Legal Briefings

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The Interplay Between the ADA & the FMLA [1]

I. Introduction

Issues related to employee leave are among the most complicated – and most important – of any for employees with disabilities. The Americans with Disabilities Act (ADA) and Family Medical Leave Act (FMLA) are the two prominent federal laws that provide workplace protections for employees who need to take leave for disability-related reasons. While the ADA and FMLA share certain similarities, these two laws have notable differences as well. There are also a number of ways the ADA and FMLA interplay with one another.

This Legal Brief examines how the ADA and FMLA address issues related to employee leave, outlining everything from employer coverage to requesting leave to reinstatement. In addition to reviewing the laws' statutory and regulatory requirements, this Legal Brief illustrates legal principles and highlights interplay issues through a discussion of recent case law.

II. ADA, FMLA, and Interplay Issues

A. Background and Goals

Although the ADA and FMLA both provide leave-related protections for employees, they have different stated goals and purposes. The ADA, passed in 1990, is a broad anti-discrimination law that seeks to eliminate disability discrimination and fosters the goals of equality of opportunity, full participation and integration, independence, and economic self-sufficiency.[2] As part of its protections for employees with disabilities, the ADA defines discrimination to include the failure to provide a reasonable accommodation to an individual with a known disability.[3]Leave is considered a possible reasonable accommodation,[4] but is just one part of this broad anti-discrimination law.

On the other hand, the FMLA entitles eligible employees to up to 12 weeks of unpaid, job-protected leave in a 12-month period.[5] The FMLA's leave protections are at the very core of this law, which was passed by Congress in 1993.[6] The FMLA's stated purpose is to allow employees to balance work and family life.[7]

Although in some circumstances, employees may be eligible for leave under both the ADA and the FMLA, there are various differences between these two federal laws. Employers are encouraged to "determine an employee's rights under each statute separately, and then consider whether the two statutes overlap regarding the appropriate actions to take."[8]

B. Covered Employers

The FMLA applies to private employers with at least 50 employees working within 75 miles; public agencies, regardless of the number of employees they employ; and public or private elementary or secondary schools, regardless of the number of employees they employ.[9] The ADA applies to state and local government employers, and private employees with at least 15 or more employees.[10] Therefore, employees who work for small employers and may be ineligible for FMLA protection should always consider the ADA when they need leave for a disability-related reason.

C. Eligible Employees

To receive protection under the FMLA, employees must have been employed for at least 12 months by a covered employer and have performed 1,250 hours of work during those 12 months.[11] The ADA, by contrast, applies to all qualified employees with disabilities, regardless of the employee's tenure, and also covers job applicants with disabilities. Because the FMLA does not apply until an employee has worked for a certain amount of time and a sufficient number of hours, the ADA can provide additional protection and should be considered when leave is needed.

The FMLA protects employees with a serious health condition,[12] whereas the ADA protects qualified individuals with a disability.[13] While certain conditions may fall within both categories, employees and employers cannot presume that eligibility under one law ensures eligibility under another.

Under the FMLA, a "serious health condition" is an illness, injury, impairment, or physical/mental condition involving: (1) any period of incapacity or treatment connected with inpatient care in a hospital, hospice, or residential medical care facility; (2) any period for pregnancy or pre-natal care; or (3) continuing treatment by or under the

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supervision of a health care provider. Continuing treatment can include conditions that are permanent/long term for which treatment may not be effective (such as Alzheimer's or terminal diseases), conditions which require multiple treatments (such as chemotherapy, physical therapy, or dialysis), chronic serious health conditions (such as asthma, diabetes, or epilepsy), or a period of incapacity of more than three consecutive days.[14]

On the other hand, an individual has a disability under the ADA if he or she: (1) has a physical or mental impairment that causes a substantial limitation to one or more major life activities; (2) has a record of such an impairment; or (3) has been regarded as having an impairment.[15] Note, however, that the ADA's reasonable accommodation requirement does not apply to individuals covered by the "regarded as" prong.[16] In addition, an individual is qualified if he or she can perform the essential job functions with or without a reasonable accommodation. [17]

D. When May Eligible Employees Request Leave

Under the FMLA, an eligible employee may request leave: (1) for the birth and care of a newborn child; (2) for placement with the employee of a son or daughter for adoption or foster care; (3) to care for an immediate family member (spouse, child, or parent) with a serious health condition; or (4) when the employee is unable to work because of a serious health condition.[18]

Under the ADA, an employee may request leave for a wide range of reasons including medical appointments, treatment for new or progressive limitations, time to adjust to new medication, or anything related to an employee's *own* disability-related needs.[19] Significantly, unlike the FMLA, under the ADA, employees may not request leave due to a disability of a family member. However, if an employer otherwise provides employee leave, the employer cannot restrict an employee's use, if an employee wants to take that leave to care for a family member with a disability.[20] This would be viewed as disparate treatment (treating someone differently based on his their association to an individual with a disability) as opposed to failing to providing a reasonable accommodation of leave to an employee.

E. How Much Leave is Permitted

Under the FMLA, eligible employees are entitled to 12 weeks of leave in a 12-month period.[21] The FMLA does not provide for any extensions beyond this 12-week period. However, service members who have been injured in the line of active service or their family members have additional protections, and may receive up to 26 weeks of leave.[22]

There are no *per se* rules regarding leave under the ADA. Unlike the FMLA, there are not strict requirements for the amount of leave that is permissible. Instead, whether leave is reasonable and the amount of leave permitted is governed by the ADA's reasonable accommodation provisions.[23] The biggest question faced by courts evaluating requests for leave is whether the leave is reasonable and at what point does it pose an undue hardship for the employer.

F. Intermittent Leave

Many employees with disabilities need leave on an intermittent basis, as opposed to one large block. Both the FMLA and the ADA provide the opportunity for employees to take intermittent leave.

The FMLA's 12-week leave entitlement may be taken on an intermittent basis when it is medically necessary.[24] Employees are required to make a "reasonable effort" to schedule treatments in such a way as to avoid disruptions to an employer.[25] Further, if leave is foreseeable, an employer may require an employee to temporarily transfer (for the duration of the leave) to an available alternative position for which the employee is qualified and which better suits his/her reduced hours.[26]

The ADA also considers intermittent leave to be reasonable in certain circumstances, provided that it does not pose an undue hardship to an employer. If the nature of intermittent leave would pose an undue hardship, employers should consider reassignment to other vacant positions for which the employee is qualified.[27]

One recent case out of the Fifth Circuit demonstrates how leave under the FMLA and the ADA can interplay with one another. In *Carmona v. Southwest Airlines Co.,* the Court held that the employee's history of irregular attendance, which included a history of intermittent FMLA leave, was one factor in establishing the reasonableness of the employee's requested accommodation of intermittent leave under the ADA.[28] In *Carmona*, the U.S. Court of Appeals for the Fifth Circuit reversed the district court and upheld a jury verdict concluding that Southwest Airlines had violated the ADA when terminating the flight attendant instead of accommodating his need for leave when he experienced flare-ups of his disability. In rejecting the district court's conclusion that the flight attendant was not qualified due to his need for leave, the appellate court noted that while flight attendants cannot simply skip work on scheduled days, they do have nearly unlimited discretion in determining when they wish to work and how often they wish to work, making attendance not an essential function of this particular position. The court said that even if attendance were an essential function, the employee's attendance was adequate in light of the airline's lenient attendance policy. The court also relied on the fact that the employee had irregular attendance, partially as a result of his intermittent FMLA, for seven years without any problems.

