reasonable accommodation, as required under this subchapter.

(b) Qualification standards

The term "qualification standards" may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace.

* * * * *

§ 12114. Illegal use of drugs and alcohol

(a) Qualified individual with a disability

For purposes of this subchapter, a qualified individual with a disability shall not include any employee or applicant who is currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use.

(b) Rules of construction

Nothing in subsection (a) shall be construed to exclude as a qualified individual with a disability an individual who—

(1) has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in such use;

(2) is participating in a supervised rehabilitation program and is no longer engaging in such use; or

(3) is erroneously regarded as engaging in such use, but is not engaging in such use;

except that it shall not be a violation of this chapter for a covered entity to adopt or administer reasonable policies or procedures, including but not limited to drug testing, designed to ensure that an individual described in paragraph (1) or (2) is no longer engaging in the illegal use of drugs.

(c) Authority of covered entity

A covered entity—

(1) may prohibit the illegal use of drugs and the use of alcohol at the workplace by all employees;

(2) may require that employees shall not be under the influence of alcohol or be engaging in the illegal use of drugs at the workplace;

(3) may require that employees behave in conformance with the requirements established under chapter 81 of Title 41;

(4) may hold an employee who engages in the illegal use of drugs or who is an alcoholic to the same qualification standards for employment or job performance and behavior that such entity holds other employees, even if any unsatisfactory performance or behavior is related to the drug use or alcoholism of such employee; and

(5) may, with respect to Federal regulations regarding alcohol and the illegal use of drugs, require that—

(A) employees comply with the standards established in such regulations of the Department of Defense, if the employees of the covered entity are employed in an industry subject to such regulations, including complying with regulations (if any) that apply

to employment in sensitive positions in such an industry, in the case of employees of the covered entity who are employed in such positions (as defined in the regulations of the Department of Defense);

(B) employees comply with the standards established in such regulations of the Nuclear Regulatory Commission, if the employees of the covered entity are employed in an industry subject to such regulations, including complying with regulations (if any) that apply to employment in sensitive positions in such an industry, in the case of employees of the covered entity who are employed in such positions (as defined in the regulations of the Nuclear Regulatory Commission); and

(C) employees comply with the standards established in such regulations of the Department of Transportation, if the employees of the covered entity are employed in a transportation industry subject to such regulations, including complying with such regulations (if any) that apply to employment in sensitive positions in such an industry, in the case of employees of the covered entity who are employed in such positions (as defined in the regulations of the Department of Transportation).

(d) Drug testing

(1) In general

For purposes of this subchapter, a test to determine the illegal use of drugs shall not be considered a medical examination.

(2) Construction

Nothing in this subchapter shall be construed to encourage, prohibit, or authorize the conducting of drug testing for the illegal use of drugs by job applicants or employees or making employment decisions based on such test results.

(e) Transportation employees

Nothing in this subchapter shall be construed to encourage, prohibit, restrict, or authorize the otherwise lawful exercise by entities subject to the jurisdiction of the Department of Transportation of authority to—

(1) test employees of such entities in, and applicants for, positions involving safety-sensitive duties for the illegal use of drugs and for on-duty impairment by alcohol; and

(2) remove such persons who test positive for illegal use of drugs and on-duty impairment by alcohol pursuant to paragraph (1) from safety-sensitive duties in implementing subsection (c).