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**In The
Supreme Court of the United States**

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THE METROPOLITAN GOVERNMENT OF
NASHVILLE AND DAVIDSON COUNTY, TENNESSEE,

Petitioner,

v.

BEVERLY MCMAHON,

Respondent.

◆

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit**

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Respondent was a public health nurse working in petitioner's health department. She suffered from depression and anxiety. She asked for leave of indefinite duration. Her physician's letter stated that it was "not possible to predict" when she could return. Petitioner wrote respondent explaining that there were unpaid leave days available under the rules but that her current request must be denied because it was for "indefinite duration." Respondent never asked for any of the allowable unpaid leave days and never provided a return-to-work date. Instead, she resigned, stating that she "should not be working for [petitioner] at this time."

The question presented is:

Whether a disabled employee who only requests indefinite leave by the time of termination is not qualified under the ADA, as a matter of law, as the First, Fifth, Eighth, Tenth, and Eleventh Circuits have concluded – or whether, in such situations, an employee's qualification under the ADA is essentially a question of fact, as the Sixth Circuit has concluded.

PARTIES TO THE PROCEEDING

Petitioner, who was the appellant below, is the employer, the Metropolitan Government of Nashville and Davidson County, Tennessee.

Respondent, who was the appellee below, is the employee, Beverly McMahon.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED.....	i
PARTIES TO THE PROCEEDING.....	ii
TABLE OF AUTHORITIES.....	v
OPINIONS BELOW.....	1
JURISDICTION.....	1
STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE.....	2
I. Factual Background	3
II. District Court Proceedings	5
III. Court of Appeals' Opinion	7
REASONS FOR GRANTING THE PETITION....	8
I. The Sixth Circuit's Decision Deviates Mark- edly From Decisions Of Its Sister Circuits	8
II. Review Is Needed To Establish A Uniform Rule On An Important Issue For Both Em- ployers And Employees.....	13
CONCLUSION.....	16
APPENDIX:	
OPINION, U.S. Court of Appeals for the Sixth Circuit (July 27, 2017)	App. 1
ORDER ON MOTION FOR JUDGMENT AS A MATTER OF LAW, U.S. District Court for the Middle District of Tennessee (September 7, 2016)	App. 6

TABLE OF CONTENTS – Continued

	Page
MEMORANDUM OPINION, U.S. District Court for the Middle District of Tennessee (September 7, 2016).....	App. 8
ORDER ON PETITION FOR REHEARING EN BANC, U.S. Court of Appeals for the Sixth Circuit (November 9, 2017).....	App. 30

TABLE OF AUTHORITIES

	Page
CASES:	
<i>Alwood v. Ecolab, Inc.</i> , No. CV 14-101-BLG-SPW, 2017 WL 1162164 (D. Mont. Mar. 28, 2017)	13
<i>Bertig v. Julia Ribaud Healthcare Grp., LLC</i> , No. 3:15-CV-2224, 2017 WL 4922012 (M.D. Pa. Oct. 31, 2017)	13
<i>Cehrs v. Northeast Ohio Alzheimer’s Research Center</i> , 155 F.3d 775 (6th Cir. 1998)	8
<i>Cunningham v. City of Kansas City, Missouri</i> , No. 14-0326-CV-W-RK, 2016 WL 9051163 (W.D. Mo. Mar. 3, 2016)	14
<i>Davis v. Kimbel Mech. Sys., Inc.</i> , No. 5:16-CV- 5194, 2017 WL 4810707 (W.D. Ark. Oct. 25, 2017)	13
<i>Echevarria v. AstraZeneca Pharm. LP</i> , 856 F.3d 119 (1st Cir. 2017)	9
<i>Green v. Bakemark USA, LLC</i> , No. 1:13-CV-841, 2016 WL 258345 (S.D. Ohio Jan. 20, 2016)	14
<i>Hambright v. Bartow Cty., Georgia</i> , No. 4:16-CV- 236-HLM-WEJ, 2017 WL 6460246 (N.D. Ga. July 11, 2017)	13
<i>Hwang v. Kansas State Univ.</i> , 753 F.3d 1159 (10th Cir. 2014)	10
<i>James v. Munson Med. Ctr.</i> , No. 1:15-CV-67, 2016 WL 1055756 (W.D. Mich. Mar. 17, 2016)	14
<i>Lancaster v. Sprint/United Mgmt. Co.</i> , No. CIV- 13-1348-R, 2016 WL 379785 (W.D. Okla. Jan. 29, 2016)	14