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One recent case suggests that employees may be able to use their intermittent FMLA entitlement to modify their position in a way that would not be reasonable under the ADA. In *Santiago v. Department of Transportation*, the plaintiff worked as a material storage supervisor, a position that required significant overtime during the snowy winter months.[29] It was assumed that overtime was likely an essential function of the position. Due to his "cluster headaches," which the plaintiff described as headaches more severe than migraines, the plaintiff's doctor restricted overtime work, explaining that such work was a contributing factor to triggering his headaches. The plaintiff requested, through his attorney, the ability to use intermittent FMLA when overtime work was required, but this request was denied. The employer argued that the employee could not use FMLA because FMLA is for incapacitation not prevention. The court rejected this argument, explaining that the FMLA does not require a complete inability to do work, and supported this finding with an example in the FMLA regulations about taking leave to avoid the onset of an illness.[30] The court also considered the novel question of whether the FMLA permits a plaintiff to use his yearly FMLA leave allotment to permanently change his position into one in which he was no longer required to work overtime, and concluded that it does. In reaching this conclusion, the court noted that this is possible, as a practical matter, because the FMLA prohibits employers from forcing employees to take "more intermittent leave than is necessary,"[31] which enables employees to take leave in increments of one hour. Because FMLA permits 12 weeks of leave, employees have 480 hours, amounting to 9.2 hours per week or 1.8 hours per day. As a result, employees could use their yearly allotment to alter their schedule on a permanent basis. The court concluded "[t]he FMLA could be used to essentially create a new position for [plaintiff] that does not involve overtime."[32] It reasoned that unlike the ADA, the FMLA has no undue hardship defense and the Congressional legislative history did not suggest any restriction for this type of usage.

G. Benefits

Under the FMLA, employers must maintain an employee's existing level of coverage under a group health plan, but employers may require the employee to pay his or her share of the premiums.[33] The FMLA also provides that if paid leave is substituted for FMLA, the employee must pay his or her share of the premium by method normally used during paid leave. Further, employers must also provide employees with the same benefits, such as life or disability insurance, that are normally provided to an employee in the same leave or part-time status.[34]

The ADA looks at the maintenance of health benefits through the lens of disability discrimination. Under the ADA, an employer must continue health insurance coverage for an employee with a disability taking leave or working part-time only if the employer also provides coverage for other employees in the same leave or part-time status.[35]

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H. Paid v. Unpaid

Leave under the FMLA and ADA are generally unpaid. Under both laws, employees may choose, and employers may require, that employees take their accrued paid leave concurrently to cover some or all of their leave.[36]

I. Requesting Leave

The FMLA spells out the rules for requesting leave both in terms of timing and substance. With respect to timing, for leave that is foreseeable, such as a surgery scheduled in the future or pregnancy, employees are required to request leave at least 30 days in advance of the leave.[37] Of course, many employees who require FMLA leave have needs that are unforeseeable. In those situations, employees are required to request the leave as soon as practicable.[38] With respect to substance, when the employee is requesting FMLA leave for the first time, he must provide sufficient information for an employer to reasonably determine whether the FMLA may apply to the leave request. There is no requirement to use any specific words, such as FMLA. However, once an employee has been approved for FMLA, if she has a subsequent request, the employee is required to reference either the qualifying reason or the FMLA.

The general rule under the ADA is that employees need not use any "magic words", such as ADA or reasonable accommodation.[39] Instead, employees must only state that they have a medical need or a disability and then make a request for something related to that need. The ADA also does not require employees to make a request in writing. Despite the legal framework, it is considered a best practice for the employee to use the ADA-related words and put the request in writing.

Once an employee makes the initial disclosure, under both the ADA and the FMLA, the burden then shifts to the employer to respond in an appropriate manner. One recent case is a good lesson for employers to ask enough questions necessary to determine eligibility. In *Coutard v. Municipal Credit Union*, an employee requested to take leave so that he could care for his grandfather.[40] His employer denied the request, reasoning that the FMLA does not apply to grandparents. The FMLA, however, defines the term "parent" to include *in loco parentis* and the employee's grandfather raised him for a number of years when he was a child. The employee did not offer this additional information about the nature of his relationship with his grandfather, and his employer did not ask any supplemental questions about this relationship. Therefore, the issue in this case was which party had the obligation to investigate further. The U.S. Court of Appeals for the Second Circuit concluded that it was the employer's burden and explained that under the FMLA, if an eligible employee provides sufficient information for an employer to reasonably determine that the requested leave "may" qualify for FMLA, then the employer "must" specify what additional information is needed. Here,

the employee's request was sufficient, and if additional information were needed, it was up to the employer to make the additional request.

While the ADA does not require the use of "magic words," an employee must do more than simply note a limitation, especially if that limitation is stated in the context of an FMLA request. In *Jenks v. Naples Community Hospital, Inc.*, an employee took FMLA leave to seek treatment for breast cancer.[41] The employee's FMLA documentation showed that fatigue was a side effect of cancer, but did not make any specific request to accommodate this fatigue. The employee passed away and her estate brought an ADA lawsuit against the employer asserting a violation of the ADA. It alleged that the employee's FMLA documentation requested an ADA accommodation, and that the employer failed to provide her with a reasonable accommodation—namely additional breaks or approved long absences from her desk. The court rejected this argument and concluded that the employee never requested a reasonable accommodation, emphasizing that the FMLA documentation did not request any change to the workplace. This case is a good reminder for employees to be explicit when requesting reasonable accommodations.

