No. _____

IN THE
Supreme Court of the United States

RAYMOND SEVERSON,

Petitioner,

v.

HEARTLAND WOODCRAFT, INC.,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Title I of the Americans with Disabilities Act (the "ADA") requires employers to make "reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless [the employer] can demonstrate that the accommodation would impose an undue hardship * * * ." 42 U.S.C. § 12112(a), (b)(5)(A). The ADA defines a "qualified individual" as "an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8).

The question presented is:

Is there a *per se* rule that a finite leave of absence of more than one month cannot be a "reasonable accommodation" under 42 U.S.C. § 12112, or does the question of whether such a leave is a "reasonable accommodation" turn on the facts of the case?

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Raymond Severson petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The decision and order of the Eastern District of Wisconsin granting summary judgment for Respondent Heartland Woodcraft, Inc., on Severson's ADA claim (Pet. App. 12a–45a) is not reported. The opinion of the Seventh Circuit (Pet. App. 1a–11a) affirming the grant of summary judgment is reported at 872 F.3d 476.

JURISDICTION

The judgment of the Seventh Circuit was entered on September 20, 2017.

Severson filed a timely Application for an Extension of Time Within Which to File a Petition for Writ of Certiorari on December 8, 2017. Justice Kagan granted that Application on December 11, 2017, making the petition due on January 18, 2018.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 12112 of Title 42 provides:

(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) of this section, the term "discriminate against a qualified individual on the basis of disability" includes—

* * *

(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 . . . .

Section 12111(8) of Title 42 provides:

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.

Section 12111(9) of Title 42 provides:

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.

INTRODUCTION

This case presents an important and recurring question regarding the scope of the Americans with Disabilities Act (the "ADA"), 42 U.S.C. § 12101 *et seq.*, that has divided the courts of appeals. Title I of the ADA prohibits employers from discriminating against employees on the basis of disability, including by "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability," unless doing so would impose an undue hardship on the employer. 42 U.S.C. § 12112(a), (b)(5)(A). Whether a given accommodation is a "reasonable accommodation" to which an employee is entitled under this provision typically is a fact-based inquiry that looks at the circumstances of the case. *See, e.g.*, *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 405–06 (2002).

The circuit courts are sharply divided on the question of whether this same analysis applies in a specific subset of cases: when the proposed reasonable accommodation is a leave of absence, of a finite duration of more than one month, that will enable the employee to return to performing his or her job. This is an acknowledged split, with the Seventh Circuit's decision in this case standing against decisions from the First, Sixth, Ninth, and Tenth Circuits.

In this case, the Seventh Circuit applied its *per se* rule that "a long-term leave of absence *cannot* be a reasonable accommodation" under the ADA. *See* Pet. App. 8a (emphasis added). Thus, in the Seventh

Circuit, even when the requested medical leave would be without pay and without any hardship whatsoever to the employer, and would enable the employee to do the job, the employer still cannot be required to provide the leave as a reasonable accommodation. The Seventh Circuit's position on this issue is entrenched, and it recently denied a petition to reconsider this position *en banc*. *See Golden v. Indianapolis Hous. Agency*, 698 F. App'x 835 (7th Cir. 2017), *reh'g en banc denied*, No. 17-1359, 2017 U.S. App. LEXIS 22613 (7th Cir. Nov. 9, 2017).

For decades, however, other circuits have rejected such a *per se* rule, and instead have held that whether a finite, long-term leave of absence from work is a reasonable accommodation under the ADA requires a fact-specific inquiry. *See, e.g.*, *García-Ayala v. Lederle Parenterals, Inc.*, 212 F.3d 638, 647–50 (1st Cir. 2000) (holding that a long-term leave of absence can be a required reasonable accommodation under the ADA); *Nunes v. Wal-Mart Stores, Inc.*, 164 F.3d 1243, 1247 (9th Cir. 1999) (holding that "even an extended medical leave, or an extension of an existing leave period, may be a reasonable accommodation [under the ADA] if it does not pose an undue hardship on the employer"); *Cehrs v. Ne. Ohio Alzheimer's Research Ctr.*, 155 F.3d 775, 782–83 (6th Cir. 1998) (same); *Rascon v. U.S. West Commc'ns, Inc.*, 143 F.3d 1324, 1333–35 (10th Cir. 1998), *overruled on other grounds by New Hampshire v. Maine*, 532 U.S. 742 (2001) (same). Moreover, each of these circuits has held that a leave equal to or greater in length to the leave sought in

this case is or could be a reasonable accommodation required by the ADA. *See, e.g.*, *Dark v. Curry Cty.*, 451 F.3d 1078, 1090 (9th Cir. 2006) (three-month leave); *Cleveland v. Fed. Express Corp.*, 83 F. App'x 74, 79 (6th Cir. 2003) (six-month leave); *García-Ayala*, 212 F.3d at 647 (five-month leave); *Rascon,* 143 F.3d at 1333–35 (four-month leave).

The question presented is one of great significance. When an employee with a disability needs time off of work for treatment or recuperation because of his disability, whether or not that employee is able to take that leave can have grave consequences for his well-being and livelihood. In this case, as in many cases, the employee was terminated from his job because he could not return to work during his requested medical leave. Whether an employee with a disability is eligible to take a medical leave as a reasonable accommodation should not depend on where the employee lives.

This case presents an excellent vehicle to resolve the question presented. The issue is squarely presented and outcome-determinative. The petitioner sought a finite, unpaid medical leave to recover from a surgery to treat his disability and—as expected—was cleared by his doctor to return to work after that time. It is undisputed that the petitioner was disabled and was qualified to do his job prior to his medical leave. As the Seventh Circuit acknowledged, his case therefore turns on the question of whether he was entitled to the requested leave as a reasonable accommodation under the ADA. Moreover, had the courts below conducted fact-specific analyses into whether the requested

leave was a reasonable accommodation or an undue hardship, the petitioner would have met his burden of proof to defeat summary judgment and proceed to trial.

Finally, review is also warranted because the decision below is incorrect. Whether a proposed accommodation is a reasonable accommodation under the ADA is a case-by-case inquiry that requires an examination of the facts. *See U.S. Airways*, 535 U.S. at 401–02, 405–06 (holding that an employee may show that an accommodation is reasonable "on the particular facts" and an employer may show undue hardship "in the particular circumstances"). As Judge Rovner explained in a concurring opinion in another recent Seventh Circuit case—an opinion that acknowledged the Seventh Circuit's entrenched rule but vigorously disagreed with it—the Seventh Circuit's "[h]olding that a long term medical leave can never be part of a reasonable accommodation does not reflect the flexible and individual nature of the protections granted employees under the Act." *See Golden*, 698 F. App'x at 837 (Rovner, J., concurring). The Seventh Circuit's position also leads to nonsensical and problematic outcomes—including that months of leave taken on an intermittent basis can be a reasonable accommodation under the ADA, but leave of the same or a lesser duration taken all at once cannot. *Id.*

The petitioner respectfully requests that this Court grant review.

STATEMENT OF THE CASE

A. Factual Background And Proceedings In The District Court.

Petitioner Raymond Severson started working for Heartland Woodcraft, Inc., a fabricator of retail display fixtures, in 2006. Pet. App. 3a. Over time, he was promoted from supervisor to shop superintendent to operations manager. *Id.*

Severson also had a history of back pain, which started before he began working at Heartland. Pet. App. 3a. In 2010, he was diagnosed with back myelopathy caused by impaired functioning and degenerative changes in his back, neck, and spinal cord. *Id.* His back condition did not hamper his ability to work. *Id.* At times, though, he experienced severe flare-ups, making it hard (or sometimes impossible) for him to walk, bend, lift, sit, stand, move, and work. *Id.*

On June 5, 2013, Severson wrenched his back, aggravating his preexisting condition and leaving him demonstrably uncomfortable. Pet. App. 3a–4a. Later that same day, Heartland informed him that it was relieving him of his duties as the operations manager and instead moving him to a second-shift "lead" position. *Id.* at 3a. Heartland said that it was making this change, which was a demotion, due to his performance in the operations manager role. *Id.* He accepted the move to the second-shift "lead" position. *Id.*

Severson left work early that day because of his back pain. Pet. App. 4a. He later requested and

received a leave of absence under the Family and Medical Leave Act ("FMLA"), 29 U.S.C. § 2601 *et seq.*, for his back condition, retroactive to June 5th. *Id.* Over the summer months, Severson submitted periodic notes from his doctor informing Heartland that he had multiple herniated and bulging discs in his lumbar spine and was unable to work until further notice. *Id.* His doctor attempted to treat his condition with steroid injections, but they had little effect on his condition. *Id.*

When these treatments were not successful, Severson ultimately underwent a back surgery. Pet. App. 4a–5a. On August 13th, he told Heartland's human resources manager that his condition had not improved and that he would be having disc decompression surgery on August 27th. *Id.* at 4a. He requested an additional leave of absence for his surgery and recovery. *Id.* He explained that the typical recovery time for this surgery was two months, or potentially three months if he ended up needing a second surgery. *Id.* at 4a, 14a. Severson thus communicated to Heartland that he needed a finite leave of absence, with a maximum duration of three months, because of his disability. *Id.* at 14a. Heartland understood Severson to be requesting the leave as an accommodation. *Id.* at 2a, 14a–15a. Severson had exhausted his available leave under Heartland's policies, so this leave would have been without pay. *Id.* at 4a, 14a.

Heartland took nearly two weeks to respond to Severson's request. Pet. App. 4a. On August 26th, Heartland's human resources manager and operations manager told Severson that his

employment with Heartland would terminate as of August 28th, the day after his FMLA leave ended, because he would be unable to return to work as of that date. *Id.*

Severson's back surgery took place as planned on August 27th. Pet. App. 5a. He fully recovered on the timetable he previously had communicated to Heartland. Specifically, on October 17th, his doctor cleared him to return to work with a 20-pound lifting restriction. *Id.* Then, on December 5th, Severson's doctor cleared him to work without any limitations. *Id.* Heartland did not hire another employee for the second-shift "lead" position for which it had slated Severson until late November 2013,[1] days before Severson was cleared to return to work without any limitations.

Severson filed suit against Heartland, alleging that it violated the ADA by failing to provide him with a reasonable accommodation for his disability. Pet. App. 5a. As relevant here, Severson claimed that his request for the additional medical leave, so that he could recover from disability-related surgery, was a reasonable accommodation required by the ADA. *Id.* The district court had jurisdiction under 28 U.S.C. § 1331 because the case involves a federal question under the ADA.

The district court granted summary judgment to Heartland. As the district court noted, "Heartland

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[1] Although not mentioned in the opinion of either the district court or the Seventh Circuit below, this fact appears to be undisputed. *See* Heartland 7th Cir. Br. (ECF 24) at 38; Severson 7th Cir. Br. (ECF 11) at 11.

[did] not dispute that Severson was disabled within the meaning of the ADA, or that he satisfied the basic prerequisites for the second-shift lead position, 'such as possessing the appropriate educational background, employment experience, skills, licenses, etc.'" Pet. App. 18a–19a. The district court held that a leave of absence of multiple months was not a reasonable accommodation under Seventh Circuit precedent, because the inability to work for multiple months removes an employee from the class of persons protected by the ADA. *See id.* at 27a–28a (*citing Basden v. Prof'l Transp., Inc.*, 714 F.3d 1034, 1037 (7th Cir. 2013); *Byrne v. Avon Prods., Inc.*, 328 F.3d 379, 380–81 (7th Cir. 2003)).

