

No. 17-1124

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

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**

**BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI**

AUGUST C. WINTER
Two Brentwood Commons,
Suite 150
750 Old Hickory Boulevard
Brentwood, TN 37027

BRIAN T. BOYD
Counsel of Record
750 Old Hickory Boulevard,
Bldg. 2
Suite 150
Brentwood, TN 37027
(615) 371-6119
brian@boydlegal.co

*Counsel for Respondent
Beverly McMahon*

QUESTION PRESENTED

Whether the court of appeals correctly affirmed, in a per curiam, unpublished opinion, a jury verdict finding sufficient evidence to support the verdict on violation of the Americans With Disabilities Act (ADA), and distinguished indefinite leave cases involving unqualified employees, in light of the record here that respondent had been harassed by a supervisor, then successfully performed her job after a requested transfer to a different location as recommended by her treating physician, but was transferred back to the original location by petitioner, who denied respondent's request to remain at the second location and did not provide leave without pay although it acknowledged that it was authorized to grant her up to four months of such leave.

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**ADDITIONAL STATUTORY
PROVISION INVOLVED**

42 U.S.C. § 12112 – Discrimination, in pertinent part,

(a) GENERAL RULE

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

(b) CONSTRUCTION

As used in subsection (a), the term, “discriminate against a qualified individual on the basis of disability” includes –

(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 undue hardship on the operation of the business of such covered entity;



INTRODUCTION

Respondent nurse Beverly McMahon was a disabled employee covered by the ADA, who suffered from

depression and anxiety. She was harassed by a supervisor and submitted a transfer request, which was supported by a provider's statement that the respondent's job site presented a "toxic" work environment. "Striving to achieve a reasonable accommodation," the petitioner employer, the Metropolitan Government of Nashville and Davidson County, "Metro," transferred McMahon to a different clinic at a different location. Without notice to McMahon, Metro simultaneously executed a transfer order that would send McMahon back to her old location once a nurse supervisor returned from maternity leave.

McMahon thrived in her new work place. When the nurse supervisor returned, McMahon asked to stay where she was. That request was denied.

McMahon soon suffered a major depressive episode at her old location and requested indefinite leave. That request was denied. McMahon was ordered to return to work, even though she was eligible for four months of unpaid leave. She resigned after she was charged with job abandonment and a disciplinary hearing that could result in termination was scheduled.



COUNTERSTATEMENT OF THE CASE

Petitioner seeks Supreme Court review of an unpublished per curiam opinion from the Sixth Circuit, which affirmed the district court's ruling that there

was sufficient evidence to support the jury's finding that petitioner had violated the ADA.

I. Factual Background.

The parties agree that McMahon was a disabled employee who suffered from depression and anxiety.

McMahon requests a job transfer after being harassed by a supervisor at the STD Clinic at the Lentz Public Health Center. Respondent here adopts the trial court's summary of the evidence presented in the court's post-trial Memorandum Opinion. (Pet. App. 8, 9-13).

In pertinent part, McMahon was harassed by a supervisor, which caused McMahon to become anxious and depressed. (*Id.*, 9-10). She made mistakes at work, sought mental health counseling and twice took family medical leave. (*Id.*, 11-12). McMahon requested a transfer. (*Id.*) Her request was supported by statements from two providers who stated that McMahon needed to be working at a different clinic. (*Id.*) One described the respondent's work environment as "toxic." (*Id.*, 11-12). McMahon's bureau head offered a transfer to a different location, i.e., the Woodbine Clinic. (*Id.*, 13). "To get out of Lentz," McMahon agreed. (*Id.*)

In addition to the foregoing, there also was evidence that McMahon's treating physician provided a statement confirming that McMahon would be able to perform her job duties *at Woodbine*. (Emphasis supplied). (RE 100, PageID# 863, Tr. Ex. 23). Further, on

the day after McMahon's physician released respondent to work at Woodbine, Metro executed a transfer order that would return McMahon to Lentz once a nurse supervisor returned from maternity leave. (RE 101, PageID# 984-985, and Tr. Ex. 7). The HR manager testified that Metro had received funding to hire an additional RN to work at Lentz. (RE 101, PageID# 959). Six weeks before Metro sent McMahon from Lentz to Woodbine, before McMahon had requested a transfer, (RE 101, PageID# 984), Metro made plans to transfer an RN from Woodbine to Lentz and hire a new RN for Woodbine. (RE 959, Tr. Ex. 7). Even though there were a number of other RNs at Woodbine, (RE 100, PageID# 834-835), as well as the new hire, Metro subsequently chose to send McMahon back to what was for her a toxic environment. (RE 101, PageID# 984-985). Metro never shared any of this information with respondent. (RE 100, PageID# 834).