J. Employer's Notice Requirements

The FMLA and ADA have very different requirements about the type of notice employers must give to employees about their rights. The FMLA has very specific requirements regarding eligibility, rights, responsibilities, and designation. When employees make a first request, employers must provide an "eligibility notice."[42] This notice must be provided within five days of the employee's request, or when the employer acquires knowledge that leave may be for a qualifying reason.[43] If an employee is not eligible for FMLA leave, an employer must explain his ineligibility. For all requests, employers must provide a rights/responsibilities notice.[44] This notice must be provided in writing and must include: notification that leave may be considered FMLA leave; certification requirements and consequences of failure to provide certification; an employee's right to substitute paid leave; instructions for premium payments; right to restoration and maintenance of benefits; and the designation as "key" employee and implications. The U.S. Department of Labor (DOL) has created a form that employers can use that includes all of this information.[45]

Finally, for all requests, employers must also provide a designation notice.[46] This request must be provided within five days of receipt of information sufficient to determine eligibility and provided for each qualifying reason. Further, it must include the designation determination, any substitution for paid leave requirements, fitness for duty requirements, and a statement of the amount of leave designated and counted against the employee's entitlement, if this information is known. The DOL has created a form that employers can use that includes all of this information.[47]

The ADA, on the other hand, has no specific rules about what type of notice an employer must give or how quickly it must respond to requests for leave. Instead, the ADA requires employers to engage in the interactive process and respond in a reasonable time frame.[48]

While the FMLA requirements may seem technical, they are important to ensure that employees can make informed decisions about whether to take leave. In *Vannoy v. Federal Reserve Bank of Richmond,* the plaintiff was diagnosed with major depression and needed in-patient treatment.[49] He requested a 30-day leave of absence; a request supported by his doctor. Although his employer approved the FMLA request, the notice provided to the employee omitted any information about the employee's right to job restoration at the conclusion of his leave and consequently, the employee did not understand that his job was protected. Fearful of losing his job, the employee reported to work. As a likely result of his untreated depression, he experienced a number of problems at work and was ultimately fired from his job. The U.S. Court of Appeals for the Fourth Circuit reversed and remanded a lower court's decision granting summary judgment to the employer. The court explained that the employer violated the FMLA by failing to provide notice of the employee's right to reinstatement. While this violation is actionable only if the plaintiff can show that it was prejudicial, here, the employee was able to establish that. The employee testified that had he known of his right to reinstatement at the conclusion of his leave, he would have taken the full 30-day leave, as recommended by his doctor, to secure in-patient psychiatric treatment. *See also, Young v. The Wackenhut Corporation*, 2013 WL 435971 (D.N.J. Feb. 1, 2013) (finding FMLA violation because the employer failed to provide individual notice and the employee then did not know return to work date).

K. Employee's Medical Certification in Support of Leave

Both the FMLA and the ADA require employees to provide medical certification in support of their requested leave. Consistent with its statutory framework, the FMLA offers specific rules and timeframes. Under the FMLA, an employer has 5 days to request certification of the serious health condition after the employee requests leave.[50] If an employee's medical support is insufficient, the FMLA dictates that the employer must inform the employee of the deficiency and allow the employee seven days to cure it.[51] Moreover, the employer may require additional medical opinions, though such additional opinions must be at the employer's expense.[52] The employer may also require periodic reports (though not fewer than 30 days) and also recertification.[53]

The ADA's requirements for leave are consistent with its requirements for any reasonable accommodation. The ADA requires medical inquiries of current employees to be job-related and consistent with business necessity.[54] Requiring medical

documentation in support of a reasonable accommodation request, including leave, is generally permitted under the ADA, but an employer's right to request documentation is limited to records sufficient to establish a disability and a need for an accommodation.[55]

While the FMLA permits certification, it also specifies how such certification must be sent to ensure receipt from an employee. One recent case touched on the permissibility of sending a certification via email, as many employers may do in today's world. In *Gardner v. Detroit Entertainment*, an employee with degenerative spinal disorder regularly took FMLA.[56] The employee expressed a preference to receive work-related correspondence through the mail, and regularly received his letters through the mail. On this occasion, however, her employer sent her FMLA certification letter via email. The employee failed to provide sufficient certification and later asserted that she failed to do so because she did not open this email in time to respond to the deadline. The court considered whether the employer's recertification notice was sufficient, given that it was sent electronically. The employer argued that under the FMLA, verbal notice is sufficient, so electronic notice should be too. The court rejected this argument and concluded that email is not proper notice. The court explained that oral notice guarantees delivery, whereas email lacks proof that the message has been opened and received.

L. Confidentiality of Medical Records in Support of Leave

The FMLA and the ADA both recognize the personal nature of medical and disability-related information and include confidentiality provisions to protect employees' rights. Both laws require protected information to be kept in files separate from a personnel file.[57] Under the FMLA, protected records include documents relating to FMLA certifications, recertifications, and medical histories of employees and/or employees' family members.[58] Interesting to the interplay question, the FMLA regulations specifically reference the ADA's confidentiality requirements and exceptions.[59]

Under the ADA, there are a handful of exceptions to an employer's confidentiality obligations. Disclosure is permitted to supervisors/managers, if information is regarding necessary restrictions or accommodations; first aid personnel; and government officials investigating compliance.[60] Also, an employer may not be required to maintain confidentiality if the employee has already voluntarily disclosed her disability.

M. Must The Leave Be Granted?

This is another area where the laws diverge and where the FMLA, in some situations, provides stronger protections for employees who need leave. Under the FMLA, eligible employees are entitled to up to 12 weeks of unpaid leave.[61] This is an entitlement

without any reasonableness analysis, and remains true even if the employee could continue working with an effective reasonable accommodation. While the FMLA does not prevent an employee from accepting an alternative to leave, acceptance must be voluntary and not coerced.[62]

Under the ADA, this question is more complicated and requires an individualized analysis. Employees seeking leave under the ADA do so as a request for reasonable accommodation. Thus, the general principles guiding the reasonable accommodation process govern an employee's request for leave. This means that whether leave is a reasonable accommodation in any given situation—and the amount of leave that is reasonable—is a fact-specific inquiry requiring an individualized assessment and subject to the undue hardship defense. Further, because employers need only provide an effective accommodation under the ADA, as opposed to the employee's preferred accommodation, they also have the right to offer an alternate accommodation instead of leave, so long as the alternate accommodation is effective. The analysis is simpler when requesting leave under the FMLA.

Is The Leave Reasonable? Would it Pose an Undue Hardship?

As to whether the requested leave is "reasonable," the answer to this question varies greatly, demonstrating the fact-intensive nature of this question.

Courts are generally unwilling to draw bright line rules, given that the reasonableness of leave varies based on the employer's policies and the employee's position. In some circumstances, courts are willing to permit extended periods of leave, whereas others find relatively short leaves to be unreasonable. Some of this depends on the nature of the job, the impact of the leave on the employer, and the way in which the employer has been able to manage in the employee's absence. Other times the case outcome simply depends on the judge or the court. The following cases help demonstrate the fact-intensive nature of these inquiries.