B. Proceedings in the Seventh Circuit.

Severson timely appealed. As is relevant here, he alleged that Heartland's failure to allow him to take an additional unpaid medical leave, of a maximum of three months, violated the ADA's reasonable accommodation requirements, which require employers to make "reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability." Pet. App. 5a–6a; *see also* 42 U.S.C. § 12112(a), (b)(5)(A). Like the district court, the Seventh Circuit acknowledged that it was undisputed that Severson was disabled for purposes of the ADA, and that his temporary inability to perform an essential function of the second-shift "lead" job was because of his disability. Pet. App. 6a. Accordingly, the Seventh Circuit stated that "liability thus turns on the accommodation question: Did Heartland violate the

ADA by failing to reasonably accommodate his disability?" *Id.*

The Seventh Circuit concluded that the list of examples of "reasonable accommodations" in the ADA was neither exhaustive nor dispositive in this case. That provision states:

> 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.

42 U.S.C. § 12111(9). As the Seventh Circuit explained, "[t]he use of the permissive phrase 'may include'—rather than 'must include' or 'includes'—means that the concept of 'reasonable accommodation' is flexible and the listed examples are illustrative." Pet. App. 7a. The court acknowledged that under Seventh Circuit precedent, intermittent time off or a short leave of absence of a couple of days or a couple of weeks may in some circumstances be a reasonable accommodation under the ADA. *Id.* at 8a.

The court held, however, that "a multimonth leave of absence is beyond the scope of a reasonable accommodation under the ADA" and "a long-term leave of absence cannot be a reasonable accommodation." Pet. App. 3a, 8a. In so holding, it relied on the ADA's definition of "qualified individual" as one "who with or without reasonable accommodation, can perform the essential functions of the employment position." *Id.* at 7a–8a. The court concluded that "an extended leave of absence does not give a disabled individual the means to work; it excuses his not working." *Id.* at 8a. It thus held that an individual needing a long-term leave of absence cannot be a "qualified individual" under the ADA—and therefore that a long-term leave of absence cannot be a "reasonable accommodation" under the ADA. *Id.* The court rejected the argument that a long-term leave of absence could in some circumstances be a reasonable accommodation because it allows the employee to perform the essential functions of his job once the accommodation is implemented—*i.e.*, once the employee has taken the leave. *Id.* at 9a–10a.

Because the court applied the *per se* legal rule that a long-term leave cannot be a reasonable accommodation, it did not undertake a fact-specific inquiry into whether the requested unpaid leave was reasonable under the specific facts of this case. It also did not undertake the related inquiry into whether the requested leave would have been an undue hardship for Heartland under the facts of this case. Pet App. 6a n.1 ("The question of undue hardship is a second-tier inquiry under the statute;

that is, the hardship exception does not come into play absent a determination that a reasonable accommodation was available.").

REASONS FOR GRANTING THE PETITION

This case satisfies all of the Court's criteria for review. Whether or not a finite leave of absence of more than one month in duration is categorically exempted from the ADA's reasonable accommodation requirements is an important issue that recurs frequently. Confusion surrounding the proper analytical framework for examining such leaves under the ADA's reasonable accommodation requirements has matured into an intransigent circuit split. Further percolation is unlikely to resolve this circuit split, so the legal issue is ripe for this Court's intervention. Moreover, this case presents an ideal vehicle to resolve the widely recognized and important conflict.

I. The Courts of Appeals Are Divided On The Question Presented.

A. The First, Sixth, Ninth, and Tenth Circuits, in conflict with the Seventh Circuit, have held that a long-term leave of absence can be a reasonable accommodation required by the ADA.

Under longstanding precedent, several circuits have rejected a *per se* rule that a long-term leave of absence cannot be a reasonable accommodation under the ADA. These circuits conclude that such a leave can be a "reasonable accommodation" because it enables the employee to return to work and

perform the essential functions of his job following the leave. Thus, in these circuits, a request for a finite, long-term leave does not categorically vitiate one's status as a "qualified individual" under the ADA.

Rather, these circuits employ a fact-specific analysis to determine whether a finite, long-term leave of absence is a reasonable accommodation. They therefore perform the same analysis that they would perform when analyzing requests for other accommodations under the ADA, examining whether the accommodation was reasonable or an undue hardship to the employer based on the facts of the case. *See, e.g.*, *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 401–02, 405–06 (2002) (holding that whether an accommodation is reasonable or an undue hardship depends on the facts and circumstances in the case).

First Circuit. The First Circuit rejects a *per se* rule that a finite, long-term leave of absence cannot be a reasonable accommodation under the ADA, and instead determines whether such a leave is a reasonable accommodation based on the facts of the case. In *García-Ayala v. Lederle Parenterals, Inc.*, 212 F.3d 638 (1st Cir. 2000), the First Circuit held that a long-term leave was a reasonable accommodation under the ADA and directed a verdict for the employee on this issue. *Id.* at 647, 650. The employee, who was battling breast cancer, had exhausted her available leave under her employer's policies but still needed four-and-a-half additional months of leave for medical treatment. *Id.* at 642. Her employer terminated her employment

midway through that period, and she brought suit claiming she was entitled to the leave as a reasonable accommodation under the ADA. *Id.* at 642–43. The district court granted her employer's motion for summary judgment because (in the words of the court of appeals) "a requested accommodation of extension of a leave on top of a medical leave of fifteen months was per se unreasonable." *Id.* at 647.

The First Circuit reversed, holding that the district court erred in "applying per se rules, and not giving the type of individualized assessment of the facts that the [ADA] and the case law require[ ]." *Id.* at 647. At the threshold, the First Circuit rejected the central premise of the Seventh Circuit's rulings, explaining that under circuit precedent, a request for leave does not "necessarily mean * * * that the employee is unable to perform the essential functions of her job." *Id.* at 646 n.7, 647. Next, the First Circuit held that "a medical leave of absence * * * is a reasonable accommodation under the [ADA] in some circumstances." *Id.* at 647 (collecting similar precedent from other circuits). Because the employer had filled the position with temporary employees during the leave and otherwise failed to present evidence of undue hardship, the panel majority directed entry of judgment for the employee.[2] *Id.* at

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[2] The First Circuit concluded that whether the leave request was deemed to be for five months or for just under two months (since the employee was terminated mid-leave) would not change the outcome, because "[e]ven if the leave request were for an additional five months of unpaid leave, we see no reason to adopt a rule on these facts that the additional medical leave

650. The First Circuit has repeatedly applied these holdings in other cases, and has recognized that even a much longer leave could be required as a reasonable accommodation under the ADA, depending on the specific facts of the case. *See, e.g.*, *Echevarría v. AstraZeneca Pharm. LP*, 856 F.3d 119, 132–33 (1st Cir. 2017) (holding that a twelve-month leave was not a reasonable accommodation under the facts of the case, but stating that "we need not—and therefore do not—decide that a request for a similarly lengthy period of leave will be an unreasonable accommodation in every case"); *see also McDonald v. Town of Brookline*, 863 F.3d 57, 65–66 (1st Cir. 2017); *Criado v. IBM Corp.*, 145 F.3d 437, 443–44 (1st Cir. 1998).

Sixth Circuit. The Sixth Circuit also holds that the question of whether a finite, long-term leave is a reasonable accommodation turns on the facts of the case, and not on a *per se* rule. In *Cehrs v. Ne. Ohio Alzheimer's Research Ctr.*, 155 F.3d 775 (6th Cir. 1998), the Sixth Circuit held that a four-month leave could be a reasonable accommodation, reversing a grant of summary judgment for the employer on that issue. *Id.* at 783. The employee in that case suffered from a life-threatening form of psoriasis. *Id.* at 777, 781. She requested medical leave after a psoriasis flare-up at the end of November 1993, but was terminated during her months-long recuperation, despite an estimated return to full-time work at the beginning of April 1994. *Id.* at 778. She brought suit

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sought would be per se an unreasonable accommodation." *Id* at 647–48.

under the ADA, claiming that she was entitled to the leave as a reasonable accommodation. The district court granted summary judgment to the employer, finding that the employee was not a "qualified individual" within the meaning of the ADA. *Id.* at 779.

The Sixth Circuit reversed. Recognizing the growing split on whether a leave of absence can be a reasonable accommodation, the court of appeals found "persuasive" the side of the split that permits leave under the appropriate circumstances. *Id.* at 782. The court "conclude[d] that no presumption should exist that uninterrupted attendance is an essential job requirement," and accordingly ruled "that a medical leave of absence can constitute a reasonable accommodation under appropriate circumstances." *Id.* at 783. As the court stated, the alternative was a "presumption [that would] eviscerate[ ] the individualized attention that the Supreme Court has deemed 'essential' in each disability claim." *Id.* (quoting *School Bd. of Nassau Cty. v. Arline*, 480 U.S. 273, 287 (1987)). The Sixth Circuit thus held that there was a genuine issue of material fact as to whether the employee was entitled to the long-term leave as a reasonable accommodation. *Id.* at 783. Since *Cehrs*, the Sixth Circuit has engaged in fact-based analysis when determining whether even a lengthier leave would be a reasonable accommodation. *See, e.g.*, *Cleveland v. Fed. Express Corp.*, 83 F. App'x 74, 78, 81 (6th Cir. 2003) (holding that there was a genuine issue of material fact as to whether an employee's request for a six-month leave of absence was a reasonable

accommodation, as "this Court has declined to adopt a bright-line rule defining a maximum duration of leave that can constitute a reasonable accommodation"); *see also Walsh v. United Parcel Serv.*, 201 F.3d 718, 727 (6th Cir. 2000) (recognizing that while "it would be very unlikely for a request for medical leave exceeding a year and a half in length to be reasonable," the court "must still address the particular accommodation that [the] plaintiff requested").

Ninth Circuit. Similarly, in the Ninth Circuit, "[e]ven an extended medical leave, or an extension of an existing leave period, may be a reasonable accommodation if it does not pose an undue hardship on the employer." *Nunes v. Wal-Mart Stores, Inc.*, 164 F.3d 1243, 1247 (9th Cir. 1999). In *Nunes*, the employer granted the employee nearly eight months of medical leave for her disability, but then terminated her employment a month or two before the expected return-to-work date provided by her doctor. *Id.* at 1245–46. The employee filed suit, claiming that she was entitled to the leave as a reasonable accommodation under the ADA. *Id.* at 1246.

The Ninth Circuit reversed the district court's grant of summary judgment to the employer. *Id.* at 1247. The court reasoned that "[d]etermining whether a proposed accommodation (medical leave in this case) is reasonable, including whether it poses an undue hardship on the employer, requires a fact-specific, individualized inquiry." *Id.* The Ninth Circuit, rejecting the reasoning used by the Seventh Circuit in this case, further recognized that the

ability to perform the essential functions of the job must be evaluated at the conclusion of the leave. *See id.* at 1247 ("By focusing on [the employee's] disability during the period of her medical leave, however, the district court misapplied the ADA's 'qualified individual' requirement."). Thus, like its sister circuits, the Ninth Circuit rejects a *per se* rule that a long-term leave cannot be a reasonable accommodation under the ADA. *See id.*; *Dark v. Curry Cty.*, 451 F.3d 1078, 1090 (9th Cir. 2006) (finding a genuine issue of material fact as to whether it was a reasonable accommodation under the ADA to allow an employee to use 89 days of sick leave or unpaid leave until his seizure condition was resolved); *see also Humphrey v. Mem'l Hospitals Ass'n*, 239 F.3d 1128, 1135–36 (9th Cir. 2001).

Tenth Circuit. The Tenth Circuit likewise does not categorically exclude requests for finite, long-term leaves of absence from the ADA reasonable accommodation requirements. In *Rascon v. U.S. West Comm'cns, Inc.*, 143 F.3d 1324, 1333 (10th Cir. 1998), *overruled on other grounds by New Hampshire v. Maine*, 532 U.S. 742 (2001), the Tenth Circuit affirmed the district court's determination that a four-month leave of absence was a reasonable accommodation and not an undue hardship in light of the employer's policy of granting similar accommodations to other employees. *Id.* at 1333–35. The court further concluded that the fact the employee was unable to work while he was receiving long-term treatment "simply does not preclude a finding that he is a qualified individual with a disability" under the ADA. *Id.* at 1333.