TABLE OF AUTHORITIES – Continued

	Page
<i>Lang v. Wal-Mart Stores E., L.P.</i> , 813 F.3d 447 (1st Cir. 2016)	9
<i>Lee v. Chicago Transit Auth.</i> , No. 12-CV-09180, 2016 WL 6680483 (N.D. Ill. Nov. 14, 2016)	13
<i>McIntyre v. San Antonio Water Sys.</i> , No. 16-CV- 399 (RCL), 2017 WL 1532608 (W.D. Tex. Apr. 26, 2017)	13
<i>Moss v. Harris Cty. Constable Precinct One</i> , 851 F.3d 413 (5th Cir. 2017)	9
<i>Peyton v. Fred’s Stores of Arkansas, Inc.</i> , 561 F.3d 900 (8th Cir. 2009)	10, 12
<i>Rascon v. US W. Commc’ns, Inc.</i> , 143 F.3d 1324 (10th Cir. 1998)	10, 11
<i>Reyer v. Saint Francis Country House</i> , 243 F. Supp. 3d 573 (E.D. Pa. 2017)	13
<i>Robert v. Bd. of Cty. Comm’rs of Brown Cty., Kans.</i> , 691 F.3d 1211 (10th Cir. 2012)	10
<i>Shann v. Atl. Health Sys.</i> , No. CV-124822-ES- MAH, 2017 WL 5260780 (D.N.J. Nov. 13, 2017)	13
<i>Smith v. Millennium Rail, Inc.</i> , 241 F. Supp. 3d 1183 (D. Kan. 2017)	13
<i>Smith v. Sturgill</i> , 516 F. Appx. 775 (11th Cir. 2013)	11
<i>Spillers v. City of New York Health & Hosps. Corp.</i> , No. 15-CV-06472 (PKC), 2017 WL 4326505 (E.D.N.Y. Sept. 28, 2017)	13

TABLE OF AUTHORITIES – Continued

	Page
<i>Wenc v. New London Bd. of Educ.</i> , No. 3:14-CV-0840 (VAB), 2016 WL 4410061 (D. Conn. Aug. 16, 2016)	13
<i>Wood v. Green</i> , 323 F.3d 1309 (11th Cir. 2003)	11
STATUTE:	
42 U.S.C. § 12111	1, 8, 9
RULE:	
SUP. CT. RULE 10(a)	15

OPINIONS BELOW

The opinion of the court of appeals (App. 1-App. 5) is not reported. The memorandum opinion of the district court denying petitioner's motion for judgment as a matter of law (App. 6-App. 29) is not published in the *Federal Supplement* but is available at 2016 WL 10650816.



JURISDICTION

The judgment of the court of appeals was entered on June 27, 2017. The court of appeals denied a timely petition for rehearing *en banc* on November 9, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).



STATUTORY PROVISIONS INVOLVED

The Americans with Disabilities Act, as amended, codified at 42 U.S.C. §§ 12101, *et seq.*, specifically, § 12111, “Definitions,” including:

subsection (8) “Qualified individual”:

The term “qualified individual” means an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purposes of this subchapter, consideration shall be given to the employer's judgment as to

what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.

and subsection (9) “Reasonable accommodation”:

The term “reasonable accommodation” may include –

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

(B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.



STATEMENT OF THE CASE

This case raises the important and recurring question of whether an employee, who requests indefinite leave as an accommodation under the ADA, may still be considered qualified under the Act.

I. Factual Background.

Respondent was a public health nurse working in petitioner's health department since 2006. She suffered from depression and anxiety. (App. 3.) In 2011, there were several incidents resulting in respondent taking family medical leave. (App. 3.) By mid-2011, she had used all of her FMLA leave for the year. (App. 12.) However, by September-October 2011, respondent was back at work, working successfully. (App. 3.) She worked for "four months without problem." (App. 4.)

Respondent's request for indefinite leave. In late October 2011, respondent suffered a "relapse in her mental state." (App. 3.) She asked for leave of indefinite duration. (App. 3.) On November 8, 2011, respondent provided petitioner with a physician's statement, requesting that she be excused from work, stating "it is not possible to predict when she will be able to return to work." (App. 17.)