In *Walker v. NF Chipola, LLC*, a certified nursing assistant (CNA) worked at a nursing facility.[63] She requested six months of leave for shoulder surgery. Although her employer provided 12 weeks of leave under FMLA, it then forced her to resign or be fired. The court denied the employer's motion for summary judgment, and a jury found for the employee. The district court then upheld the jury verdict, concluding that six months of leave was a reasonable accommodation. It refused to draw any bright line rules as to what length of leave is ordinarily reasonable, finding the concept to be at odds with reasonable accommodations. It explained that here, there is a very high rate of CNA turnover, and the employer "easily" could have left the employee on the roster without giving her pay or benefits.

Another consideration is whether the leave would pose an undue hardship on the employer. As explained by the Equal Employment Opportunity Commission (EEOC): "In certain circumstances, undue hardship will derive from the disruption to the operations of the entity that occurs because the employer can neither plan for the employee's return nor permanently fill the position." [64]

While undue hardship is an employer's defense, many courts consider the reasonableness of the requested leave in conjunction with whether the leave would pose an undue hardship. Undue hardship is defined as action requiring significant difficulty or expense.[65] The ADA also provides a list of factors to consider in this inquiry including: (1) nature and cost of the accommodation needed; (2) overall financial resources of the facility, number of employees, effect on expenses/resources, impact on operations; (3) overall financial resources, size, number of employees, and type and location of facilities of employer, if the facility involved in the reasonable accommodation is part of a larger entity; and (4) type of operation of the employer, including the structure and functions of the workforce, the geographic separateness, and the administrative/fiscal relationship of the facility.[66]

For many courts, the dispositive question to whether the request is reasonable is: Is the request indefinite and open-ended or is the request for temporary leave, which would enable the employee to perform the essential functions of his job in the near future? If the answer is the former, then courts find the request to be unreasonable and/or an undue hardship. If the answer is the latter, then the leave may be required.

It has long been the case that indefinite leave has been found to be unreasonable under the ADA. *See*, *e.g.*, *Corder v. Lucent Technologies Inc.*, 162 F.3d 924, 928 (7th Cir. 1998) ("Nothing in the ADA requires an employer to give an employee indefinite leaves of absence."); *Hudson v. MCI Telecommunications Corp.,* 87 F.3d 1167, 1168 (10th Cir.1996) (concluding that indefinite leave was not a reasonable accommodation under the ADA).

Given this important distinction, courts have had the opportunity to help define the meaning of indefinite leave. For some courts, employee requests that do not provide an anticipated date of return are considered requests for indefinite leave. *See Salem v. Houston Methodist Hospital* 2015 WL 6618471 (S.D. Tex. Oct. 30, 2015) (concluding that the employee failed to provide an anticipated date of return and that requests "without an end-date [are] requests for indefinite leave.").

A common scenario is when an employee or an employee's doctor fails to provide a specific return-to-work date and any stated date is either aspirational or in the form of a date range. Courts have differed in how they treat these types of requests. For instance, in *Maat v. County of Ottawa, Michigan*, the U.S. Court of Appeals for the Sixth Circuit concluded that a date that is aspirational amounted to a request for

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indefinite leave.[67] In this case, a court reporter for a small courthouse had worked a reduced schedule for nearly seven-months and then requested full-time leave until Aug. 1. Although the doctor provided an estimated date, it was clear that the doctor did not know the "probable duration" and the stated date just signified the date they "hoped" she "might" be able to return.[68]

Other courts, however, have understood the practical realities of many medical treatments and the impossibility of providing a stated return date. In *Sharbaugh v. West Haven Manor*, the plaintiff worked as the Environmental Director of a nursing home.[69] She requested leave under the FMLA to undergo knee surgery, and provided information from her surgeon that she should be ready to return within two to six weeks from the surgery. Her employer argued that this uncertainty amounted to a request for indefinite leave. The court strongly rejected that argument, and explained that no medical professional can foresee the exact date a patient will recover. Nonetheless, that does not mean that an estimate or a range makes a request indefinite or open ended. Despite this conclusion, employees are encouraged to be as specific as possible when providing an estimated return to work date when requesting leave as a reasonable accommodation, and provide updates to employers promptly if the timing changes.

Employers are cautioned from calling all requests indefinite to escape liability, as courts are regularly rejecting such arguments. *See Bernhard v. Brown & Brown of Lehigh Valley, Inc.*, 720 F. Supp. 2d 694, 701 (E.D. Pa. 2010) (rejecting employer's argument that the employee's request for an additional three month leave of absence as a reasonable accommodation under the ADA, following the expiration of his FMLA leave, as "disingenuous[]" and "absurd"); *Feldman v. Law Enforcement Associates Corp.*, 779 F. Supp. 2d 472 (E.D.N.C. 2011) (rejecting an employer's assertion that an employee with Multiple Sclerosis sought "indefinite" leave, as the employee sought leave for "at least three weeks" on two separate occasions).

Short of indefinite leave, courts vary significantly in the amount of leave time they find to be reasonable. As a few examples, in *Schwab v. Northern Illinois Medical Center*, the court found a one month personal leave enabling an employee to be available for medical appointments to treat breast cancer could have been a reasonable accommodation under the ADA."[70] Similarly, in *Feldman v. Law Enforcement Associates Corporation*, the court denied the employer's motion to dismiss, finding that had the employer approved the employee's leave request, the employee, who had sought leave due to exacerbations of Multiple Sclerosis, could have returned after seven weeks of leave.[71] However, in *Hwang v. Kansas State University*, the court held that it was unreasonable to require over six months of leave as a reasonable accommodation.[72]

Another way to determine whether the leave is reasonable is to participate in the

interactive process. To this end, employers are cautioned from relying on inflexible leave policies where employees are automatically terminated after a certain amount of leave. This has been a priority area of litigation for the EEOC given that this type of policy disregards an employer's obligation to engage in the interactive process for each employee to determine whether an extension of leave is reasonable.

In *EEOC v. Interstate Distributor Company*, the EEOC filed a nationwide lawsuit challenging the trucking company's "maximum leave policy," as unlawfully denying reasonable accommodations to hundreds of employees.[73] The maximum leave policy provided that employees who needed leave in excess of twelve weeks were terminated automatically. According to the EEOC, the employer has an obligation under the ADA to consider whether it would be reasonable to provide additional leave time as a reasonable accommodation. The employer's policy also required employees to have no restrictions upon their return to the workplace, a policy also challenged by the EEOC. In 2012, this case settled for $4.85 million.[74] Further, the employer was enjoined from engaging in further discrimination on the basis of disability, required to modify its policies to include reasonable accommodations for employees with disabilities, provide periodic training on the ADA to employees, issue reports to the EEOC, post the settlement in the workplace, and appoint a monitor to ensure compliance.