More recently, *Hwang v. Kansas State Univ.*, 753 F.3d 1159 (10th Cir. 2014), centered on whether a professor's request for a six-month leave of absence was a reasonable accommodation under the Rehabilitation Act, 29 U.S.C. § 794, which prohibits recipients of federal funding from discriminating against qualified individuals and incorporates the ADA standards. *See* 29 U.S.C. § 794(d). Though opining that a six-month leave would "almost always" not be a required reasonable accommodation under the statute, then-Judge Gorsuch nonetheless explained that the reasonableness of leave as an accommodation "depends on factors like the duties essential to the job in question, the nature and length of the leave sought, and the impact on fellow employees." *Hwang*, 753 F.3d at 1161–62 (*citing U.S. Airways*, 535 U.S. at 400). Like its sister circuits, the Tenth Circuit thus has declined to adopt a *per se* rule that a finite, long-term leave of absence cannot be a reasonable accommodation. *See id.*; *see also Boykin v. ATC/VanCom of Colorado, L.P.*, 247 F.3d 1061, 1065 (10th Cir. 2001) ("The determination of exactly how long an employer should retain an employee on indefinite or medical leave pending the availability of a position that would accommodate the employee's disability * * * must be made on a case-by-case basis.").[3]

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[3] In keeping with the holdings of these circuits, the Eleventh Circuit recently recognized that "an extended leave of absence of a definite duration, as opposed to an indefinite duration, may be a reasonable accommodation [under the ADA] in certain circumstances." *See Spears v. Creel*, 607 F. App'x 943, 946, 950 (11th Cir. 2015). In that case, the employee claimed that she

B. The Seventh Circuit has adopted a *per se* rule that a long-term leave of absence cannot be a reasonable accommodation for purposes of the ADA.

In the decision below, the Seventh Circuit continued its sharp departure from its sister circuits on the statutory coverage of the ADA. In reaching the conclusion that a finite, long-term leave of absence *cannot ever* be a reasonable accommodation, the court below took two detours from the majority understanding of the ADA. First, rather than making the usual fact-specific inquiry into whether a requested accommodation is reasonable or an undue hardship under the facts of the case, the Seventh Circuit applied a *per se* rule that negates the need for any fact-specific inquiry on the reasonable accommodation question. Pet. App. 8a. Second, the Seventh Circuit adopted an erroneous interpretation of the term "qualified individual" that looks at whether the employee can perform the essential functions of the job during the leave of absence—an interpretation that is inconsistent with the language of the statute and that would wholly remove employees who require any form of leave from the statute's ambit. *Id.* at 7a–8a. This incorrect interpretation of 42 U.S.C. § 12111(8) broke with the majority of circuits, which measure the ability to

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was entitled to a three-month extension of her leave as a reasonable accommodation. *Id.* The court held that there was no genuine issue of material fact on this claim, however, because the record did not show that she had requested the accommodation. *Id.*

"perform the essential functions of the employment position" at the conclusion of the leave of absence—that is, as the language of the statute prescribes, once the accommodation has been provided.

The Seventh Circuit recently reiterated these holdings in *Golden v. Indianapolis Hous. Agency*, 698 F. App'x 835 (7th Cir. 2017). In that case, a long-time employee suffering from breast cancer took sixteen weeks of unpaid medical leave. *Id.* at 835. When she was still incapacitated at the end of that leave period, she requested an additional six months of unpaid leave, under her employer's policy that permitted up to six months of leave when no other form of leave was available. *Id.* at 836. The Seventh Circuit rejected the employee's claim that this leave was a reasonable accommodation,[4] following its holding in *Severson* that "[a] multimonth leave of absence is beyond the scope of a reasonable accommodation under the ADA." *Id.* at 837 (*citing* Pet. App. 3a). As discussed further below, Judge Rovner issued a concurring opinion explaining her disagreement with the Seventh Circuit's position on this issue. Nevertheless, the Seventh Circuit denied the employee's request for rehearing *en banc*, further demonstrating that the Seventh Circuit's position on this issue is entrenched. *See Golden v. Indianapolis*

[4] Because the employer in the *Golden* case was a public entity, the employee brought her claims under both the ADA and the Rehabilitation Act, 29 U.S.C. § 794. *Golden*, 698 F. App'x at 835. The Seventh Circuit stated in its opinion that "[t]he legal standards under the Rehabilitation Act and the ADA are identical." *Id.* at 837.

Hous. Agency, No. 17-1359, 2017 U.S. App. LEXIS 22613 (7th Cir. Nov. 9, 2017) (denying petition for rehearing *en banc*).[5]

* * *

As these cases illustrate, there is a stark and acknowledged split among the circuit courts on whether a finite leave of absence of more than one month can be a reasonable accommodation under the ADA. The Court should grant certiorari in this case to harmonize these divergent interpretations of the ADA.

II. The Question Presented Is Important.

The question presented is one of great significance. As a result of this circuit split, employees in several circuits may be eligible to take finite, long-term leaves of absence as reasonable accommodations under the ADA, but employees in

[5] While the D.C. Circuit does not appear to have weighed in on this circuit split, it recently held that to be a "qualified individual" under the ADA, "[t]he plaintiff must establish her ability to perform [her essential job] functions (with or without reasonable accommodation) at the time the employer denied her request for accommodation." *Minter v. Dist. of Columbia*, 809 F.3d 66, 70 (D.C. Cir. 2015) (holding that employee seeking to take an indefinite and open-ended leave was not a "qualified individual" under the ADA). This holding appears to be at odds with the holdings of the circuits that look at the employee's ability to perform her job functions *following the leave*. *See* Section I.A, *supra*. Because *Minter* involved an employee's request for an *open-ended and indefinite* leave, though, it is unclear whether the D.C. Circuit's analysis or holding would have been different had the employee been requesting a finite leave that would enable her to return to work, as is at issue in this circuit split.

the Seventh Circuit *never* can do so. An employee's eligibility for leave under the ADA should not depend on where in the country he lives.

The question presented directly affects the well-being and livelihood of employees with disabilities. To be sure, only some employees with disabilities will need to take long-term leaves of absence from work because of their disabilities. And, only a subset of those cases would involve leaves that are both a reasonable accommodation and not an undue hardship to the employer under the circumstances. For employees in this subset, however, this issue can have significant and long-term impacts. In this case, for example, Severson was terminated from his job because he could not return to work during his requested unpaid leave time. In other cases, employees are in the untenable position of having to choose between taking medically necessary time off and attending work to keep their jobs. For an employee with a disability, the entitlement to an unpaid leave thus can be the difference between whether or not the employee can keep his job, continue supporting himself and his family, and potentially even live independently. It also can have significant job and career implications for the employee well into the future. The importance of this issue underscores the need for this Court's guidance on this circuit split.

III. This Case Presents An Excellent Vehicle To Resolve The Question Presented.

This case is an excellent vehicle for resolving the question of whether a finite leave of absence of more

than one month can be a "reasonable accommodation" for purposes of the ADA. As the Seventh Circuit acknowledged, Severson's case rises and falls on whether he was entitled to the leave of absence as a reasonable accommodation under the ADA. *See* Pet. App. 6a (stating that "liability * * * turns on the accommodation question: Did Heartland violate the ADA by failing to reasonably accommodate his disability?").

Severson requested to take a finite leave of absence from work because of his disability. He told Heartland that he would need a maximum of three months of leave to recover from needed surgery. Pet. App. 14a. This therefore is not a case involving an open-ended or indefinite leave, nor one where it was doubtful that the leave would enable the employee to return to performing the essential functions of the job. Following Severson's surgery and recovery, his doctor in fact cleared him to return to work on the expected timetable. *Id.* at 5a. Accordingly, this case squarely raises the question presented.

Moreover, had the courts below conducted the individualized analysis required by the ADA and this Court's precedents, Severson would have met his burden of proof to defeat summary judgment and proceed to trial. A reasonable jury could easily conclude that the additional leave of absence was a reasonable accommodation in this case. After his return, Severson would have been able to perform the essential functions of his position without need for further accommodation. Pet. App. 5a. In addition, Heartland did not show that the accommodation would have caused an undue

hardship. To the contrary, Heartland failed to hire a replacement for Severson until just days before Severson was cleared by his doctor to return to work without restrictions. *See supra* note 1. As a result, a reasonable jury could easily find that Heartland would not have suffered undue hardship by granting Severson's request for leave and allowing Severson to return to work in this position following his leave.

The Seventh Circuit's *per se* rule that a finite, long-term leave of absence cannot be a reasonable accommodation for purposes of the ADA thus was outcome-determinative. Accordingly, this Court should take the opportunity in this case to resolve this important circuit split.

IV. The Decision Below Was Wrongly Decided.

Review is also warranted because the Seventh Circuit forsook the individualized, case-by-case assessment the ADA and this Court require and instead imposed a *per se* rule declaring that a finite, long-term leave of absence can never be a reasonable accommodation.

The ADA calls for a flexible, case-by-case analysis of reasonable accommodations and any undue hardship on the employer. *See U.S. Airways*, 535 U.S. at 401–02, 405–06. Since *School Bd. of Nassau Cty. v. Arline*, 480 U.S. 273 (1987), this Court has consistently reminded the lower courts to conduct individualized inquiries when evaluating disability cases; *per se* rules are disfavored. *Id.* at 287 (noting that "in most [disability] cases, the district court will need to conduct an individualized inquiry and make appropriate findings of fact," in the context of

analyzing whether an employee was a "handicapped individual" under the ADA). More recently, in *U.S. Airways*, this Court again emphasized that lower courts must look into the individual facts and circumstances of the particular case when determining whether a proposed accommodation is a reasonable accommodation or an undue hardship for purposes of the statute. 535 U.S. at 395, 401–02, 405–06 (analyzing whether reassigning an employee to a given position, when a different employee was entitled to that position under a seniority system, was a reasonable accommodation). That case laid out a burden-shifting analysis. The plaintiff has, as a first step, the opportunity to show that an accommodation is reasonable "on its face, *i.e.*, ordinarily or in the run of cases." *Id. at* 401–02. A plaintiff's failure to show that the accommodation is reasonable in the run of cases is not decisive, however. Instead, the plaintiff alternatively may show that an accommodation is reasonable "on the particular facts," an individualized inquiry the Court has always favored in the ADA context. *Id.* at 405–06. The employer, in turn, may show special circumstances, which "typically [are] case-specific," "that demonstrate undue hardship in the particular circumstances." *Id.* at 402.

The Seventh Circuit's decision in this case tosses aside such individualized inquiry in favor of its *per se* rule that a long-term leave could never be a reasonable accommodation under the ADA. The bright-line rule fails to consider the special circumstances of the case. Critically, as Judge Rovner pointed out in her concurring opinion in the

Seventh Circuit's recent *Golden* case, the bright-line rule also "applies regardless of whether the leave would cause any hardship to the employer." 698 F. App'x at 837 (Rovner, J., concurring). This means that, even in a case where the employer concedes that an unpaid leave for disability-related treatment or recovery would pose no hardship on the employer whatsoever, the employee nevertheless would not be entitled to take the leave as a reasonable accommodation under the ADA. Thus, as Judge Rovner put it, the holding that "a long term medical leave can never be part of a reasonable accommodation does not reflect the flexible and individual nature of the protections granted employees under the Act." *Id.*

The Seventh Circuit defended its *per se* rule by asserting that "[a]n employee who needs long-term medical leave *cannot* work and thus is not a 'qualified individual' under the ADA." Pet. App 2a–3a (emphasis in original). This is wrong. The ADA defines "qualified individual" as someone "who, with or without reasonable accommodation, can perform the essential functions" of the job. 42 U.S.C. § 12111(8). In this case, the accommodation was time off that allowed Severson to recover. Once that accommodation was implemented, Severson was able to return to work: in the language of the ADA, "with [that] * * * reasonable accommodation," Severson *could* "perform the essential functions of the job." Pet. App. 5a. By analogy, an employee who needs a physical accommodation such as a wheelchair ramp or specialized equipment for her work station may not be able to work during the period while those

accommodations are acquired and installed, but once those accommodations are implemented, the employee could return to work and perform all the essential functions of her position. The only difference between the two situations is an irrelevant one: while Severson was able to return to work without a continuing need for accommodation following his leave, employees needing physical accommodations will require both the period of absence and the continuing use of the accommodations after they return to work.

