

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

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**

REPLY BRIEF IN SUPPORT OF CERTIORARI

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ARGUMENT

I. Review Is Essential Because There Is A Clear Split Of Authority On The Question Presented.

As discussed in the Petition (at 8-12) and in the Amici Brief (at 4-8), the federal courts of appeals are irreconcilably split on whether an individual requesting indefinite leave could ever be considered “qualified” under the ADA. The majority of circuits to consider the issue of a request for indefinite leave have treated it as a threshold issue. They have held, in essence, that an employee who asks for indefinite leave, without any indication when she might return, cannot show, as a matter of law, that she can perform the essential functions of her job (since attendance is an essential function of *any* job) and is, thus, disqualified under the ADA. In those circuits, the analysis stops there. The burden does not shift back to the employer to do anything else. (Pet. 8-12; Amici Br. 4-8.)¹

By contrast, the Sixth and Ninth Circuits have refused to establish such a bright-line rule. Both circuits have held, in essence, that a request for “indefinite leave” might be “reasonable” depending on the circumstances of each case. *See Dark v. Curry Cnty.*, 451 F.3d

¹ As discussed in further detail in the Amici Brief, other courts have reached a similar conclusion by viewing the issue through the lens of whether an “indefinite leave” request constitutes an unreasonable request as a matter of law. Nor in those cases does the burden shift back to the employer to do anything further. Rather, “indefinite leave” is treated as a facially unreasonable request, which does not trigger any further action on the part of the employer. (Amici Br. 7-8, and cases cited there.)

1078, 1090 (9th Cir. 2006); *Cehrs v. Northeast Ohio Alzheimer's Research Ctr.*, 155 F.3d 775, 782 (6th Cir. 1998). In *Cehrs* (which was relied upon by the district court in our case, Pet. 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. *Cehrs*, 155 F.3d at 782. Instead, in cases involving “indefinite leave” requests, the Sixth and Ninth Circuits wish to reserve the ability to uphold employer liability by sometimes shifting the burden back to the employer to create, for instance, a “definite leave” plan (as the Sixth Circuit did in this case). (Pet. App. 4.) As discussed above (and at Pet. 8-12 and Amici Br 4-8), this approach of perhaps shifting the burden back to the employer, depending on the facts of the case (even where the request is for “indefinite leave”), is in direct conflict with the bright-line approach taken by the majority of circuits.

Respondent argues that there is no circuit split. In an effort to support the notion that the law of the Sixth Circuit is perfectly in keeping with that of the other circuits, respondent devotes several pages of her brief discussing two cases from the Sixth Circuit, *Walsh v. United Parcel Service*, 201 F.3d 718 (6th Cir. 2000) and *Williams v. AT&T Mobility Services, LLC*, 847 F.3d 384 (6th Cir. 2017), where the court happened to land on the side of the employer. (Br. in Opp. 8-11.)

Respondent’s analysis of the split is flawed, however, because she believes, incorrectly, that the split disappears once we explore the particular circumstances

of each case, such as: how much leave the employee had already taken, how well he or she could perform the job at an earlier point in time, and what more the employer could have done. (Br. in Opp. 8-11.) Respondent states that the Sixth Circuit's opinions in *Walsh*, *Williams*, and our case, can all be distinguished, and were properly distinguished by our panel "based upon the specific set of facts presented in the case before it." (Br. in Opp. 10.) Respondent states "the instant case is different" and then goes on to discuss what she sees as the distinguishing circumstances that led to her request for indefinite leave. (Br. in Opp. 10.)

Such an analysis, however, only serves to further the petitioner's and the amici's point about the way such "indefinite leave" cases are decided in the Sixth and Ninth Circuits (*i.e.*, using a fact-sensitive analysis and leaving open the possibility of placing the burden on the employer to propose a defined leave plan) in contrast to the way such cases are decided in the majority of circuits (*i.e.*, through application of a bright-line rule regarding disqualification under the ADA).

Indeed, the very fact that the respondent, as well as the Sixth and Ninth Circuits, wish to leave open the possibility of employer liability in "indefinite leave" cases, depending on the circumstances (such as the amount of leave already taken and the employee's level of performance during some earlier timeframe), simply highlights the conflict among the circuits and the need for this Court to establish a uniform rule. Once an employee insists on leave of indefinite duration, as the respondent did here (supported by her

doctor's statement that "it is not possible to predict when she will be able to return to work"), the other circuits that have considered the issue would have held that the employee, thus, cannot show that she can perform the essential functions of the job and, is, therefore, disqualified under the ADA. (Pet. 9-11.)

But, as the amici have pointed out (Amici Br. 8-9), the Sixth and Ninth Circuits have refused to establish such a bright-line rule and, instead, review cases involving "indefinite leave" just as the respondent says – in a very fact-sensitive, case-by-case basis – here, going so far as to examine how well the employee performed earlier in the year, at a point in time before she insisted on indefinite leave, and also examining what else the employer might have offered in response to a request for indefinite leave. (Pet. App. 3-4.)

By emphasizing what she sees as the "uniqueness" of her facts (Br. in Opp. 11), the respondent has actually drawn attention to the murkiness of the law in the Sixth and Ninth Circuits, which lies in stark contrast to the bright-line rule followed by the other circuits – and has drawn attention to the need for a uniform rule. On many occasions, this Court has granted review on an important matter such as this for that very purpose: to establish a uniform rule. *See* Kenneth S. Geller and Brian D. Netter, *Factors Guiding the Court in the Exercise of its Certiorari Jurisdiction*, 6 BUS. & COM. LITIG. FED. CTS. § 61:14 (4th ed. 2017) (discussing this Court's granting of petitions where the establishment of a "uniform rule" on an important issue is needed).