The EEOC reached a similar settlement in *EEOC v. Sears Roebuck & Co.*, where it asserted that Sears maintained an inflexible workers' compensation leave policy, and terminated employees who exhausted their leave instead of considering accommodations, including an extension of their leave.[75] In 2010, this case settled for $6.2 million.[76] *See also, EEOC Settlement with Verizon Communications* (settling case for $20 million regarding Verizon's "no fault" attendance policy that failed to consider reasonable accommodations for employees with disabilities).[77] *See also, Gibson v. Lafayette Manor, Inc.*, 2007 WL 951473 (W.D. Pa. March 27, 2007) (concluding that blanket policies may violate the ADA because employers are not engaging in the ADA's required interactive process; in this case, an employee was fired after she exhausted her 12-week FMLA allotment per employer policy).

However, one recent case out of the Tenth Circuit questioned whether all inflexible leave policies are unlawful. In *Hwang v. Kansas State University*, the Tenth Circuit held that the University's inflexible leave policy, which permitted only six months of paid leave, was not impermissible, noting that leave in excess of six months is rarely reasonable.[78] In this case, a teacher required a leave of absence for cancer treatments, and after six months, was automatically terminated under the University's stated leave policy. While this opinion raises some questions about inflexible leave policies, employers are still cautioned from relying on them too heavily, and should be reminded to engage in the interactive process to determine if a leave extension is reasonable in any given situation.

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One recent case out of the Sixth Circuit addressed a leave policy whereby the employer automatically terminated an employee after six months of leave *unless* prior to the expiration of the leave, the employee submitted a request for an extension, supported by medical documentation demonstrating the employee's ability to return to work within a reasonable time.[79] This case, *Cash v. Siegel-Robert, Inc.*, involved a mold setter who took a medical leave of absence to undergo surgery for back pain.[80] Prior to the expiration of his leave, the employee sought guidance from his employer about how to apply for long term disability benefits. He did not, however, ask for a leave extension or any other accommodation. Just three days after his leave expired, the employee was cleared to return to work, and he went to the plant to provide this documentation to his HR manager. The HR manager explained that his leave had already expired; she did not offer to revoke the termination or reassign him to a different position. Company policy permitted the employee to reapply for employment, but he did not do so. Without criticizing the leave policy, the Sixth Circuit affirmed the dismissal of the employee's claim for discriminatory termination and failure to accommodate. Regarding his failure to accommodate, the Sixth Circuit explained that the employee failed to propose an accommodation, and even if the doctor's note was a "tacit request," he had already been terminated according to company policy. Regarding his discriminatory termination case, the Sixth Circuit stated that the employee knew that his leave would expire, but did not seek additional leave time; instead, he filed for long term disability, which reasonably signaled to the HR manager that he was unable to return to work at the end of his leave. Interestingly, after the employee initiated litigation, the employer revised its practices and now communicates with employees nearing the end of their medical leave of absence, and specifies how to request an extension of leave if needed. This suggests that even if a policy is deemed lawful, maintaining an open line of communication and assessing accommodations on an individualized basis is still a best practice for employers.

Is The Leave Effective?

Whether leave is considered a reasonable accommodation also depends on whether it would permit the employee to return to work. For instance, in *Sclafani v. PC Richard & Son*, an employee was diagnosed with Post Traumatic Stress Disorder ("PTSD") after surviving an assault in her employer's parking lot.[81] Following the exhaustion of her FMLA leave, the employee sought additional unpaid leave under the ADA. In her accommodation request, however, her doctor stated that she could never again work at her previous place of employment. The court concluded that because the employee's requested leave would not have rendered her qualified, the employer did not violate the ADA by denying the additional leave. *See also, Basden v. Professional Transport Inc.*, 714 F.3d 1034 (7th Cir. 2013) (upholding the employer's decision to deny an employee's request for a 30-day leave of absence, even though the employer

failed to engage in the interactive process, because the employee suggested that she would remain unable to return to work following the requested leave time).

Is There An Alternative Effective Accommodation?

Under the ADA, employers are generally able to choose which accommodation to provide to an employee, so long as the accommodation is effective. In *Daley v. Cablevision Sys. Corp.*, the plaintiff worked as an Advanced Field Services Technician.[82] He was injured in a motorcycle accident and took various leaves of absence, including FMLA leave. The employee requested additional leave under the ADA. His medical record in support of this request stated that the employee was capable of performing sedentary work, but he was unable to work as a technician for approximately six months. Instead of providing the full six months of leave, the employer granted the employee an additional two months, then tried to reassign the employee to a vacant, sedentary position. The employee refused all positions, with the exception of one position that would be considered a promotion, and was ultimately fired. The court found for the employer in this case. It held that because the plaintiff had refused to consider the sedentary position, the employer had met its burden under the ADA.

However, when an employer is choosing between an accommodation that enables the employee to perform the essential functions of his job, thereby maintaining a salary, and unpaid leave as an accommodation, there is a line of cases that hold that unpaid leave is improper. For instance, in *Mamola v. Group Manufacturing Services, Inc*., the court held that unpaid leave may not be reasonable when an employee specifically requests another accommodation that would allow him to perform the essential functions of the position without missing work.[83] In *Mamola*, a salesman was hospitalized after a severe automobile accident resulting in a brain injury, the loss of his left eye, and occurrences of periodic seizures; resulting in a series of surgeries. Following one surgery with a recuperation period of approximately five weeks, the employee requested permission to telework. The employer rejected this accommodation, citing the "security and integrity of the Company's computer network and data" and instead permitted the employee to continue unpaid leave.[84] The court permitted the employee's case to proceed past summary judgment, and stated "[a] reasonable fact finder could therefore conclude that unpaid leave actually prevented [the employee] from earning wages for work that he would have performed if [the employer] had granted the requested accommodation."[85] *See also Reilly v. Revlon, Inc.*, 620 F.Supp.2d 524 (S.D.N.Y. 2009) ("Providing paid disability leave above and beyond the FMLA requirements is commendable, but providing benefits to a person who cannot work is not the same thing as making an accommodation in the workplace so the person can work.").

Other courts have reached similar conclusions, cautioning employers from relying too

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heavily on leave instead of considering accommodations that would keep an employee in the workplace. *See also, Woodson v. Int'l Bus. Machines, Inc.*, 2007 WL 4170560, at *5 (N.D. Cal. Nov. 19, 2007) (noting that leave may not accommodate an employee if other accommodations would be more effective); *Jadwin v. Cnty. of Kern*, 610 F. Supp. 2d 1129 (E.D. Cal. 2009) (finding that full time leave may not have been a reasonable accommodation given the fact that the employee was cleared to return to work on a part-time basis and had been permitted to do so for a period of time); *But see, Gleed v. AT & T Servs., Inc.*, 2014 WL 3708546, at *1 (E.D. Mich. July 28, 2014) (finding no ADA violation when the employer denied plaintiff's request for a modified work schedule, and offered leave, some of which was potentially paid instead, and plaintiff rejected that offer and resigned, stating that the employer has the right to choose between effective accommodations). As a best practice, employers are discouraged from automatically assuming that leave is the best accommodation option for an employee with disability, and instead are encouraged to consider ways through the interactive process to maintain an employee's position with accommodation.