In fact, according to the Seventh Circuit's reasoning, no amount of time off could ever be a required accommodation; after all, an employee who requires time off "*cannot* work" during that time. But even the panel below conceded that "[i]ntermittent time off or a short leave of absence—say, a couple of days or even a couple of weeks" might be an appropriate accommodation. *See* Pet. App. 8a. That concession—which is obviously correct—is flatly inconsistent with the premise on which the panel decided this case.

Similarly, as Judge Rovner pointed out in her concurring opinion in *Golden,* the Seventh Circuit's *per se* rule creates "nonsensical" distinctions. 698 F. App'x at 837 (Rovner, J., concurring). For example, under Seventh Circuit precedent, it might be a reasonable accommodation to allow repeated leaves of absence for someone with a condition that intermittently makes work impossible, such as arthritis or lupus. *See id.* at 838. But a one-time, unpaid leave of a similar or even shorter duration would not be a reasonable accommodation, even if it

would not create a hardship for the employer and would allow the employee to return to work without restriction. *Id.* As Judge Rovner explained:

> What sense does it make that the ADA could require an employer to accommodate an employee with lupus who requires one week leaves, several times a year, every year, but can never require an employer to accommodate an employee who needs a one-time leave of four or five months to recuperate from, for example, a kidney replacement? Whether an employer can reasonably accommodate an employee who requires a leave of either the first or second type is a factual determination that can be made in the latter case just as easily as in the former * * * . There is no reason to think that the ADA was meant to accommodate one type of disability over another or that the fact-intensive assessments required to determine undue hardship can be applied to some forms of leave but not others.

Id.

In sum, the Seventh Circuit's reading of the ADA is not supported by its text, its purpose, or this Court's precedent. This Court should grant review to clarify that whether a finite leave of absence of more than one month is a reasonable accommodation must turn on the facts of the case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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January 18, 2018

APPENDIX

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APPENDIX A

In the
United States Court of Appeals
For the Seventh Circuit

No. 15-3754

RAYMOND SEVERSON,

Plaintiff-Appellant,

v.

HEARTLAND WOODCRAFT, INC.,

Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Wisconsin.
No. 14-CV-1141 — **Lynn Adelman**, *Judge*.

ARGUED SEPTEMBER 12, 2016 –
DECIDED SEPTEMBER 20, 2017

Before WOOD, *Chief Judge*, and EASTERBROOK and SYKES, *Circuit Judges*.

SYKES, *Circuit Judge*. From 2006 to 2013, Raymond Severson worked for Heartland Woodcraft, Inc., a fabricator of retail display fixtures. The work was physically demanding. In early June 2013, Severson took a 12-week medical leave under the Family Medical Leave Act ("FMLA"), 29 U.S.C. §§

2601 *et seq.*, to deal with serious back pain. On the last day of his leave, he underwent back surgery, which required that he remain off of work for another two or three months.

Severson asked Heartland to continue his medical leave, but by then he had exhausted his FMLA entitlement. The company denied his request and terminated his employment, but invited him to reapply when he was medically cleared to work. About three months later, Severson's doctor lifted all restrictions and cleared him to resume work, but Severson did not reapply. Instead he sued Heartland alleging that it had discriminated against him in violation of the Americans with Disabilities Act ("ADA" or "the Act"), 42 U.S.C. §§ 12101 *et seq.*, by failing to provide a reasonable accommodation—namely, a three-month leave of absence after his FMLA leave expired. The district court awarded summary judgment to Heartland and Severson appealed.

We affirm. The ADA is an antidiscrimination statute, not a medical-leave entitlement. The Act forbids discrimination against a "qualified individual on the basis of disability." *Id.* § 12112(a). A "qualified individual" with a disability is a person who, "with or without reasonable accommodation, can perform the essential functions of the employment position." *Id.* § 12111(8). So defined, the term "reasonable accommodation" is expressly limited to those measures that will enable the employee to work. An employee who needs long-term medical leave *cannot* work and thus is not a "qualified individual" under

the ADA. *Byrne v. Avon Prods., Inc.*, 328 F.3d 379, 381 (7th Cir. 2003).

With support from the EEOC, Severson urges us to retreat from or curtail our decision in *Byrne*. We decline to do so. *Byrne* is sound and we reaffirm it: A multimonth leave of absence is beyond the scope of a reasonable accommodation under the ADA.

I. Background

Severson has suffered from back pain since 2005. In 2010 he was diagnosed with back myelopathy caused by impaired functioning and degenerative changes in his back, neck, and spinal cord. Typically Severson's back condition did not hamper his ability to work. But at times he experienced severe flare-ups, making it hard (and sometimes impossible) for him to walk, bend, lift, sit, stand, move, and work.

Severson began working for Heartland in 2006. Over time he was promoted from supervisor to shop superintendent to operations manager. He performed poorly in this last position, so Heartland relieved him of his duties and moved him to a second-shift "lead" position. According to the job description, an employee in this position performs manual labor in the production area of the plant, operates and troubleshoots production machinery, performs minor repairs as necessary, maintains the building, and frequently lifts materials and product weighing 50 pounds or more. Heartland notified Severson of the demotion in a meeting on June 5, 2013. He accepted it but never worked in his new assignment.

Earlier that same day, Severson wrenched his back at home, aggravating his preexisting condition and leaving him demonstrably uncomfortable. He left work early due to the pain and later requested and received FMLA leave retroactive to June 5. Over the summer months, Severson submitted periodic notes from his doctor informing Heartland that he had multiple herniated and bulging discs in his lumbar spine and was unable to work until further notice. His doctor treated him with steroid injections, to little effect. During this time period, Doug Lawrence, Heartland's general manager, and Jennifer Schroeder, the human resources manager, remained in regular phone and email contact with Severson and approved his requests for continuation of his FMLA leave.

On August 13 Severson called Schroeder and told her that his condition had not improved and he would undergo disc decompression surgery on August 27. He explained that the typical recovery time for this surgery was at least two months. He requested an extension of his medical leave. But he had already exhausted his FMLA entitlement; the maximum 12-week leave would expire on August 27, his scheduled surgery date.

Schroeder did not talk with Severson again until August 26. In a phone call that day, she and Lawrence told Severson that his employment with Heartland would end when his FMLA leave expired on August 27. Schroeder invited him to reapply with the company when he recovered from surgery and was medically cleared to work.

Severson had back surgery as planned on August 27. On October 17 his doctor gave him partial clearance to return to work as long as he did not lift anything heavier than 20 pounds. On December 5 Severson's doctor removed the 20-pound lifting restriction and cleared him to return to work without limitation. Instead of reapplying to work for Heartland, Severson sued the company alleging that it discriminated against him in violation of the ADA by failing to accommodate his physical disability. He pointed to three accommodations that the company could have offered him but did not: (1) a two- or three-month leave of absence; (2) a transfer to a vacant job; or (3) a temporary light-duty position with no heavy lifting.

Heartland moved for summary judgment, arguing that Severson's proposed accommodations were not reasonable. The district judge agreed and entered judgment for Heartland. Severson appealed. The EEOC filed a brief as amicus curiae in support of reversal.

II. Discussion

We review a summary judgment de novo, viewing the evidentiary record in the light most favorable to Severson and drawing reasonable inferences in his favor. *Burton v. Downey*, 805 F.3d 776, 783 (7th Cir. 2015). Summary judgment is warranted "if the movant shows that 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).

The ADA makes it unlawful for an employer to discriminate against a "qualified individual on the

basis of disability." § 12112(a). A "qualified individual" is "an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." § 12111(8).

The parties agree that Severson had a disability. They also agree that frequently lifting 50 pounds or more is an essential function of the second-shift lead position at Heartland and that Severson was unable to perform this function at the time he was fired. As in many ADA cases, liability thus turns on the accommodation question: Did Heartland violate the ADA by failing to reasonably accommodate his disability?[1]

Severson identifies three possible accommodations: (1) a multimonth leave of absence following the expiration of his FMLA leave; (2) reassignment to a vacant job; or (3) a temporary assignment to a light-duty position that did not require heavy lifting. The parties focus most of their attention on whether a long-term leave of absence is

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[1] Severson also accuses Heartland of failing to engage in an interactive process to discuss a reasonable accommodation. "Failure of the interactive process is not an independent basis for liability under the ADA." *Spurling v. C & M Fine Pack, Inc.*, 739 F.3d 1055, 1059 n.1 (7th Cir. 2014). He argues as well that his proposed accommodations would not impose an undue hardship on Heartland. The question of undue hardship is a second-tier inquiry under the statute; that is, the hardship exception does not come into play absent a determination that a reasonable accommodation was available. *See* 42 U.S.C. § 12112(b)(5)(A) (setting forth the undue-hardship exception).

a reasonable accommodation within the meaning of the ADA. We do the same.

The ADA contains a definition of "reasonable accommodation," but it tells us only what the term *may* include:

> 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.

42 U.S.C. § 12111(9).

The use of the permissive phrase "may include"—rather than "must include" or "includes"—means that the concept of "reasonable accommodation" is flexible and the listed examples are illustrative. But the baseline requirement found in the definition of "qualified individual" is concrete: A "reasonable accommodation" is one that allows the disabled employee to "perform the essential functions of the employment position." § 12111(8). If the proposed accommodation does not make it possible for the employee to perform his job, then the employee is not a "qualified individual" as that term is defined in the

ADA. *Id.* The illustrative examples listed in § 12111(9) are all measures that facilitate work.

Putting these interlocking definitions together, a long-term leave of absence cannot be a reasonable accommodation. As we noted in *Byrne*, "[n]ot working is not a means to perform the job's essential functions." 328 F.3d at 381. Simply put, an extended leave of absence does not give a disabled individual the means to work; it excuses his not working. Accordingly, we held in *Byrne* that "[a]n inability to do the job's essential tasks means that one is not 'qualified'; it does not mean that the employer must excuse the inability." *Id.*; *see also Waggoner v. Olin Corp.*, 169 F.3d 481, 482 (7th Cir. 1999) ("The rather common-sense idea is that if one is not able to be at work, one cannot be a qualified individual.").

Byrne leaves open the possibility that a brief period of leave to deal with a medical condition could be a reasonable accommodation in some circumstances. 328 F.3d at 381; *Haschmann v. Time Warner Entm't Co.*, 151 F.3d 591, 602 (7th Cir. 1998). For example, we noted that "[t]ime off may be an apt accommodation for intermittent conditions. Someone with arthritis or lupus may be able to do a given job even if, for brief periods, the inflammation is so painful that the person must stay home." *Byrne*, 328 F.3d at 381. Intermittent time off or a short leave of absence—say, a couple of days or even a couple of weeks—may, in appropriate circumstances, be analogous to a part-time or modified work schedule, two of the examples listed in § 12111(9). But a medical leave spanning multiple months does not permit the employee to perform the essential

functions of his job. To the contrary, the "[i]nability to work for a multi-month period removes a person from the class protected by the ADA." *Id.*

Long-term medical leave is the domain of the FMLA, which entitles covered employees "to a total of 12 work-weeks of leave during any 12-month period ... [b]ecause of a serious health condition that makes the employee unable to perform the functions of the position of such employee." 29 U.S.C. § 2612(a)(1)(D). The FMLA protects up to 12 weeks of medical leave, recognizing that employees will sometimes be *unable* to perform their job duties due to a serious health condition. In contrast, "the ADA applies only to those who can do the job." *Byrne*, 328 F.3d at 381.