Petitioner's response to the request for indefinite leave. On November 9, 2011, the human resources director emailed respondent to inform her that her paid leave was nearly exhausted. (App. 3.) The human resources director explained, "In reviewing your leave time, you are not eligible for another 12 weeks of FMLA until the end of March 2012. You will exhaust all of your sick and vacation time before the close of business on Monday, November 14th, 2011." (Tr. Ex. 15; RE 101, PageID# 966-67.) The human resources director further explained that, if respondent did not come back to work, she would be considered AWOL (absent

without leave): “Without an approved leave of absence from Dr. Paul, you will be AWOL at that point. Call me if you have any questions.” (*Id.*)

On November 14, Dr. Paul, the director of petitioner’s health department wrote to respondent explaining that the civil service rules would allow respondent up to 40 more days of unpaid leave but that, because respondent’s leave request was for an “indefinite duration,” he was denying that request as being unreasonable: “[I]n this situation the request is of indefinite duration. We need to have someone working in this nursing position, and at this time the Department is not able to hold it for an indefinite period of time.” (App. 18; Tr. Ex. 10.)

Respondent’s resignation. On November 23, 2011, after respondent failed to report to work, the director charged her with being AWOL and set a hearing date of December 2. (App. 18-19.) Had respondent attended her December 2 departmental hearing, she could have brought her attorney, and she could have discussed her disability with the director, including any proposed accommodations. (RE 101, PageID# 893-95.) In fact, nearly all employment issues are resolved at the departmental level; the director explained at trial that he could not recollect the last time that he had terminated someone’s employment. (RE 101, PageID# 895-96.)

Instead of attending her December 2 departmental hearing, respondent resigned the day before. (App. 19.) In her resignation letter, respondent insisted

that she “should not be working” for petitioner at all, citing her medical providers’ recommendations: “Dr. Paul, I have submitted written statements from both my treating psychiatrist Dr. Robert Jamieson and my EAP counselor Erin Frazier Maskiel, which advise that I should not be working for MPHD¹ at this time.” (RE 100, PageID# 849; Tr. Ex. 12.)

Respondent never submitted any other leave requests, such as one with a defined period of recovery, or a proposed return-to-work date, potentially taking advantage of her 40 remaining leave-without-pay days under the civil service rules. Nor did she call human resources with “any questions,” nor reach out to the petitioner at all.

II. District Court Proceedings.

Respondent brought suit against the petitioner in the United States District Court for the Middle District of Tennessee, claiming, among other things, failure to accommodate in violation of the ADA. (App. 1-2.)

At the close of respondent’s proof at trial, and then again at the close of petitioner’s proof, petitioner moved for a judgment as a matter of law, arguing that respondent was not qualified under the ADA because her only request for accommodation was “indefinite leave” and attendance at work is an essential function of a public health nurse position. (App. 21.)

¹ Metropolitan Public Health Department.

Petitioner also argued that “indefinite leave” is not a “reasonable accommodation” under the ADA, and, because that was respondent’s only request at the time of her resignation, then liability cannot attach. (App. 22.)

The district court denied both motions for judgment as a matter of law, and allowed the matter to go to the jury. (App. 21-23.) As is relevant here, the district court reasoned that, even though respondent had only requested “indefinite leave,” and even though such a request is “not reasonable” under the ADA (App. 22), the burden was nevertheless upon the petitioner to have crafted a plan of “definite unpaid leave” (App. 23), utilizing some or all of the 40 days of unpaid leave remaining (out of the original 120 allowed under the employment rules). The district court stated, “Metro then rejected, as it should, her unreasonable request for indefinite leave and failed to offer any other accommodation, which was available through definite unpaid leave.” (App. 21.)

Thus, despite the district court’s acknowledgement that a request for “indefinite leave” is unreasonable, and despite the court’s earlier acknowledgement that respondent’s physician’s statement said “it is *not possible to predict* when she will be able to return to work” (App. 17) (emphasis added), the court determined that petitioner’s failure to propose a period of “definite unpaid leave” – where the petitioner would be guessing at respondent’s prognosis and a viable return-to-work date – justified petitioner’s liability under the ADA. (App. 23.)

The jury returned a verdict against petitioner on respondent's failure-to-accommodate claim. (App. 24.) The total award to the respondent for damages, back pay, attorney's fees, expenses, as well as interest, is now over \$430,000. (App. 6.)