N. Right to Reinstatement

The FMLA *guarantees* the right to return to the same position or to a position "virtually identical to the employee's former position in terms of pay, benefits and working conditions, including privileges, perquisites and status. It must involve the same or substantially similar duties and responsibilities, which must entail substantially equivalent skill, effort, responsibility, and authority."[86] An employer is not required to reinstate an employee if the employee would have been terminated if not on leave or if the employee is unable to perform his job.[87] Further, an employer is not required to reinstate an employee if the employee is a "key employee."[88] A key employee is among the highest paid 10% of employees within 75 miles of worksite and restoration to employment would cause substantial and grievous injury to employer.[89] There is no undue hardship defense.

Under the ADA, an employee *must* be reinstated to the same position absent an undue hardship.[90] If it would pose an undue hardship on the employer to reinstate the employee, employers must consider reassignment to a vacant position for which the employee is qualified.[91]

O. Medical Requirements to Support Return From Leave

Employers are permitted, under both the FMLA and the ADA, to ensure that employees are medically capable of returning to work. Under the FMLA, requests for medical certification must be specific to the particular health condition that necessitated the FMLA leave.[92] Generally, recertification is not permitted for each intermittent absence. Under the FMLA, employers are not permitted to require a second or third opinion, so long as the employee's certification is sufficient.[93]

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The rules under the ADA are not as black and white. Employers are limited to requesting medical documentation and/or requiring a medical examination that is job-related and consistent with business necessity.[94] If documentation is insufficient, the employer should explain why and permit a reasonable amount of time for an employee to provide supplemental information. While the cost of obtaining the information is generally borne on the employee, if the employer wants to send the employee to its own doctor, the employer must then bear the cost.[95]

When employers follow these standards, employees will have a difficult time establishing a legal violation. For instance, in *Cleveland v. Mueller Copper Tube Co.*, an employee with various restrictions from prior injuries (including lifting) sought to return from workers' compensation/FMLA leave.[96] She bid on a position, but because the position had lifting requirements in excess of her restrictions, her employer initially refused this placement. However, the employer asked the employee to have her doctor evaluate her restrictions through a functional capacity evaluation. The employee refused and was laid off. She sued under the ADA, and the court held that the employer had an objectively reasonable basis for seeking a functional capacity evaluation. The court found no ADA violation because the employer attempted to undertake an individualized assessment to determine whether she posed a direct threat, and also found no FMLA violation because the employee's failure to submit to a reasonably requested examination was the reason for her termination.

Sometimes, information provided on FMLA documentation may prompt an employer to seek medical documentation pursuant to the ADA. For example, in *Leonard v. Electro-Mechanical Corporation*, a janitor with degenerative disc disease was cleared to return to work without restrictions.[97] Two months after returning to work, the employee submitted an FMLA request form where his doctor stated that he was unable to perform his job when his back condition flared up, estimating this to occur about one to two times a month for three to five days each time. The employee also told his manager that he needed to be able to sit and rest. Following this information, the employer required the employee to go to an independent medical examination. The employee refused, was fired, and then sued under the ADA. The court upheld the termination, finding that the employer's request for a medical examination was proper in light of the doctor's seemingly conflicting opinions and the employee's own statements.

P. Reinstatement Rights For Employees Unable To Do Previous Job Without Reasonable Accommodations

The right to reinstatement for employees who require accommodation is one area where the ADA provides stronger protections than the FMLA. Under the FMLA, an employee need not be reinstated if he is no longer able to perform an essential function of his position."[98] The FMLA's regulations provide if "the employee is unable to perform an essential function of the position because of a physical or mental condition,

including the continuation of a serious health condition or an injury or illness also covered by workers' compensation, *the employee has no right to restoration to another position under the FMLA*."[99] Interestingly, the regulations themselves discuss the interplay with the ADA by acknowledging that despite this limitation, an employer may have obligations under the ADA, as well as other state leave laws or workers' compensation laws. *See Battle v. United Parcel Service, Inc.*, 438 F.3d 856, 864-65 (8th Cir. 2006) (noting that the FMLA "omits any requirement that employers seek to reasonably accommodate employees who cannot perform the essential functions of their respective positions" and that any duty to accommodate is governed solely by the ADA).

Under the ADA, however, if the manifestation of an employee's disability renders him unable to return to his current position without accommodations, the employee can seek a reasonable accommodation to his current position or seek reassignment as a reasonable accommodation. In *Lafata v. Church of Christ Home for Aged*, an employee returning from FMLA leave was told that she was being reinstated in a different position and she could "take it or leave it."[100] The employee asserted that this violated the ADA, because her employer failed to engage in the interactive process, and the Sixth Circuit agreed for purposes of summary judgment. The court held that the employer was required to offer a reasonable accommodation and engage in the interactive process.

A good example of the difference in these statutory requirements comes from the case *Piburn v. Black Hawk-Grundy Mental Health Center, Inc.*[101] In *Piburn*, a psychiatrist with sleep apnea, major depressive disorder, and other disabilities took FMLA leave for treatment. Upon her return, the employee sought the reasonable accommodations of a transcription service and a reduced patient schedule. She was not provided with these accommodations and was ultimately fired. The employee brought a lawsuit alleging violations of both the ADA and the FMLA. The court found for the employee, denying the defendant's motion for summary judgment regarding her ADA claim and held that the plaintiff presented sufficient evidence to suggest that her requested accommodations were reasonable under the ADA. Her FMLA case did not have the same fate, however. The court granted the defendant's motion for summary judgment because the employee was not able to return to her job absent accommodations. In so doing, the court stated: "Because the FMLA does not impose a duty of reasonable accommodation, and Pilburn specifically requested upon his return from FMLA leave an accommodation . . . Piburn is not entitled to reinstatement under the FMLA."[102]

Some courts have also concluded that it is permissible for employers to require a returning employee to take FMLA leave to effectuate a reasonable accommodation request. In *Basta v. American Hotel Register Co.*, the employee took two leaves of absence to recover from an on-the-job shoulder injury, and asked to return to a part-time schedule—a four-hour work day.[103] The employer agreed to this accommodation,

but required the employee to use his FMLA leave to account for the additional hours. When challenged, the court held that it was not "improper for an employer to provide an employee with a reduced schedule as a reasonable accommodation while also attributing the unworked portion of the plaintiff's workday as leave time under the FMLA."[104] The court emphasized that the employer provided the employee with notice of deduction, and that the employee did not explicitly request to be automatically transferred to a part-time position.