The EEOC argues that a long-term medical leave of absence should qualify as a reasonable accommodation when the leave is (1) of a definite, time-limited duration; (2) requested in advance; and (3) likely to enable the employee to perform the essential job functions when he returns. On this understanding, the duration of the leave is irrelevant as long as it is likely to enable the employee to do his job when he returns.

That reading of the statute equates "reasonable accommodation" with "effective accommodation," an interpretation that the Supreme Court has rejected:

> [I]n ordinary English the word "reasonable" does not mean "effective." It is the word "accommodation," not the word "reasonable," that conveys the need for effectiveness. An *ineffective* "modification" or "adjustment" will not

> *accommodate* a disabled individual's limitations. ... Yet a demand for an effective accommodation could prove unreasonable ... .

U.S. Airways, Inc. v. Barnett, 535 U.S. 391, 400 (2002). In other words, effectiveness is a necessary but not sufficient condition for a reasonable accommodation under the ADA.

Perhaps the more salient point is that on the EEOC's interpretation, the length of the leave does not matter. If, as the EEOC argues, employees are entitled to extended time off as a reasonable accommodation, the ADA is transformed into a medical-leave statute—in effect, an open-ended extension of the FMLA. That's an untenable interpretation of the term "reasonable accommodation."

Severson's other proposed accommodations require only brief discussion. He argues that Heartland could have transferred him to a vacant job or created a light-duty position for him. Reassignment to a vacant position may be a reasonable accommodation under the statute. *See* § 12111(9)(B). But it was Severson's burden to prove that there were, in fact, vacant positions available at the time of his termination. *Kotwica v. Rose Packing Co.*, 637 F.3d 744, 750 (7th Cir. 2011). Severson points to five vacant positions at Heartland in the period *following* the termination of his employment but none at the time he was fired.

Finally, an employer is not required to "create a new job or strip a current job of its principal duties to accommodate a disabled employee." *Gratzl v. Office*

of Chief Judges of 12th, 18th, 19th & 22nd Judicial Circuits, 601 F.3d 674, 680 (7th Cir. 2010). Under EEOC guidance, "[a]n employer need not create a light duty position for a non-occupationally injured employee with a disability as a reasonable accommodation." *EEOC Enforcement Guidance: Workers' Compensation & the ADA*, 2 EEOC Compliance Manual (CCH) ¶ 6905, at 5394 (Sept. 3, 1996), 1996 WL 33161342, at *12. On the other hand, if an employer has a policy of creating light-duty positions for employees who are occupationally injured, then that same benefit ordinarily must be extended to an employee with a disability who is not occupationally injured unless the company can show undue hardship. *Id.*

The question, then, is whether Heartland had a policy of providing light-duty positions for employees who suffered work-related injuries. It did not. In its Return to Work manual, Heartland retained the option, in its discretion, to give occupationally injured employees temporary duties on an ad hoc basis if such work was available. These temporary light-duty assignments were infrequent and generally lasted no longer than two days; they were essentially acts of grace. No evidence suggests that Heartland had a policy of crafting light-duty positions for employees injured on the job. If an employer "bends over backwards to accommodate a disabled worker ... , it must not be punished for its generosity." *Vande Zande v. State of Wis. Dep't of Admin.*, 44 F.3d 538, 545 (7th Cir. 1995).

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

RAYMOND SEVERSON,
Plaintiff,

v. Case No. 14-C-1141

HEARTLAND WOODCRAFT, INC.,
Defendant.

DECISION AND ORDER

Plaintiff Raymond Severson filed a complaint alleging claims under the Americans with Disabilities Act ("ADA") and the Family and Medical Leave Act ("FMLA"). Before me now are several motions: (1) the defendant's motion for summary judgment on plaintiff's ADA claims; (2) the defendant's separate motion for summary judgment on plaintiff's FMLA claims; (3) the defendant's motion for sanctions under Federal Rule of Civil Procedure 11 against plaintiff's counsel, and (4) the plaintiff's motion to amend his complaint to withdraw the FMLA claims and amend certain other allegations in the complaint.

I. BACKGROUND

Severson has been suffering from back issues since 2005. In 2006, he began working for the

defendant, Heartland Woodcraft, Inc. Heartland manufactures shelves, tables, cabinets, and other fixtures used by retail stores to display merchandise, such as apparel. Severson was initially hired as a supervisor and was later promoted to "shop superintendent." In 2010, Severson was promoted to "operations manager," which was a position that involved more supervisory and administrative responsibilities than his prior positions.

By the middle of 2013, Severson's supervisors had decided that he was not meeting expectations as an operations manager. At a meeting on June 5, 2013, Patrick Koness, the president of Heartland, and Douglas Lawrence, the general manager of Heartland, informed Severson and that they were relieving him of the operations-manager position. However, at that same time, Heartland was in the process of expanding its second-shift operations to accommodate a significant increase in orders, and it wanted to find a new "second shift lead." In Heartland's view, the person who currently held that position, Curtis Strnad, was not performing well enough to handle the expanded operation. Heartland thought that Severson would be a good fit for the second-shift lead, and it offered him the job at the June 5th meeting. That job represented a demotion from the operations-manager position.

Also at the June 5th meeting, Severson informed Koness and Lawrence that he was experiencing severe back pain. The pain was not caused by a workplace injury. At Koness's suggestion, Severson went home for the day.

A few days later, on June 9th, Severson informed Heartland that he would accept the job as second-shift lead. However, Severson was still at home with back pain at that time, and thus he did not report to work to begin performing the job. On June 10th, Severson began submitting notes from his doctor indicating that he would be unable to report for work due his back pain. Over the course of the next month or two, it became apparent that Severson had a serious back problem. In early July, Severson notified Heartland that he was exercising his right to take a leave of absence under the FMLA. Severson asked Heartland to record that his FMLA leave began on June 5, 2013, and Heartland did so. Severson remained on leave for the full twelve-week period allowed under the FMLA.

In mid-August, Severson notified Heartland that he was scheduled to have back surgery on August 27, 2013, the same day on which his FMLA leave would expire. He asked that Heartland provide him with an additional two months of medical leave following his surgery. Severson also informed Heartland that there was some chance he would need a second surgery, and that if he did need it, he would have to take an additional month's leave.

Severson made his request for additional leave to Jennifer Schroeder, Heartland's human-resources manager. After discussing Severson's request with a human-resources consultant, Schroeder presented it to Koness. Koness, in turn, decided that Heartland could not extend Severson's leave of absence by an additional two or three months. According to Koness, he made this decision because Heartland could not

afford to have Strnad, who was performing poorly, remain in the second-shift lead position during Severson's extended leave, and that therefore Heartland could not hold that position open for Severson. Rather, Heartland needed to find someone to replace Strnad as soon as possible. Koness states that he gave some thought to hiring a temporary replacement for Strnad pending Severson's return but ultimately decided not to do so because it would have been hard to find a qualified candidate to fill the job temporarily, and because he did not want to train a temporary employee. Koness decided that Severson's employment would be terminated at the end of his FMLA leave, but that he would be invited to reapply for a job at Heartland once his doctors released him to return to work.

On August 26, 2013, Schroeder and Lawrence called Severson and informed him that he was being terminated as of August 28, 2013. Schroeder followed up with a letter containing the same information and inviting Severson to reapply at Heartland after his doctor released him to return to work. Severson did not accept that invitation. He commenced this action, alleging that Heartland failed to reasonably accommodate his back issues and therefore terminated him in violation of the ADA. Heartland has moved for summary judgment on this claim.

In his original complaint, Severson also alleged that Heartland intentionally interfered with his rights under the FMLA and terminated him in retaliation for exercising his FMLA rights. About halfway through discovery in this case, Heartland's counsel drafted a motion for Rule 11 sanctions and

served it on Severson's counsel. In compliance with the safe-harbor provision of Rule 11(c)(2), Heartland's counsel did not at that time file the motion with the court. In the motion, Heartland's counsel argued that Severson's FMLA claims lacked reasonable evidentiary and legal support and therefore were filed in violation of Rule 11(b). Heartland also argued that several of the complaint's factual allegations lacked evidentiary support: its allegation that Severson could have returned to work "immediately" after his surgery in some capacity, and its allegation that Severson had told Heartland prior to the surgery that he could return to work immediately after the surgery in some capacity.

Within 21 days of service of the Rule 11 motion, plaintiff's counsel sent a letter to defendant's counsel in which she stated that the plaintiff would agree to amend his complaint, in part. The plaintiff agreed to withdraw his allegations that he could have returned to work immediately after the surgery and that he had told Heartland he could have returned to work immediately after the surgery. The plaintiff also agreed to withdraw his claim for FMLA interference. As to the claim for FMLA retaliation, counsel stated that the plaintiff would reassess the claim following the completion of discovery. Plaintiff's counsel proposed to file, at the close of discovery, an amended complaint making the changes stated in the letter.

Defendant's counsel did not respond to plaintiff's counsel's letter, and the parties continued with discovery. A few weeks before the close of discovery, and about two months before the deadline for filing

dispositive motions, the defendant filed a motion for summary judgment on the plaintiff's FMLA claims and also the motion for Rule 11 sanctions that it had previously served on plaintiff's counsel. Plaintiff's counsel then sent defendant's counsel an email reminding him that the plaintiff had agreed to withdraw most of the claims and allegations addressed in those motions. In addition, plaintiff's counsel stated that the plaintiff was now prepared to withdraw the FMLA retaliation claim. She attached a proposed stipulation of dismissal in which both of the FMLA claims would be dismissed with prejudice. Defendant's counsel refused to stipulate to the dismissal of the FMLA claims unless plaintiff agreed that the dismissal would not prevent the defendant from pursuing its motion for sanctions. The plaintiff would not so agree, and thus the parties did not execute the stipulation. Instead, the plaintiff filed a motion for leave to amend his complaint to withdraw the FMLA claims. The defendant opposes the motion to amend.

II. DISCUSSION

I will first address the defendant's motion for summary judgment on the ADA claim. I will then address the defendant's motion for summary judgment on the FMLA claim, its motion for sanctions, and the plaintiff's motion to amend his complaint.

Summary judgment is appropriate 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). When considering a motion for

summary judgment, I take the evidence in the light most favorable to the non-moving party and may grant the motion only if no reasonable juror could find for that party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 255 (1986).

A. ADA Claim

The ADA provides that a covered employer shall not "discriminate against a qualified individual on the basis of disability." 42 U.S.C. § 12112(a). "Discrimination," for the purposes of § 12112(a), includes "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability" unless the employer "can demonstrate that the accommodation would impose an undue hardship on the operation of the business." 42 U.S.C. § 12112(b)(5)(A). To establish a claim for failure to accommodate, a plaintiff must show that he is a "qualified individual with a disability." EEOC v. Sears, Robuck & Co., 417 F.3d 789, 797 (7th Cir.2005). A qualified individual is defined as "an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position." 42 U.S.C. § 12111(8). The plaintiff has the burden of proving that he was a "qualified individual" at the time of his termination. Stern v. St. Anthony's Health Ctr., 788 F.3d 276, 285 (7th Cir. 2015).