McMahon thrives at Woodbine, but her request to stay is denied. Respondent also adopts the trial court's summary of the evidence regarding her work at Woodbine. (Pet. App. 14-15). That is, McMahon worked at Woodbine for several months. She volunteered to stay late, never missed a day's work and really enjoyed her job. (*Id.*, 14). The frequency of her mental health counseling sessions decreased. When the nurse supervisor returned from maternity leave and respondent was told that she was being reassigned to Lentz, McMahon asked only to remain at Woodbine. The request was denied. McMahon was told that another nurse wanted to return to Woodbine from Lentz. McMahon left work

early to see her doctor. She was anxious, fearful and shaking. (*Id.*)¹

McMahon's return to work at Lentz is unsuccessful. Respondent concurs in the trial court's summary of the evidence regarding her reassignment to Lentz. (Pet. App. 16-19). Specifically, McMahon was sent to a clinic at Lentz that was next door to the STD Clinic where her harasser worked. McMahon's anxiety returned. She felt worse when she saw her harasser. (*Id.*, 16). There were incidents at work, and, ultimately, McMahon's treating physician informed Metro that he had been treating McMahon for a major depressive illness for over a month. (*Id.*, 16-17). He requested that McMahon be excused from work and stated that "it is not possible to predict when she will be able to return to work." (*Id.*, 17).

Metro's Director of Health denied McMahon's request for leave without pay. (*Id.*, 18). Although the director noted that he was permitted to grant McMahon up to another four months' of unpaid leave, he reported that he chose not to. The director acknowledged that denying McMahon's request could lead to an end of her employment, but he encouraged her to reapply for a position after she had recovered from her illness. The director charged McMahon with job abandonment and "inability to perform duties, when reasonable accommodation has been considered and cannot be made."

¹ McMahon also testified that she told her supervisor that she was afraid to go back to Lentz and be working anywhere near her harasser. (RE 100, PageID# 840).

The director informed McMahon that he would be conducting a hearing to determine whether discipline, such as demotion, suspension or dismissal was indicated. (*Id.*, 18-19). McMahon “resigned prior to the hearing because she did not want an involuntary employment termination on her record.” (*Id.*, 19).

II. District Court Proceedings.

Metro filed a motion for summary judgment asserting, inter alia, that McMahon as a matter of law was not a qualified employee under the ADA, because she had requested indefinite leave. (RE 26, MSJ Mem., PageID# 145-147). The magistrate judge recommended that the case proceed, citing *Kleiber v. Honda of Am. Mfg., Inc.*, 485 F.3d 862, 871 (6th Cir. 2007), for the proposition that under ADA regulations both parties are required to engage in a mandatory interactive process to determine the appropriate accommodation and to act in good faith. (RE 42, PageID# 453). Metro objected to the magistrate’s report, but the senior district judge adopted the report and recommendation of the magistrate after de novo review. (RE 49, PageID# 485).

At trial, the presiding district judge denied Metro’s Rule 50(a) motions. The jury was instructed that

[t]he ADA requires that the parties engage in good faith in an interactive process to determine whether there is a reasonable accommodation that would allow the employee to perform the essential functions of her job

without an undue burden on the Metropolitan Government. (RE 97, PageID# 731).

The jury then found that Metro had failed to provide reasonable accommodation to McMahon in violation of the ADA.² Metro's Rule 50(b) motion was denied. (Pet. App. 6).

III. Court of Appeals Proceedings.

The sole issue presented in Metro's appeal to the Sixth Circuit was whether there was sufficient evidence to support the jury's verdict. The parties waived oral argument. (Pet. App. 1-2). In a per curiam unpublished opinion, a panel of the Sixth Circuit affirmed the trial court. In pertinent part, the panel noted that the evidence showed that McMahon had worked successfully for three months after being transferred out of a toxic work situation. The panel also noted that McMahon suffered a relapse one month after the employer had reassigned her to the original location, notwithstanding McMahon's stated request to remain where she was. (*Id.*, 3).