Q. Protection From Retaliation

The FMLA and the ADA both prohibit employers from retaliating against employees or prospective employees for exercising or attempting to exercise their rights under these federal laws. One case example showing the interplay between these two laws is *Gresham-Walls v. Brown*.[105] In *Gresham-Walls*, the employee worked for the county clerk's office and took FMLA leave, both block and intermittent leave, on a regular basis to address her mental health conditions. Approximately three weeks following one of her leaves, she was fired and told that her services were no longer needed. The plaintiff was able to establish evidence that her supervisor complained to management about the plaintiff's absences, drafted a memo detailing her concerns about the plaintiff's absenteeism, and requested that the plaintiff be transferred to another department. The supervisor stated that she needed an administrative assistance who was more regularly in the office due to time-sensitive projects and admitted that she considered the plaintiff's absences when evaluating her performance. Accordingly, the court denied the employer's motion for summary judgment on the plaintiff's claims for retaliation under the FMLA and the ADA. *See also Sowell v. Kelly Services, Inc.*, 2015 WL 5964989 (E.D. Pa. Oct. 14, 2015) (denying employer's motion for summary judgment on the FMLA and ADA retaliation claims when employee was fired just two days after telling management that she would likely need FMLA leave for a medical procedure).

R. Enforcement

Employees can enforce their rights under the FMLA by filing a complaint with the Wage and Hour Division of the U.S. Department of Labor or by filing a private lawsuit. Employees are not required to exhaust administrative remedies with the DOL prior to initiating private litigation;[106] however, filing with the DOL does not toll the statute of limitations for filing an FMLA lawsuit. The statute of limitations for FMLA violations is two years or three years for willful violations.[107]

The ADA, on the other hand, is enforced by the Equal Employment Opportunity Commission (EEOC).[108] Before filing a private lawsuit under the ADA, employees must exhaust administrative remedies by filing a charge of discrimination within 180 days of the date of the adverse employment action (or 300 days if there is a work share

agreement with the agency that enforces the state disability discrimination law.)[109] After receiving a right to sue letter from the relevant administrative agency, the employee then has 90 days to file an ADA lawsuit in court. Federal employees have a different process, which requires them to first file with their agency's EEO counselor within 45-days of the adverse action. [110]

III. Conclusion

Many employees need to take leave from the workplace at some point in their career, whether it is for the birth of a new baby, to care for a sick loved one, or to address their own medical condition. The FMLA and the ADA offer important protections, enabling employees to address their personal or medical needs without losing their job. As outlined in this Legal Brief, the ADA and FMLA are similar, different, overlapping and complementary. Employers are required to apply the law that provides the strongest employee protections and, therefore, it is critical for employees and employers to understand the ADA's and FMLA's similarities, differences, and interplay.

NOTES

1. This Legal Brief was written by Barry C. Taylor, Vice President of Systemic Litigation and Civil Rights, Rachel M. Weisberg, Staff Attorney and Employment Rights Helpline Manager with Equip for Equality, the Illinois Protection and Advocacy Agency (P&A). The authors would like to thank Hannah Walsh, Equip for Equality Employment Rights Helpline Attorney and Megan Harkins, Equip for Equality Legal Intern, for their valuable assistance with this Legal Brief. Equip for Equality is providing this information under a subcontract with the Great Lakes ADA Center.
2. 42 U.S.C. § 12101(a)(7).
3. 42 U.S.C. § 12112(b)(5)(a).
4. *See*, *e.g.*, 29 C.F.R. pt. 1630 app. §1630.2(o) ("…other accommodations could include permitting the use of accrued paid leave or providing additional unpaid leave for necessary treatment…").
5. 29 U.S.C. § 2601.
6. 29 C.F.R. § 825.112(a).
7. 29 U.S.C. § 2601(b)(1).
8. *EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act*, Oct. 17, 2002, Question 21, http://www.eeoc.gov/policy/docs/accommodation.html.
9. *See Fact Sheet #28: The Family and Medical Leave Act, U.S. Department of Labor Wage and Hour Division*, http://www.dol.gov/whd/regs/compliance/whdfs28.pdf
10. 29 U.S.C. § 12111(5)(A).

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11. 29 C.F.R. § 825.110.
12. 29 C.F.R. § 825.112(a).
13. 29 C.F.R. § 1630(4)(a).
14. 29 C.F.R. § 825.113-115.
15. 29 C.F.R. § 1630.2(g)(1)(i)-(iii).
16. 29 C.F.R. § 1630.9(e).
17. 29 C.F.R. § 1630.2(m).
18. 29 C.F.R. § 825.112(a)(1)-(4).
19. *EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act*, *supra*, note 8.
20. 29 C.F.R. § 1630.8.
21. 29 C.F.R. § 825.100(a).
22. 29 C.F.R. § 825.100(a).
23. *Employer-Provided Leave and the American with Disabilities Act*, U.S. Equal Employment Opportunity Commission, May 9, 2016, https://www.eeoc.gov/eeoc/publications/ada-leave.cfm#_edn1.
24. 29 C.F.R. § 825.100(a).
25. *Fact Sheet #28: The Family and Medical Leave Act*, *supra*, note 9.
26. *EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act*, Question 23, *supra*, note 8.
27. *The Family and Medical Leave Act, The Americans with Disabilities Act, and Title VII of the Civil Rights Act of 1964*, U.S. Equal Employment Opportunity Commission, July 6, 2000, Question 13, https://www.eeoc.gov/policy/docs/fmlaada.html.
28. *Carmona v. Southwest Airlines Co.,* 604 F.3d 848 (5th Cir. 2010).
29. *Santiago v. Department of Transportation,* 50 F.Supp.3d 136 (D. Conn. 2014).
30. 29 C.F.R. § 825.115(f).
31. *Santiago,* 50 F.Supp.3d at 147.
32. *Id*.
33. *Fact Sheet #28A: Employee Protections under the Family and Medical Leave Act*, U.S. Department of Labor Wage and Hour Division, https://www.dol.gov/whd/regs/compliance/whdfs28a.htm.
34. *Id.*
35. *EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act*, Question 21, *supra*, note 8.
36. *Id*.
37. 29 C.F.R. § 825.302(a).
38. *Id*.
39. *EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act*, Question 1, *supra*, note 8.