Heartland does not dispute that Severson was disabled within the meaning of the ADA, or that he satisfied the basic prerequisites for the second-shift lead position, "such as possessing the appropriate

educational background, employment experience, skills, licenses, etc." Id. However, Heartland contends that no reasonable jury could find that Severson could have performed the essential functions of the second-shift lead position (or any other vacant position at Heartland) at the time of his termination, with or without reasonable accommodation. In this regard, Heartland contends that an essential function of the second-shift lead position was the ability to lift heavy items, which was something that Severson would not have been able to do for approximately two months after his surgery.

Severson concedes that, as things looked prior to his surgery, he would not have been able to do much of the lifting associated with the second-shift lead position for some time after his back surgery. He also concedes that the second-shift lead is generally required to lift heavy items. Severson Dep. at 84:19–22, ECF No. 54-1. However, Severson contends that lifting was only a marginal function of the position, not an essential function, and that Heartland could, as a reasonable accommodation, have reallocated his lifting duties to other employees until his lifting restrictions were lifted. See Stern, 788 F.3d at 290–91 (explaining that reallocating marginal functions can be a reasonable accommodation but that reallocating essential functions is not). Severson contends that with this reasonable accommodation he could have performed all of the essential functions of the second-shift lead position "shortly after [his] back surgery." Severson Decl. ¶ 29, ECF No. 52.

Under the ADA, the factors a court should consider to determine whether a particular duty is an essential function include the employee's job description, the employer's opinion, the amount of time spent performing the function, the consequences for not requiring the individual to perform the duty, and past and current work experiences." Stern, 788 F.3d at 285 (quoting Gratzl v. Office of the Chief Judges, 601 F.3d 674, 679 (7th Cir.2010)); see 29 C.F.R. § 1630.2(n)(3). The employer's judgment is an important factor, but it is not controlling; the court also looks to evidence of the employer's actual practices in the workplace. Id. (quoting Miller v. Ill. Dep't of Transp., 643 F.3d 190, 198 (7th Cir.2011)).

According to Heartland's written job description, the second-shift lead "performs manual labor in the production area," "operates and troubleshoots machinery," "perform[s] minor repairs as necessary," and "maintains the building." ECF No. 46-2. The job description also states that the position involves various administrative and supervisory duties, such as "convey[ing] all production priorities to second shift personnel," "assur[ing] that productivity expectations are met on 2nd shift," and "complet[ing] daily production logs." Id. Under a section entitled "working conditions," the job description states:

> Working conditions are normal for a manufacturing environment. Work may involve frequent lifting of materials and product of 50 pounds, or occasionally more. Occasional physical exertion is required. Assisting in the loading of

> trucks, moving materials, or generally helping others will be required from time to time.

Id.

Koness and Lawrence describe the second-shift lead as being a "working lead" position, by which they mean that the person holding the job has "general responsibility for ensuring that production and quality expectations are met on the 2nd shift" but also must assist subordinates with manufacturing tasks. See Koness Aff. ¶ 17, ECF No. 25; Lawrence Aff. ¶ 7, ECF No. 46. Koness and Lawrence identify several lifting tasks for which the second-shift lead is responsible. One of the duties of this position is to "stage" the production projects that will be performed during the shift. Koness Aff. ¶ 18. This involves identifying the work that will be performed during the shift and the raw materials and other inputs that will be needed for the production associates to perform their tasks, and then retrieving those materials and inputs from other parts of the facility and transporting them to the production area. In the course of staging, the second-shift lead will have to pull raw materials, including sheets of particle board weighing up to 170 pounds and stacks of pre-cut panels, to the production area. In addition to staging, the second-shift lead works directly with assemblers and machine operators to set up and operate equipment, and to fabricate and assemble materials into finished products. This work regularly involves lifting equipment, raw materials, fixture components, and finished fixtures weighing from 30 pounds to over 50 pounds, and assisting in lifting fixture components

and completed fixtures weighing from 100 to over 300 pounds. Koness Aff. ¶ 19; see also Lawrence Aff. ¶¶ 8–12. Koness states that "[a] Lead subject to a 20 pound lifting restriction would constantly have to pull associates from their own jobs in distant parts of the plant to assist with the routine lifting that is an integral part of the 2nd Shift Lead's duties, and this would severely disrupt production." Koness Aff. ¶ 20.[1]

If the written job description, Koness's and Lawrence's descriptions of the second-shift lead position, and Koness's description of the

[1] In addition to the evidence described in the text, Heartland submits affidavits from two individuals, Samuel Barbercheck and Donald Enders, who held the second-shift lead position in 2015. These individuals largely concur with Koness's and Lawrence's descriptions of the job, and they add that they each spent about 90% of their time engaged in physical work involving repeated bending, twisting, and lifting, including the lifting of items weighing between 30 and 100 pounds. See generally ECF Nos. 47 & 48. The plaintiff argues that Heartland cannot use these affidavits to support its motion for summary judgment because it failed to disclose Barbercheck and Enders under Federal Rule of Civil Procedure 26(a) and (e) until after the close of discovery, which prevented the plaintiff from deposing them. See Fed. R. Civ. P. 37(c)(1). I agree that the defendant's failure to timely disclose Barbercheck and Enders means that the defendant cannot use information supplied by them in support of its motion for summary judgment. However, because nearly all of the information contained in the affidavits of Barbercheck and Enders is also in the affidavits of Koness and Lawrence, and because the plaintiff does not argue that Koness and Lawrence lack personal knowledge of the aspects of the second-shift lead position they describe in their affidavits, the exclusion of Barbercheck's and Enders's affidavits is inconsequential.

consequences of employing a lead who was unable to lift more than 20 pounds are accurate, then lifting would be an essential function of the lead position. Cf. Majors v. Gen. Elec. Co., 714 F.3d 527, 543 (7th Cir. 2013); Peters v. City of Mauston, 311 F.3d 835, 845 (7th Cir. 2002); Basith v. Cook County, 241 F.3d 919, 928–29 (7th Cir. 2001).

Severson does not dispute that the second-shift lead is expected to perform the tasks described in the job description, and he does not point to any evidence in the record that contradicts Koness's and Lawrence's descriptions of the second-shift lead's duties. Severson does point to information that Heartland submitted to an insurance company in connection with Severson's application for long-term disability benefits in August 2013. In that application, Heartland stated that lifting building products and transporting materials weighing "50+" pounds were "occasional" functions of the second-shift lead position. ECF No. 54-3 at p. 22 of 37. The form defined "occasionally" as meaning "the person does the activity up to 33% of the time." Id. Severson contends that this information is inconsistent with Heartland's claim that the second-shift lead performed "physical activity" on a regular basis. However, if a person performs a function as much as 33% of the time while on the job, one could fairly say that the person performs the function regularly. Moreover, on the disability form, Heartland identified a number of other physical activities that the second-shift lead performed up to 33% of the time, including pushing, pulling, carrying, climbing, stooping, crouching, and working overhead. When all

of these separate tasks are added together, one could easily conclude that the second-shift lead performed physical work more than 33% of the time. Also, the form does not identify how often the second-shift lead lifted less than 50 pounds. Presumably, lifting less than 50 pounds would be a more frequent task. Thus, the insurance form is consistent with Heartland's claim that lifting was an essential function of the second-shift lead position.

Severson does not point to any "evidence of the employer's actual practices in the workplace," Stern, 788 F.3d at 285, that suggests lifting is not an essential function of the second-shift lead position. Although Severson was offered that position on June 5, 2013, he never actually performed the job, and there is no evidence in the record that Severson worked on second shift prior to his leave of absence and observed the work performed by the second-shift lead during that time. Thus, Severson has not shown that he has personal knowledge of the amount of lifting the position required in practice or the consequences of requiring other employees to perform the lifting normally done by the second-shift lead.[2] See Fed. R. Civ. P. 56(c)(4). Nor has Severson submitted declarations or deposition testimony from others who worked on second shift that contradicts

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[2] Of course, because Severson was offered and accepted the job as second-shift lead, he likely had a general idea of what the position entailed. But the important point is that, so far as the record reveals, Severson has not observed the "actual practices" performed by the second-shift lead in the workplace. Stern, 788 F.3d at 285.

Koness's and Lawrence's descriptions of the amount of lifting the lead performed or Koness's statement that reallocating the lead's lifting duties would disrupt production.[3]

In his declaration, Severson contends that his duties as shop superintendent were similar to those of the second-shift lead, and that he was able to perform the essential functions of the superintendent position with a fifteen-pound lifting restriction between November 2010 and January 2011. Severson Decl. ¶¶ 33–36. However, as just discussed, Severson has not shown that he has personal knowledge of the duties of the second-shift lead, and thus his assertion that the duties of the lead were similar to those he performed as shop superintendent is inadmissible on summary judgment. Fed. R. Civ. P. 56(c)(4). Koness and Lawrence have submitted their own affidavits in which they explain that the duties of the two positions are not similar and that the second-shift lead performs much more physical activity than the

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[3] Severson notes that Heartland does not submit declarations or other evidence from persons either holding or directly supervising the second-shift lead in 2013 as evidence of the amount of lifting performed by the lead at that time. See Pl.'s Br. at 7 n. 11, ECF No. 49. But if Severson thinks that those persons would contradict Koness's or Lawrence's descriptions of the job, then it would be his burden to submit such evidence in opposition to Heartland's motion for summary judgment. The plaintiff does not contend that Lawrence or Koness lack personal knowledge of the essential functions performed by the second-shift lead in 2013, and their affidavits lay a foundation showing that, in fact, they have such personal knowledge. See Koness Aff. ¶ 16, Lawrence Aff. ¶ 6.

shop superintendent. Supp. Koness Aff. ¶¶ 8–15, ECF No. 59; Supp. Lawrence Aff. ¶¶ 4–11, ECF No. 62. And in their affidavits, Koness and Lawrence explain that they have personal knowledge of the day-to-day activities performed by both the second-shift lead and the shop superintendent. Supp. Koness Aff. ¶3; Supp. Lawrence Aff. ¶¶3–4.[4] Thus, Severson's assertion that the second-shift lead position required no more lifting than the shop superintendent position does not create a genuine factual dispute over whether lifting was an essential function of the lead position.

Severson also offers an affidavit from a former operations manager, Roy Desimone, who worked with Severson while he was the shop superintendent. ECF No. 56-11. Desimone states that, during that time, Severson "worked as an administrator, rather than a 'worker bee.'" ¶ 6. Again, however, the position of second-shift lead is different than shop superintendent, and as discussed above, the admissible evidence establishes that the lead

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[4] Some of Lawrence's statements in his supplemental affidavit appear to be based on hearsay—i.e., based on reports he received from other employees rather than his own observations, see Supp. Lawrence Aff. ¶¶ 3 & 6, and thus those statements may be inadmissible for lack of personal knowledge. But see Fed. R. Evid. 803(6) (hearsay exception for records of regularly conducted activity). However, Koness's affidavit is based on his own observations, see Supp. Koness Aff. ¶ 9 ("it has been my expectation and observation . . .), and thus it is admissible. Even if Lawrence's supplemental affidavit were excluded, Koness's supplemental affidavit would be sufficient to support the conclusion that the second-shift lead performed more lifting than the shop superintendent.

position involved more manual labor than the shop superintendent position. Thus, Desimone's observations concerning the amount of physical activity Severson performed while he was a shop superintendent do not create a genuine factual dispute.

Accordingly, Heartland is entitled to summary judgment on the issue of whether lifting was an essential function of the second-shift lead position. Because lifting was an essential function, requiring Heartland to reallocate Severson's lifting duties to other employees would not have been a reasonable accommodation. See Majors, 714 F.3d at 535–35 (having another person perform an essential function of the job is, as a matter of law, not a reasonable accommodation); Peters, 311 F.3d at 845–46 (reallocating lifting duties to other employees is not a reasonable accommodation when lifting is an essential function of the job); Basith, 241 F.3d at 929–30 (ADA does not require employer to reallocate the essential functions of the job).