The court of appeals distinguished *Williams v. AT&T Mobility Services, LLC*, 847 F.3d 384 (6th Cir. 2017) and *Walsh v. United Parcel Service*, 201 F.3d 718 (6th Cir. 2000), which involved the issues of an unqualified employee and a request for indefinite leave by an employee who had been on leave already for 18 months,

² The jury also decided that Metro had not constructively discharged McMahon in violation of the ADA and that Metro had not retaliated against her in violation of Title VII.

from the instant case where the trial evidence demonstrated that respondent previously had returned to work successfully and also had up to four months of unpaid leave that petitioner was authorized to provide her. (Pet. App. 3-4).

Next, the employer filed a Petition for Rehearing En Banc, notwithstanding Sixth Circuit I.O.P. 35, which states that alleged errors in determination of the facts of the case, including sufficient evidence, are matters for panel rehearing but not for rehearing en banc. In denying the employer's Petition for Rehearing En Banc, the original panel concluded that the issues raised had been fully considered upon the original submission and decision of the case. No judge requested a vote on the suggestion for rehearing en banc. (Pet. App 30).



REASONS FOR DENYING THE PETITION

Certiorari should be denied in this case for several reasons. First, there is no circuit split. The Sixth Circuit's ADA law on indefinite leave does not deviate from its sister circuits, and, as the Sixth Circuit held, the instant case is distinguishable on its facts from the cited authorities. Second, this case is a poor vehicle for reviewing the question presented given the unique facts of the case and the unpublished per curiam opinion below, which has no precedential value. Third, the Sixth Circuit's opinion was correct on the merits and there are alternative grounds for affirmance.

I. There is No Circuit Split.

The Sixth Circuit’s law on indefinite leave in ADA cases is aligned with those of its sister circuits and there is no circuit split. *See, for example, Walsh v. United Parcel Service*, 201 F.3d 718, 727 (6th Cir. 2000). “We therefore hold that when, as here, an employer already has provided a substantial leave, an additional leave period of a significant duration, with no clear prospects for recovery, is an objectively unreasonable accommodation.”

To the same effect is *Williams v. AT&T Mobility Services, LLC*, 847 F.3d 384 (6th Cir. 2017). In affirming a grant of summary judgment to the employer, the Court held that, “even if we were to assume that Williams was qualified for her position with the accommodation of leave, her request for additional leave was unreasonable. An employer is not required to keep an employee’s job open indefinitely.” *Id.*, at 394. *See, also, Gantt v. Wilson Sporting Goods*, 143 F.3d 1042, 1047 (6th Cir. 1998) (employee was not a qualified individual under the ADA, because she had been on a year-long medical leave of absence, and her physician had not released her for work or specified a day when she would be able to return).

These published Sixth Circuit opinions are on all fours with those from sister circuits that are cited by the petitioner, which hold that indefinite leave is an unreasonable accommodation, *e.g., Echevarria v. Astra-Zeneca Pharm., LP*, 856 F.3d 119 (1st Cir. 2017), and/or that an employee who cannot work for an indefinite

period of time is not a qualified individual under the ADA. *Wood v. Green*, 323 F.3d 1309 (11th Cir. 2003).

Indeed, the court below was not unmindful of the prevailing rule in the Sixth Circuit on indefinite leave as set forth in cases such as *Walsh* and *Williams*. To the contrary, the panel expressed no disagreement with these cases, but simply distinguished them based upon the specific set of facts presented in the case before it. (Pet. App. 3-4). The common denominator in *Williams* and *Walsh* and in the cases from other circuits cited by the petitioner is that the disabled employee is seeking additional leave of an extended or indefinite duration without having accomplished a successful return to work.³ The Sixth Circuit panel noted that the employee in *Williams* had been essentially absent from her job for most of 18 months without improvement, and that the employee in *Walsh* had taken a year of paid leave followed by six months of unpaid leave before requesting additional leave in excess of one year. (*Id.*)

The instant case is different. The Sixth Circuit noted that McMahon “had recovered after her previous medical leave sufficiently to work for four months without problem.” (Pet. App. 4). Further, the instant case also presents a unique fact situation where the employee’s request for leave was made after the

³ For example, in *Echevarria, supra*, the employer had provided multiple leave extensions before terminating employee who claimed that she was still unable to work. In *Wood, supra*, the employee, who had missed excessive amounts of work for years, took a period of unpaid leave and then was terminated after requesting additional leave of indefinite duration.

employer insisted that the employee return to a work environment known to be toxic for her. (*Id.*, 3). McMahon did not take any leave, paid or otherwise, while she was assigned to Woodbine. (*Id.*, 14). All of McMahon's FMLA and unpaid leave referenced by petitioner occurred during times when McMahon was assigned to work at Lentz.