III. Court of Appeals' Opinion.

On June 27, 2017, the Sixth Circuit affirmed the district court's denial of petitioner's motions for judgment as a matter of law. (App. 5.) The court of appeals, like the district court, recognized that respondent's only request under the ADA was for indefinite leave. (App. 3.) ("She asked for leave of indefinite duration.") Also like the district court, the court of appeals shifted the burden to the petitioner to propose a defined-leave plan for the respondent. (App. 4.)

Thus, despite respondent's physician's statement that it was "not possible to predict" when she could return to work (App. 17), and despite respondent not proposing any return date herself, the court of appeals, like the district court, determined that petitioner's failure to propose a "definite leave period" justified liability under the ADA. (App. 4.)

The court of appeals believed, without explanation, that it would not have been an imposition to the petitioner's health department to hold the nursing position open for another 40 days, on the off-chance that respondent might recover. (App. 4-5.) (" . . . Nashville informed McMahon that she had to return to work at the expiration of her paid leave, when it would have

been no more of an imposition for Nashville to propose that McMahon had to return to work no later than the expiration of unpaid leave.”)

On July 11, 2017, petitioner timely filed a petition for rehearing *en banc*, which was denied on November 9, 2017. (App. 30.)



REASONS FOR GRANTING THE PETITION

I. The Sixth Circuit’s Decision Deviates Markedly From Decisions Of Its Sister Circuits.

The Sixth Circuit held that an employee’s request for “leave of indefinite duration” (App. 3) at the time of employment termination – here, a voluntary resignation – does not necessarily render the employee unqualified under the ADA. (App. 3.) Along those same lines, in a previous ruling, *Cehrs v. Northeast Ohio Alzheimer’s Research Center*, 155 F.3d 775 (6th Cir. 1998) (cited by the district court in our case, App. 23), the Sixth Circuit specifically stated that it did not wish to establish a rule that “leave of indefinite duration” could never constitute a “reasonable accommodation” under the ADA. *Id.* at 782.

Other circuits have held otherwise. They have held that if the employee’s request is for “indefinite leave,” then the employee cannot be considered qualified under the ADA (42 U.S.C. § 12111(8)), as a matter of law, because attendance at work is an “essential function” of the job. Similarly, other circuits have

held that “indefinite leave” is not a “reasonable accommodation” under the ADA (42 U.S.C. § 12111(9)) and that, upon receiving such a request, the employer has no duty under the ADA to do anything further.

In *Echevarria v. AstraZeneca Pharm. LP*, 856 F.3d 119 (1st Cir. 2017), the First Circuit held that “indefinite leave” is “an accommodation that is not reasonable under the ADA.” *Id.* at 127. The court rejected the employee’s argument that the employer failed to engage in an interactive process with her. The court stated that, because the employee failed to show that a reasonable accommodation existed, the burden never shifted to the employer to do anything further. *Id.* at 133 (citing *Lang v. Wal-Mart Stores E., L.P.*, 813 F.3d 447, 456 (1st Cir. 2016) (“[T]he omission of an interactive process is of no moment if the record forecloses a finding that the employee could do the essential duties of the job, with or without reasonable accommodation . . . ”)) (internal quotation marks omitted).

The Fifth Circuit, in *Moss v. Harris Cty. Constable Precinct One*, 851 F.3d 413 (5th Cir. 2017), emphasized that it is the employee’s burden to show that he is qualified under the ADA. *Id.* at 419. The court held that since the employee’s request at the time of termination was for “indefinite leave,” then he could not establish that he could “perform the essential functions of his job.” *Id.* Accordingly, “he cannot establish that he was qualified under the ADA at the time of his termination.” *Id.* at 418-19.

Similarly, the Eighth Circuit, in *Peyton v. Fred's Stores of Arkansas, Inc.*, 561 F.3d 900 (8th Cir. 2009), held that an employee who requests indefinite leave “cannot, as a matter of law, be considered ‘otherwise qualified’ under the ADA.” *Id.* at 903. Because the employee, by the time of her termination, “had no idea when, if ever, she would be able to return,” the burden did not shift to the employer to craft a defined-leave plan for the employee. *Id.* The court stated, “[E]mployers should not be burdened with guess-work regarding an employee’s return to work after an illness.” *Id.*