Severson next contends that he was a qualified individual because he could have eventually performed the essential functions of the second-shift lead position, including lifting, if Heartland would have allowed him to continue his leave of absence for an additional two or three months after surgery. However, the case law in the Seventh Circuit provides that a person is not a "qualified individual" if his disability prevents him from performing the essential functions of his job for months at a time. Byrne v. Avon Prods., Inc., 328 F.3d 379, 380–81 (7th Cir. 2003) ("Inability to work for a multi-month

period removes a person from the class protected by the ADA."); see also Basden v. Prof'l Transp., Inc., 714 F.3d 1034, 1037 (7th Cir. 2013) ("A plaintiff whose disability prevents her from coming to work regularly cannot perform the essential functions of her job, and thus cannot be a qualified individual for ADA purposes."). To be sure, the cases recognize that if a disability involves an "intermittent condition" that requires occasional time off for "brief periods," such as a few days or a couple of weeks, then a person may be a qualified individual, and granting the person brief periods of leave may be a reasonable accommodation. Byrne, 328 F.3d at 380–81; Haschmann v. Time Warner Entm't Co., 151 F.3d 591, 599–601 (7th Cir. 1998). But at the time Heartland terminated Severson's employment, he had been unable to perform any of the essential functions of the second-shift lead position for three months, and he would remain unable to perform some of the essential functions of the position for an additional two or three months. Thus, at the time of his termination, which is the time that matters, see Basden, 714 F.3d at 1037 (whether person is a qualified individual is examined as of the time of the adverse employment decision at issue), Severson was not a qualified individual, and the ADA did not require Heartland to grant him an additional two or three months off as a reasonable accommodation.[5]

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[5] Because I conclude that an additional two- or three-month leave of absence would not have been a reasonable accommodation, I do not consider Heartland's argument that granting Severson such leave would have caused it to suffer an undue hardship.

Severson next contends that the ADA required Heartland to provide him with temporary, light-duty work—such as supervising and training employees, bagging screws, and assembling lighter-weight fixtures—until he was able to perform the essential functions of the second-shift lead position. Heartland does not maintain any full- or part-time light-duty positions at its facility, and the plaintiff concedes that Heartland would have had to create a light-duty position for him by temporarily reallocating various functions normally performed by other employees. Pl.'s Br. at 24, ECF No. 49. But the plaintiff contends that Heartland has in the past created such temporary light-duty positions for other employees, especially those who were recovering from workplace injuries, and he argues that the ADA required Heartland to treat him just as favorably as it treated those other employees.

Severson's argument that the ADA requires an employer to provide a disabled employee with any accommodation it has provided to other employees in the past is off the mark. An employer may provide an employee with an accommodation not required by the ADA without thereby becoming obligated to provide all similarly situated employees with the same accommodation. See Basith, 241 F.3d at 930 (stating that employer should not be "punish[ed] . . . for going beyond the ADA's requirements"); Sieberns v. Wal-Mart Stores, Inc., 125 F.3d 1019, 1023 (7th Cir. 1997) ("[e]mployers should not be discouraged from doing more than the ADA requires"); Vande Zande v. State of Wisconsin, 44 F.3d 538, 545 (7th Cir. 1995) ("if the employer . . . bends over backwards

to accommodate a disabled worker—goes further than the law requires—it must not be punished for its generosity by being deemed to have conceded the reasonableness of so far-reaching an accommodation. That would hurt rather than help disabled workers."). Moreover, the ADA does not require an employer to create "new" positions for disabled employees. Stern, 788 F.3d at 291; Sieberns, 125 F.3d at 1023; Gile v. United Airlines, Inc., 95 F.3d 492, 499 (7th Cir. 1996). Thus, assuming that the plaintiff is correct and that Heartland has created temporary light-duty positions for some employees, the ADA did not require Heartland to create such a position for Severson.

Severson cites my decision in Gibson v. Milwaukee County, 95 F. Supp. 3d 1061 (E.D. Wis. 2015), in support of his argument that because Heartland has created light-duty positions for other employees, the ADA required it to also create one for him. In Gibson, I found that an employer failed to reasonably accommodate the plaintiff's disability when it refused to temporarily transfer her to a vacant light-duty position that the employer reserved for workers recovering from workplace injuries. Id. at 1071–73. I concluded that the employer's wanting to reserve its light-duty program for those recovering from workplace injuries was not a sufficient reason for refusing to allow the plaintiff to occupy a vacant position. Id. But the key to this holding was that the light-duty position at issue existed and was vacant at the time when the employee needed the accommodation. The holding was based on the principle that the ADA requires an employer to

consider, as a reasonable accommodation for a disabled employee, transferring or reassigning that employee to a vacant position for which he or she is qualified. See, e.g., Dalton v. Subaru-Isuzu Auto., Inc., 141 F.3d 667, 677–79 (7th Cir. 1998). Thus, if the employer has a vacant light-duty position available, and the disabled employee is qualified for that position, the employer must consider transferring the employee to the position, even if the position is normally reserved for employees recovering from workplace injuries. Gibson, 95 F. Supp. 3d at 1071–72.

Unlike the employer in Gibson, Heartland does not maintain dedicated light-duty positions. Rather, according to the plaintiff, Heartland creates such positions as needed as part of its "return to work" program, which is designed to ensure that Heartland complies with its obligations under the state's worker's compensation law and minimizes its worker's compensation insurance costs. Pl.'s Br. at 19–24, ECF No. 49. As already discussed, the ADA does not require an employer to create a new position for a disabled employee as a reasonable accommodation. Thus, Heartland may voluntarily create light-duty positions for employees recovering from workplace injuries without becoming compelled to create such positions for employees who are protected by the ADA. Indeed, the same EEOC Guidance that I cited in Gibson makes that very point: "An employer need not create a light duty position for a non-occupationally injured employee with a disability as a reasonable accommodation. The principle that the ADA does not require

employers to create positions as a form of reasonable accommodation applies equally to the creation of light duty positions." EEOC Enforcement Guidance: Workers' Compensation and the ADA, 1996 WL 33161342, at *12 (September 1996). The EEOC provides the following example of this principle:

> R creates light duty positions for employees when they are occupationally injured if they are unable to perform one or more of their regular job duties. CP can no longer perform functions of her position because of a disability caused by an off-the-job accident. She requests that R create a light duty position for her as a reasonable accommodation. R denies CP's request because she has not been injured on the job. R has not violated the ADA.

Id. at *13.[6] In short, although the ADA requires employers to consider transferring disabled employees to vacant light-duty positions, it does not

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[6] The EEOC Guidance also states that an employer, to offset worker's compensation costs, may make modifications to job duties for occupationally injured employees that would not be reasonable accommodations under the ADA without also making those same accommodations for non-occupationally injured employees. See 1996 WL 33161342, at *12 ("Nothing in the ADA prohibits an employer from making a workplace modification that is not a required form of reasonable accommodation under the ADA for an employee with an occupational injury in order to offset workers' compensation costs. For example, the ADA does not require employers to lower production standards to accommodate individuals with disabilities. However, an employer is clearly permitted to lower production standards for an occupationally injured employee as a way of returning him/her to work more quickly.").

require employers to consider creating light-duty positions for disabled employees, even if the employer creates light-duty positions for employees who are injured on the job.

Severson next contends that even if Heartland did not have an obligation to create a light-duty position for him, it could have transferred him to another vacant position for which he was qualified and for which lifting was not an essential function. He notes that between the date of his surgery and the date on which his work restrictions were lifted, Heartland had a number of vacancies for production-level positions, such as assemblers and machine operators. All of these positions would have represented demotions from the second-shift lead position, and would have been three steps below the position of operations manager, which Severson held prior to his demotion to second-shift lead. However, the employer's duty to accommodate under the ADA requires it to consider transferring the employee to jobs that would represent a demotion. Dalton, 141 F.3d at 678. Thus, if Severson was qualified for the vacant production-level positions, Heartland would have been required to consider transferring him to one of those positions as a reasonable accommodation.

Heartland concedes that Severson possessed the basic background qualifications for the vacant production-level positions. But it contends that, as with the second-shift lead, lifting was an essential function of those positions, and thus transferring Severson to one of them would not have been a reasonable accommodation. The written description

for each of the vacant jobs supports this contention. See Supp. Koness Aff. Exs. H–L (stating that positions require ability to lift between 30 and 75 pounds, and occasionally more). In his affidavit, Koness explains that, in actual practice, the employees who hold these positions frequently lift heavy items and that it would be impractical to reallocate the lifting associated with the positions to other employees. Id. ¶ 18.

Although Severson concedes that lifting was generally a function of each of the vacant production positions, he argues that lifting was not an essential function because another employee, Wade Plautz, was able to work as an assembler even though he had a lifting restriction. In 2015, as a result of a non-workplace injury, Plautz was restricted to lifting no more than 30 pounds. Pl. Prop. Finding of Fact ¶ 85, ECF No. 50. Heartland was able to accommodate this restriction by assigning him sub-assembly jobs that were smaller and did not require him to lift more than 30 pounds. Id.

The most Heartland's accommodation of Plautz's lifting restriction shows is that lifting more than 30 pounds was not an essential function of the assembly position that Plautz held; it does not show that lifting in general was not an essential function of the various production positions that were vacant during the period following Severson's surgery. Indeed, Plautz was still required to lift the items he was working on and did not rely on other employees to do his lifting for him, as Severson would have had to do during the months following his surgery. See Supp. Koness Aff. ¶ 20. Rather, Heartland was able to

identify the lightest tasks it had available and allocate them to Plautz. This would not have been a possible accommodation for Severson, as even the lightest tasks required the ability to lift in excess of Severson's restrictions. Id. Thus, Heartland's accommodation of Plautz's restriction does not support the conclusion that lifting was not an essential function of the vacant production-level positions.

Severson also points out that Heartland accommodated another production-level employee, Ed Kurzynski, with a lifting restriction. In February 2013, Kurzynski's hand was crushed in a work-related accident. See Temeyer Decl. Ex. K, ECF No. 55-4; Supp. Koness Aff. ¶ 25. He was completely absent from work for a prolonged period and was receiving treatment from a psychologist for stress caused by the accident. During his recovery period, Kurzynski's psychologist directed Kurzynski to report to Heartland for a few hours at a time to observe the production area. The purpose of this was to determine whether Kurzynski could tolerate being in the environment where he suffered his injury. During this period, Heartland assigned Kurzynski some work that he could perform within the restrictions associated with his hand injury. However, such work was not regularly available, and Kurzynski spent most of his time simply observing the production area. Eventually, the psychologist determined that Kurzynski would be unable to return to work at Heartland in any capacity. Heartland then terminated Kurzynski's employment. See Supp. Koness Aff. ¶¶ 25–28.

The evidence pertaining to Kurzynski does not support the conclusion that lifting was not an essential function of the vacant production-level positions. The work Kurzynski performed after his accident was not the work of a typical production-level employee. Rather, Heartland essentially created a special position for him to facilitate his recovery from a workplace injury. And as discussed above, Heartland could create a special position for an employee recovering from a workplace injury—could provide that employee with an accommodation not required by the ADA—without thereby becoming obligated by the ADA to provide all similarly situated employees with the same accommodation. See Basith, 241 F.3d at 930; Sieberns, 125 F.3d at 1023; Vande Zande, 44 F.3d at 545; EEOC Enforcement Guidance, 1996 WL 33161342, at *12–13. Thus, the evidence pertaining to Kurzynski does not create a genuine issue of fact.