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40. *Courtard v. Municipal Credit Union,* 848 F.3d 102 (2nd Cir. 2017).
41. *Jenks v. Naples Community Hosp., Inc.,* 829 F. Supp. 2d 1235 (M.D. Fla. 2011).
42. *Fact Sheet #28D: Employer Notification Requirements under the Family and Medical Leave Act*, U.S. Department of Labor Wage and Hour Division, https://www.dol.gov/whd/regs/compliance/whdfs28d.htm.
43. *Id*.
44. *Id*.
45. Notice of Eligibility and Rights and Responsibilities (Family and Medical Leave Act), U.S. Department of Labor Wage and Hour Division, www.dol.gov/whd/forms/wh-381.pdf.
46. *Fact Sheet #28D: Employer Notification Requirements under the Family and Medical Leave Act*, *supra*, note 42.
47. Designation Notice, (Family and Medical Leave Act), U.S. Department of Labor Wage and Hour Division, www.dol.gov/whd/forms/wh-382.pdf.
48. *Jacobs v. N.C. Admin. Office of the Courts*, 780 F.3d 562 (4th Cir. 2015).
49. *Vannoy v. Federal Reserve Bank of Richmond,* 827 F.3d 296 (4th Cir. 2016).
50. *Fact Sheet #28D: Certification of a Serious Health Condition under the Family and Medical Leave Act*, U.S. Department of Labor Wage and Hour Division, https://www.dol.gov/whd/regs/compliance/whdfs28g.htm.
51. *Id*.
52. *Id*.
53. *Id*.
54. 29 C.F.R. § 1630.14(c)
55. *EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act*, Question 6, *supra*, note 8.
56. *Gardner v. Detroit Entertainment,* 2014 WL 5286734 (E.D. Mich. Oct. 15, 2014).
57. *The Family and Medical Leave Act, The Americans with Disabilities Act, and Title VII of the Civil Rights Act of 1964*, Question 11, *supra*, note 27.
58. 29 C.F.R. § 825.500(g).
59. *Id*.
60. 29 C.F.R. § 1630.14(d)(4)(i).
61. 29 C.F.R. § 825.100(a).
62. *The Family and Medical Leave Act, The Americans with Disabilities Act, and Title VII of the Civil Rights Act of 1964*, Question 18, *supra*, note 27.
63. *Walker v. NF Chipola, LLC,* 2016 WL 1714871 (N.D. Fla. March 28, 2016).
64. *EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, supra*, note 8.
65. 29 C.F.R. § 1630.2(p).
66. 42 U.S.C. § 12111.
67. *Maat v. County of Ottawa, Michigan***,** 657 Fed.Appx. 404 (6th Cir. Aug. 10, 2016).

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68. *Id*. at 413.
69. *Sharbaugh v. West Haven Manor, LP* 6834613 (W.D. Pa. Nov. 21, 2016).
70. *Schwab v. N. Illinois Med. Ctr.*, 2014 WL 2111124, at *10 (N.D. Ill. May 20, 2014).
71. *Feldman v. Law Enforcement Assoc. Corp.*, 779 F. Supp. 2d 472 (E.D.N.C. 2011).
72. *Hwang v. Kansas State Univ.*, 753 F.3d 1159 (10th Cir. 2014).
73. *EEOC v. Interstate Distrib. Co.*, Civil Action No. 12-cv-02591-RBJ (D.Colo.).
74. Interstate Distributor Company to Pay Nearly $5 Million to Settle EEOC Disability Suit, EEOC Press Release, Nov. 9, 2012, available at www.eeoc.gov/eeoc/newsroom/release/11-9-12.cfm.
75. *EEOC v. Sears Roebuck & Co.*, Civil Action No. 04-cv-7282 (N.D. Ill.).
76. Sears, Roebuck to Pay $6.2 Million for Disability Bias, EEOC Press Release, Sept. 29, 2009, available http://www1.eeoc.gov//eeoc/newsroom/release/9-29-09.cfm; Court Approves $6.2 Million Distribution in EEOC v. Sears Disability Settlement, EEOC Press Release, Feb. 5, 2010, available http://www.eeoc.gov/eeoc/newsroom/release/2-5-10a.cfm.
77. Verizon to Pay $20 Million to Settle Nationwide EEOC Disability Suit, EEOC Press Release, July 6, 2011, available http://www1.eeoc.gov//eeoc/newsroom/release/7-6-11a.cfm.
78. *Hwang v. Kansas State Univ.*, 753 F.3d 1159 (10th Cir. 2014).
79. *Cash v. Siegel-Robert, Inc.*, 548 Fed.Appx. 330 (6th Cir. 2013).
80. *Id.*
81. *Sclafani v. PC Richard & Son*, 668 F. Supp. 2d 423 (E.D.N.Y. 2009).
82. *Daley v. Cablevision Sys. Corp.,* 2016 WL 880203 (S.D.N.Y. March 7, 2016).
83. *Mamola v. Group Mfg. Svcs., Inc*., 2010 WL 1433491 (D. Ariz. April 9, 2010).
84. *Id*. at *2 (internal citations omitted).
85. *Id*. at *4.
86. 29 C.F.R. § 825.215(a).
87. 29 C.F.R. § 825.216(a).
88. 29 C.F.R. § 825.216(b).
89. 29 C.F.R. § 825.217(a).
90. EEOC Enforcement Guidance, *supra*, n. 4.
91. www.eeoc.gov/policy/docs/accommodation.html
92. *Fact Sheet #28D: Certification of a Serious Health Condition under the Family and Medical Leave Act*, *supra*, note 50.
93. *Id*.
94. 29 C.F.R. § 1630.14(c).
95. *EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act*, Question 7, *supra*, note 8.
96. *Cleveland v. Mueller Copper Tube Co.,* 2012 WL 1192125 (N.D. Miss. April 10, 2012).

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97. *Leonard v. Electro-Mechanical Corporation*, 2014 WL 1385356 (W.D. Va. Apr. 9, 2014).
98. 29 C.F.R. § 825.216(c).
99. *Id.* (emphasis added).
100. *Lafata v. Church of Christ Home for Aged*, 325 Fed.Appx. 416, 418 (6th Cir. 2009).
101. *Piburn v. Black Hawk-Grundy Mental Health Center, Inc.,* 2016 WL 1464570 (N.D. Iowa Apr. 13, 2016).
102. *Id*. at *19.
103. *Basta v. American Hotel Register Co.,* 2012 WL 88187 (N.D. Ill. Jan. 11, 2012).
104. *Id*. at *11.
105. *Gresham-Walls v. Brown,* 2014 WL 6685478 (N.D. Ill. Nov. 25, 2014).
106. 29 C.F.R. § 825.400(a).
107. 29 C.F.R. § 825.400(b).
108. 29 U.S.C. § 12117.
109. *Time Limits for Filing a Charge,* www.eeoc.gov/employees/timeliness.cfm.
110. *Overview of Federal Sector EEO Complaint Process*, www.eeoc.gov/federal/fed_employees/complaint_overview.cfm.

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