A uniform rule is needed here. This Court should grant the Petition and resolve the conflict in favor of the majority of circuits, providing a uniform interpretation that an employee whose only request for accommodation under the ADA is leave of indefinite duration cannot establish that she can perform the essential functions of the job and thus cannot, as a matter of law, be considered qualified under the Act.

II. This Case Is The Ideal Vehicle To Decide The Question Presented.

This case is ideal for resolving the question presented. The record is fully developed, and there are no lingering issues such as standing, default, waiver, or the like, that might inhibit full review and determination by this Court. This leaves only the purely legal question of: whether an employee who insists on indefinite leave may be considered qualified under the ADA.

First, the issue of respondent's disqualification under the ADA was presented below as purely a legal issue – and is presented here, too, as purely a legal issue. The petitioner raised the disqualification issue in timely-filed motions for judgment as a matter of law, both during trial and afterwards. (RE 103, PageID# 1051) (“Ms. McMahon could not meet the attendance requirements of a public health nurse, and the only accommodation that she requested at that time was indefinite leave, which is unreasonable as a matter of law. Therefore, she was not otherwise qualified under the ADA.”); (RE 103, PageID# 1064) (“In

November 2011, Ms. McMahon insisted upon indefinite leave, which is an unreasonable request that disqualified her under the ADA.”) Then, on appeal to the Sixth Circuit, the petitioner again presented the issue on purely legal grounds, insisting that its motions for judgment as a matter of law made below should have been granted. (“Did the District Court err by not entering judgment as a matter of law in favor of Nashville and dismissing this case?” Pet.’s 6th Cir. Br., Case No. 16-6498, Doc. 19, Page 6.)²

Second, the record has been fully developed. The facts of this case were developed by means of a jury trial. Accordingly, the exhibits and testimony have all been examined and re-examined, by both sides, and are fully documented in the court’s electronic docket. (RE 98, PageID# 763.) Furthermore, the arguments on both sides have all been well developed and are fully documented in the briefing below: the petitioner’s motions for judgment as a matter of law, and the responses thereto; the petitioner’s brief to the Sixth Circuit, and

² Respondent incorrectly states that the petitioner’s sole issue presented on appeal was whether there was sufficient evidence to support the jury’s verdict. (Br. in Opp. 7.) Instead, as stated above, petitioner’s issue presented to the Sixth Circuit was the legal issue of whether respondent’s case should have been dismissed “as a matter of law.” (Pet.’s 6th Cir. Br., Case No. 16-6498, Doc. 19, Page 19, “[T]he fact that Ms. McMahon was unable to ‘function on the job,’ and the fact that both of her health care providers recommended an objectively unreasonable accommodation (an indefinite period of leave) means that she could not have been considered ‘otherwise qualified’ under the ADA, as matter of law.”)

respondent's brief in opposition; as well as the briefing done as part of the petition for rehearing *en banc*.

Finally, as stated above, there are no procedural infirmities or other issues in this case such as standing, default, or waiver that would make it difficult for this Court to answer the question presented.

Respondent presents two arguments in response. She first contends that this Court should not take up this case due to the "uniqueness of the facts." (Br. in Opp. 11.) But, as discussed above, the very fact that the Sixth Circuit distinguishes among "indefinite leave" cases, depending on the circumstances, leaving open the possibility of employer liability, highlights the conflict among the circuits and the need for this Court to establish a uniform rule. Therefore, her first argument against review on purported vehicle grounds is without merit and actually underscores the need for this Court to review this case and establish a uniform rule. (Pet. 13-15.)

Respondent's second vehicle-related argument – that the Sixth Circuit's opinion is unpublished – is no more compelling than the first. This Court has of course granted review of many unpublished opinions over the years. Indeed, no circuit opinion is insulated from review simply by being designated "unpublished." Hon. Donna S. Stroud, *Unpublished Opinions*, 37 CAMPBELL L. REV. 333, 389 (2015) ("[T]he Supreme Court has granted review of a number of unpublished opinions, so the unpublished status of a case certainly does not always protect an opinion from review."),

citing Michael Hannon, *A Closer Look at Unpublished Opinions in the United States Courts of Appeals*, 3 J. APP. PRAC. & PROCESS 199, 227-28 (2001) (reviewing a sampling of fifty-seven unpublished cases from 1974 to 2000 where certiorari was granted by this Court).

Moreover, unpublished opinions can have a lasting effect in the circuit: “The fact that the Court of Appeals’ opinion is unpublished is irrelevant. Nonpublication must not be a convenient means to prevent review. An unpublished opinion may have a lingering effect in the Circuit and surely is as important to the parties concerned as is a published opinion.” *Smith v. United States*, 502 U.S. 1017, 1020 (1991) (BLACKMUN, J., dissenting); see also *Plumley v. Austin*, 135 S. Ct. 828, 831 (2015) (THOMAS, J., dissenting).

This is especially true in the Sixth and Ninth Circuits, where there is no bright-line rule about qualification under the ADA for an employee who requests indefinite leave. In “indefinite leave” cases, employers in those circuits must glean any guidance they can from the circuits’ recent opinions, whether published or unpublished, to try and determine which particular set of facts might lead to employer liability under the ADA in that circuit.

In sum, this case is the ideal vehicle to resolve the question presented because the record has been fully developed, including the legal arguments on both sides; there are no lingering issues such as standing or waiver that might hinder this Court’s full review; and the question presented is a pure question of law:

whether an employee's insistence on indefinite leave makes that employee disqualified under the ADA.

◆

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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