Finally, Severson argues that Heartland failed to engage in the interactive accommodation-exploration process required by the ADA. When an employee asks for an accommodation because of a disability, the employer must engage with the employee in an interactive process to determine the appropriate accommodation under the circumstances. See, e.g., Kauffman v. Peterson Health Care, 769 F.3d 958, 963 (7th Cir. 2014). Here, Severson asked Heartland for an accommodation because of a disability when he asked Heartland to extend his leave of absence for an additional two or three months. Heartland likely breached its duty to engage in the interactive process when it denied his request for leave and terminated

him without further discussion as to whether some other accommodation would be reasonable. See Basden, 714 F.3d at 1038–39 (finding that employer breached duty to engage in interactive process when, in response to employee's request for leave, employer terminated the employee without engaging employee in further discussion). However, "the failure to engage in the interactive process required by the ADA is not an independent basis for liability under the statute, and that failure is actionable only if it prevents identification of an appropriate accommodation for a qualified individual." Id. at 1039. "Even if an employer fails to engage in the required process, that failure need not be considered if the employee fails to present evidence sufficient to reach the jury on the question of whether she was able to perform the essential functions of her job with an accommodation." Id. As discussed above, Severson has failed to present evidence from which a jury could reasonably conclude that he could have performed the essential functions of his job with a reasonable accommodation. Thus, Heartland's likely failure to engage in the interactive process is not an independent basis for liability. Heartland's motion for summary judgment on the ADA claim will be granted.

B. FMLA Motion for Summary Judgment, Motion to Amend, and Motion for Sanctions

As discussed in the background section, above, the plaintiff has sought leave to amend his complaint to withdraw his FMLA claims, yet the defendant insists that leave should not be granted and that instead summary judgment should be entered on

those claims. The only reason to enter summary judgment rather than grant the plaintiff's request for leave to withdraw the claims would be to make clear that the FMLA claims are dismissed on the merits and therefore cannot be re-filed in a separate suit. But I do not understand the plaintiff to be asking to withdraw the FMLA claims without prejudice to their being re-filed in a separate suit. To the contrary, the plaintiff asked the defendant to stipulate to a dismissal of the claims with prejudice. Moreover, because the FMLA claims arose out of the same transaction as the ADA claim, a final judgment on the ADA claim would preclude a future suit on the FMLA claims. See, e.g., Cannon v. Burge, 752 F.3d 1079, 1101 (7th Cir. 2014). Thus, it makes no practical difference whether the FMLA claims are dismissed by way of plaintiff's motion to amend or defendant's motion for summary judgment. I will grant the motion to amend and deny the motion for summary judgment.

That leaves the defendant's motion for Rule 11 sanctions. The purpose of Rule 11 is to deter baseless filings in the district court. Cooney v. Casady, 735 F.3d 514, 523 (7th Cir. 2013). The rule is not a fee-shifting measure—it provides only that a court may impose an "appropriate sanction" for a violation of Rule 11(b). Id.; Fed. R. Civ. P. 11(c)(1). When a district court determines that Rule 11(b) has been violated, it "may," but is not required to, impose a sanction. See Cunningham v. Waters Tan & Co., 65 F.3d 1351, 1360–61 (1995); 2 James Wm. Moore, Federal Practice and Procedure § 11.23[2] (3d ed. 2015). As is relevant here, Rule 11(b) provides that

"[b]y presenting to the court a pleading . . . an attorney . . . certifies that to the best of the person's knowledge, information and belief, formed after an inquiry reasonable under the circumstances . . . (2) the claims . . . are warranted by existing law . . . [and] (3) the factual allegations have evidentiary support." Fed. R. Civ. P. 11(b)(2)–(3).

As discussed in the background section, the defendant contends that the plaintiff's FMLA claims were baseless and that the factual allegation that the plaintiff could have returned to work "immediately" after his surgery in some capacity, and the allegation that he told this to Heartland, were also baseless. Starting with the factual allegations, I conclude that they were not baseless. The allegation that the plaintiff could have returned to work immediately in some capacity is supported by the plaintiff's own assessment of his abilities. At his deposition, he testified that as soon as the day after his surgery, he was able to walk and could engage in some physical activity. Severson Dep. at 77. He testified that he believed could have performed light-duty work and could have done some of the work associated with the second-shift lead position, just not the lifting, within a matter of days after the surgery. Id. at 79, 84. Although it is likely that the plaintiff could not have returned to work the day of his discharge from the hospital, the word "immediately" is a relative term, and it is unreasonable to interpret the allegations of the complaint as meaning that the plaintiff could have walked out of the hospital and straight to Heartland's facilities to perform light-duty work. A more reasonable interpretation of the complaint is

that the plaintiff was alleging that he could have returned to work in a light-duty capacity within a few days after the surgery. Given the plaintiff's own description of how he felt after his surgery, that allegation was not baseless. Therefore, plaintiff's counsel did not violate Rule 11(b) by alleging that the plaintiff could have returned to work "immediately" after his surgery in some capacity.

Likewise, the allegation that Severson told Heartland that he would be able to return to work immediately after his surgery in a light-duty capacity is not baseless. The defendant takes issue with the complaint's allegation that Severson told Heartland's human-resources manager, Jennifer Schroeder, during a phone conversation on August 13, 2013, that he could return to work immediately after his August 27 surgery in a restricted or light-duty capacity. The defendant contends that Severson knew that such a conversation did not take place, and that therefore counsel had no basis for including the allegation in the complaint. But the record indicates that Severson thought he had such a conversation with Schroeder sometime between June and mid-August, and that he had trouble remembering the exact date. Severson Decl. ¶ 16, ECF No. 52. Thus, counsel had a reasonable basis for alleging that Severson had such a conversation with Schroeder on August 13th, and counsel did not violate Rule 11(b) in making the allegation.

Turning to the FMLA claims, it is hard to find a reasonable basis for the FMLA interference claim. Severson received the full twelve weeks of leave to which he was entitled, and plaintiff's counsel has not

explained why she (or her colleague who signed the complaint) included it in the complaint. However, I do not think that including such a claim in the complaint warrants sanctions. The claim itself consists of four conclusory paragraphs, see Compl. ¶¶ 117–20, and the defendant could not have spent any significant time or resources defending against it. See Advisory Committee Notes to 1993 Amendment to Rule 11 ("Rule 11 motions should not be made or threatened for minor, inconsequential violations of the standards prescribed by subdivision (b)."). Although the defendant filed a motion for summary judgment on the claim, it did so only after plaintiff's counsel stated in writing that the plaintiff had agreed to withdraw that very claim and that she would do so by filing an amended complaint at the close of discovery. It is true that by the time the defendant filed its motion for summary judgment, the plaintiff had not yet filed a formal pleading withdrawing the claim, but I do not see why that matters. Defendant's counsel did not respond to plaintiff's counsel's letter stating that she would withdraw the claim at the end of discovery, and thus plaintiff's counsel had no reason to think that defendant's counsel was not satisfied with the proposal to wait until then to formally amend the complaint. Moreover, the deadline for dispositive motions would not run for more than a month after the close of discovery, so if for some reason plaintiff's counsel did not follow through on her promise to withdraw the claim at the end of discovery, the defendant could have filed its motion for summary judgment at that time. The defendant's decision to

expend resources in moving for summary judgment on a claim that the plaintiff had already agreed to withdraw thus does not support sanctioning plaintiff's counsel for including the claim in the complaint.

Moreover, the defendant's brief in support of its motion for summary judgment on the FMLA claims does not contain any substantial argument on those claims—the brief does not cite Rule 56 or discuss the legal principles applicable to FMLA claims. Rather, the brief argues that plaintiff's counsel should be sanctioned for filing the claims and requests that the claims be dismissed. In light of this, I doubt that defendant's counsel expended substantial resources preparing its motion for summary judgment on the FMLA claims. Really all counsel did was prepare a brief in support of the motion for sanctions.

As for the FMLA retaliation claim, it was not baseless. Heartland terminated Severson as soon as he had exhausted his FMLA leave. Cases recognize that when an adverse employment action occurs on the heels of protected activity, an inference of causation may be sensible. See, e.g., Loudermilk v. Best Pallet Co., 636 F.3d 312, 315 (7th Cir. 2011). True, the timing of the termination would not, by itself, have been sufficient to survive summary judgment on an FMLA retaliation claim, and it may not even have been sufficient to survive a motion to dismiss for failure to state a claim on which relief can be granted. But it was enough to prevent the claim from being completely baseless.

In any event, even if plaintiff's counsel committed a technical violation of Rule 11(b) by including the FMLA retaliation claim in the complaint, it was a minor and inconsequential violation. The FMLA retaliation claim was made up of three conclusory allegations, see Compl. ¶¶ 121–23, and the defendant could not have spent a significant amount of time or resources defending against it. As discussed, even though the defendant filed a motion for summary judgment on the claim, its brief in support of that motion is devoid of any substantive argument on the FMLA claims and is instead a brief in support of the motion for sanctions. Moreover, before defendant's counsel filed the motion for summary judgment, plaintiff's counsel told him that the plaintiff would consider withdrawing the claim at the close of discovery. The deadline for filing dispositive motions would not run until more than a month after the close of discovery, and the defendant waited until that deadline to file its summary judgment motion on the plaintiff's ADA claim. It is not clear why the defendant did not simply wait until after the plaintiff decided whether it would withdraw the claim before filing its separate motion for summary judgment on that claim. Given this sequence of events, I can see no reason to sanction plaintiff's counsel.

Accordingly, the defendant's motion for Rule 11 sanctions will be denied.

C. Motion to Seal

Before concluding, I must address an administrative matter. In connection with his

opposition to the defendant's motion for summary judgment on the ADA claim, the plaintiff filed several documents under seal, along with a motion to seal. In the motion to seal, the plaintiff does not provide any grounds for removing the documents from the public record, other than to note that someone marked the documents "confidential" pursuant to the protective order entered in this case. But the protective order requires a party filing a confidential document with the court to provide the court with a statement of reasons why the material is confidential. See ECF No. 41 at 8–9.

In any event, three of the documents, Exhibits K, L, and M to the Declaration of Kelly Temeyer, reveal medical information about nonparties. For this reason, I conclude that there is good cause for keeping the documents under seal. The remaining two documents will not remain sealed. The first, Exhibit N to Temeyer's declaration, is entitled "employee change form" and does not contain any information that could conceivably be considered confidential. The second, Exhibit EE to Temeyer's declaration, is the Affidavit of Roy Desimone, which I discussed in connection with the ADA claim, above. Plaintiff also filed an identical copy of that same affidavit as Exhibit XX, yet Exhibit XX was not filed under seal. Because the affidavit is already available to the public as Exhibit XX, there is no reason to seal Exhibit EE.

III. CONCLUSION

For the reasons stated, **IT IS ORDERED** that the defendant's motion for summary judgment on the plaintiff's ADA claim (ECF No. 43) is **GRANTED.**

IT IS FURTHER ORDERED that the plaintiff's motion for leave to file an amended complaint withdrawing his FMLA claims (ECF No. 29) is **GRANTED.**

IT IS FURTHER ORDERED that the defendant's motion for summary judgment on the FMLA claims (ECF No. 22) is **DENIED**.

IT IS FURTHER ORDERED that the defendant's motion for sanctions (ECF No. 23) is **DENIED**.

IT IS FURTHER ORDERED that the plaintiff's motion to seal (ECF No. 53) is **GRANTED IN PART** and **DENIED IN PART**. The motion is granted to the extent that Exhibits K, L, and M to the Declaration of Kelly Temeyer may remain sealed. The motion is denied as to Exhibits N and EE.

FINALLY, IT IS ORDERED that the Clerk of Court shall enter final judgment.

Dated at Milwaukee, Wisconsin, this 12th day of November, 2015.

s/ Lynn Adelman

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LYNN ADELMAN
District Judge