The Tenth Circuit, in *Robert v. Bd. of Cty. Comm’rs of Brown Cty., Kans.*, 691 F.3d 1211 (10th Cir. 2012), also held that an employee who, by the time of termination, could not provide the employer with a definite return-to-work date, could not perform the “essential functions” of the position and was thus unqualified under the ADA. *Id.* at 1216. In *Hwang v. Kansas State Univ.*, 753 F.3d 1159 (10th Cir. 2014) (a Rehabilitation Act case), Justice Gorsuch, then writing for the Tenth Circuit, stated, “It perhaps goes without saying that an employee who isn’t capable of working for so long [there, an indefinite period spanning more than six months] isn’t an employee capable of performing a job’s essential functions. . . .” *Id.* at 1161 (bracketed text added). Those Tenth Circuit decisions both rely upon an earlier decision, *Rascon v. US W. Commc’ns, Inc.*, 143 F.3d 1324 (10th Cir. 1998) *overruled on other grounds (judicial estoppel)* by *New Hampshire v. Maine*, 532 U.S. 742 (2001), where the Tenth Circuit held that a leave request is unreasonable when the

employee “fails to present evidence of the expected duration of her impairment.” *Id.* at 1334.

Finally, the Eleventh Circuit, in *Wood v. Green*, 323 F.3d 1309 (11th Cir. 2003), negated a jury verdict in favor of the employee, by holding that the employee “was not a qualified individual within the meaning of the ADA,” as a matter of law, because the employee’s request for indefinite leave “was not reasonable.” *Id.* at 1312. The court reversed and vacated the district court’s denial of the employer’s motion for judgment as a matter of law (and the accompanying jury verdict in favor of the employee) and instead rendered judgment as a matter of law in favor of the employer. *Id.* at 1314; *see also Smith v. Sturgill*, 516 F. Appx. 775, 776-77 (11th Cir. 2013) (per curiam) (request for indefinite leave is not reasonable and, therefore, employee “was not a qualified individual under the ADA”).

In our case, despite the Sixth Circuit acknowledging that respondent’s request at the time of her resignation was for “leave of indefinite duration” (App. 3), the court nevertheless found that respondent was “qualified to perform her job” had she been given more time off (App. 4), citing the fact that she had worked “for four months without problem” earlier in the year. (App. 4.)

Setting aside for the moment the fact that the “four month” time period referenced by the court predates her doctor’s statement that “it is not possible to predict when she will be able to return to work” (App. 17), the fundamental difference between the Sixth

Circuit's decision and the decisions from the other circuits is that, here, when the employee makes an unreasonable request, the court would still shift the burden to the employer, placing it in the impossible position (to the point of liability under the ADA) of guessing what a viable return-to-work date might be, when the employee herself was not able to provide one. Rather, "[E]mployers should not be burdened with guesswork regarding an employee's return to work after an illness." *Peyton*, at 903 (8th Cir. 2009). Importantly, even after the director wrote to the respondent on November 14, explaining that she had available unpaid leave days remaining under the civil service rules, respondent never wrote back asking for any of them. Instead, she submitted a resignation letter December 1, the day before her departmental hearing with the director.

In stark contrast to the decisions from other circuits, the Sixth Circuit's decision upholds liability against the petitioner for not providing respondent the remaining 40 days of available leave under the civil service rules (App. 3), when respondent herself never even asked for them – saying instead in her resignation letter that she “should not be working for MPHD at this time.” (RE 100, PageID# 849; Tr. Ex. 12.)