In its effort to articulate a circuit split worthy of Supreme Court review, Metro fails to cite the Sixth Circuit precedent that is consistent with those of the other circuits and that was distinguished by the panel below on very dissimilar facts. Metro has purged all references to the very Sixth Circuit cases, such as *Walsh, supra*, and *Williams, supra*, that it insisted were controlling authorities in the courts below. Indeed, based upon its petition, Metro would have this Court believe that the universe of Sixth Circuit ADA law dealing with employee requests for indefinite leave consists of only two cases – the instant case and *Cehrs v. Northeast Ohio Alzheimer's Research Center*, 155 F.3d 775, 782 (6th Cir. 1998), which touches upon the subject in dicta.

II. This Case is Not a Good Vehicle for Reviewing the Question Presented.

The uniqueness of the facts in this case makes it both a poor and an unnecessary vehicle for taking up the question presented by the petitioner. Further, not only is there not a split between the circuits as to a matter of law, there is not even an intra-circuit split of authority.

Unpublished opinions such as the panel's per curiam decision in the present case have no precedential value. "[A]n unpublished opinion of this court . . . because it has no precedential value, cannot be given any weight in this case." *Mfrs.' Industrial Relations Ass'n v. E. Akron Casting Co.*, 58 F.3d 204, 208 (6th Cir. 1995). Unpublished decisions are not precedentially binding. *U.S. v. Sanford*, 476 F.3d 391, 396 (6th Cir. 2007). Metro cites no published Sixth Circuit opinions, which establish that a split exists either between the circuits or within the Sixth Circuit.

III. The Sixth Circuit's Opinion is Correct.

There also was no error in the court of appeals decision below. As the panel noted, McMahon amply demonstrated that she was capable of regular attendance and was qualified to work with the reasonable accommodation requests that she be transferred to and remain at the Woodbine Clinic. (Pet. App. 3-4). Since there was sufficient evidence for the jury to have concluded that Metro violated the ADA by breaching its good faith duty to engage in the required ADA interactive process when a) Metro transferred McMahon to Woodbine and simultaneously executed an undisclosed transfer order that would send McMahon back to Lentz or when b) Metro denied McMahon's request to remain at Woodbine when Metro insisted that McMahon return to a toxic work environment, Metro's Rule 50(b) sufficiency of the evidence appeal was properly rejected by the Sixth Circuit.

There is no doubt that the failure to engage in the required ADA interactive process is actionable. “When a party obstructs the [interactive] process or otherwise fails to participate in good faith, courts should attempt to isolate the cause of the breakdown and then assign responsibility.” *Kleiber v. Honda of Am. Mfg., Inc.*, 485 F.3d 862, 871 (6th Cir. 2007). *See, also, Rorrer v. City of Stow*, 743 F.3d 1025, 1041 (6th Cir. 2014) (citing 42 U.S.C. § 12112(b)(5)(A) and *Kleiber, supra*, court reaffirmed that an employer’s failure to exercise good faith in regard to the parties’ mandatory duty to engage in the interactive process can be an independent violation of the ADA and reversed summary judgment awarded to employer). Most recently, in *Mosby-Meachem v. Memphis Light, Gas & Water Division*, ___ F.3d ___ (6th Cir. 2018), the Sixth Circuit held that where the jury could have reasonably concluded that the employer failed to engage in the interactive process, the employer’s Rule 50(b) renewed motion for judgment as a matter of law was properly denied. Accordingly, there is in the present case an alternative ground for affirmation.

CONCLUSION

Metro seeks Supreme Court review by attempting to articulate a split between circuits where no such split exists. This case merely presents a request for a splitless, factbound error correction where there was no error by the Sixth Circuit and where there is an independent basis for affirming the trial court’s decision.

Further, the unique factual circumstances of the case and the unpublished per curiam opinion below render this a poor vehicle for reviewing the petitioner's question presented. Respectfully, this case does not merit this Court's review, and the petition should be denied.

Respectfully submitted,

AUGUST C. WINTER
Two Brentwood Commons,
Suite 150
750 Old Hickory Boulevard
Brentwood, TN 37027

BRIAN T. BOYD
Counsel of Record
750 Old Hickory Boulevard,
Bldg. 2
Suite 150
Brentwood, TN 37027
(615) 371-6119
brian@boydlegal.co

Counsel for Respondent
Beverly McMahon