II. Review Is Needed To Establish A Uniform Rule On An Important Issue For Both Employers And Employees.

The question presented in this case holds critical importance to employers and employees around the country. Issues surrounding requests for indefinite leaves of absence arise frequently. Besides the circuit-level cases cited above, consider the many districts across the country where “indefinite leave” under the ADA was analyzed just within the last two years: *Shann v. Atl. Health Sys.*, No. CV-124822-ES-MAH, 2017 WL 5260780 (D.N.J. Nov. 13, 2017); *Bertig v. Julia Ribaud Healthcare Grp., LLC*, No. 3:15-CV-2224, 2017 WL 4922012 (M.D. Pa. Oct. 31, 2017); *Davis v. Kimbel Mech. Sys., Inc.*, No. 5:16-CV-5194, 2017 WL 4810707 (W.D. Ark. Oct. 25, 2017); *Spillers v. City of New York Health & Hosps. Corp.*, No. 15-CV-06472 (PKC), 2017 WL 4326505 (E.D.N.Y. Sept. 28, 2017); *Hambright v. Bartow Cty., Georgia*, No. 4:16-CV-236-HLM-WEJ, 2017 WL 6460246 (N.D. Ga. July 11, 2017); *McIntyre v. San Antonio Water Sys.*, No. 16-CV-399 (RCL), 2017 WL 1532608 (W.D. Tex. Apr. 26, 2017); *Alwood v. Ecolab, Inc.*, No. CV 14-101-BLG-SPW, 2017 WL 1162164 (D. Mont. Mar. 28, 2017) *appeal filed* April 25, 2017; *Reyer v. Saint Francis Country House*, 243 F. Supp. 3d 573 (E.D. Pa. 2017); *Smith v. Millennium Rail, Inc.*, 241 F. Supp. 3d 1183 (D. Kan. 2017); *Lee v. Chicago Transit Auth.*, No. 12-CV-09180, 2016 WL 6680483 (N.D. Ill. Nov. 14, 2016), *aff’d*, 696 F. Appx. 752 (7th Cir. 2017); *Wenc v. New London Bd. of Educ.*, No. 3:14-CV-0840 (VAB), 2016 WL 4410061 (D. Conn. Aug.

16, 2016), *aff'd*, 702 F. Appx. 27 (2d Cir. 2017); *James v. Munson Med. Ctr.*, No. 1:15-CV-67, 2016 WL 1055756 (W.D. Mich. Mar. 17, 2016) *dismissed* (May 9, 2016); *Cunningham v. City of Kansas City, Missouri*, No. 14-0326-CV-W-RK, 2016 WL 9051163 (W.D. Mo. Mar. 3, 2016), *aff'd*, 672 F. Appx. 618 (8th Cir. 2017); *Lancaster v. Sprint / United Mgmt. Co.*, No. CIV-13-1348-R, 2016 WL 379785 (W.D. Okla. Jan. 29, 2016), *aff'd*, 670 F. Appx. 984 (10th Cir. 2016), *cert. denied*, 137 S. Ct. 2094 (2017); *Green v. Bakemark USA, LLC*, No. 1:13-CV-841, 2016 WL 258345 (S.D. Ohio Jan. 20, 2016), *aff'd*, 683 F. Appx. 486 (6th Cir. 2017).

Unsurprisingly, then, such issues are common sources of conflict between employers and employees. And the Sixth Circuit's approach of determining the "reasonableness" of indefinite leave requests on a case-by-case basis ensures a steady stream of litigation, as employees, on the one hand, believe that they can perform the essential functions of the job if they are only given an indefinite leave of absence, and as employers, on the other hand, struggle to accommodate such requests under the ADA by essentially guessing at when the employee might return.

This instant case would have been decided differently had it arisen in one of the other circuits listed above. In those circuits, an employee who, by the time of termination, can only propose "indefinite leave" as an accommodation would have been considered unqualified under the ADA, since the very purpose of the ADA is to keep disabled individuals included as part of the workforce, with or without a reasonable

accommodation, not to keep disabled individuals on leave status of indefinite duration.

Petitioner of course is not insensitive to employees who suffer from depression or anxiety, or who require an extended leave of absence, but once an employee's condition reaches a level where neither the employee nor the physician can provide a return-to-work date, and where the only request is for indefinite leave, then, as a matter of law, the employee should not be considered qualified under the ADA. The employer should not be placed in the impossible position of proposing a defined leave plan, where even the employee's physician is unable to do so. The ADA is simply not designed for that.

This Court has never weighed in on this topic. The Sixth Circuit has entered a decision regarding an important employment matter that is in conflict with the decisions of the other circuits, as discussed above. Accordingly, under this Court's Rule 10(a), review is warranted.

This Court should resolve the conflict in favor of the First, Fifth, Eighth, Tenth, and Eleventh Circuits and provide a uniform interpretation that an employee whose only request for accommodation under the ADA is leave of indefinite duration cannot establish that he or she can perform the essential functions of the job and thus cannot, as a matter of law, be considered qualified under the Act.



CONCLUSION

For the foregoing reasons, the petitioner respectfully requests that this Court grant this petition, review this matter, and reverse and remand with instructions that petitioner's motions for judgment as a matter of law should have been granted, or, alternatively, reverse and remand, without formal review, in light of the weight of authority conflicting with the Sixth Circuit's opinion.

Respectfully submitted,

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