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The Most Difficult ADA Reasonable Accommodation Issues: Reassignment and Leave of Absence

Stephen F. Befort
University of Minnesota Law School, befor001@umn.edu

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The Americans with Disabilities Act obligates employers to provide reasonable accommodations to disabled workers as a means of enabling those workers to perform essential job duties. Of all the accommodations contemplated by the ADA, leaves of absence and reassignment to another position pose the most troublesome legal and human resource issues. These two types of accommodations do not merely tweak the job that a disabled employee is asked to perform, but instead excuse such employees from performing their original job assignment. While facilitating disabled employees to remain gainfully employed, these accommodations impose significant burdens on both employers and fellow employees. This Article discusses a number of legal issues currently in dispute concerning these two accommodations, and recommends several policy-based solutions that would aid in defining the appropriate contours of the reasonable accommodation duty.

The Americans with Disabilities Act (ADA) turns ten years old in 2002. The statute, although enacted with widespread support, has spawned a deluge of litigation. This litigation explosion reflects
a broad diversity in judicial construction of the ADA and, in turn, has influenced the Supreme Court to issue eight decisions interpreting the act over a brief span between 1998 and 2001. In an earlier article, a co-author and I argued that both the litigation explosion and the judicial dissonance phenomenon resulted, in part, from the fact that the ADA's anti-discrimination formula differed from that of other federal anti-discrimination statutes. Under Title VII, for example, an employer is prohibited from discriminating "because of" an individual's race, color, religion, sex, or national origin. The ADA's anti-discrimination formula is more complicated in two significant respects. First, only individuals who have a qualifying "disability" have standing to assert a claim under the ADA. Second, in ascertaining whether an employer is acting with discrimination under the ADA, the statute asks whether the employee is qualified for the job "with or without reasonable accommodation.

Much of the litigation that has arisen under the ADA has involved these two unique ADA provisions. During the ADA's first decade, disputes concerning the breadth of the "disability" definition occupied center stage. Five of the Supreme Court's eight decisions have dealt with this issue.

As the Supreme Court has clarified who is disabled for purposes of the ADA, the focus of attention now is shifting to the reasonable accommodation provision. The Supreme Court, in 2001, decided its
first reasonable accommodation case and accepted review of another.

Determining the scope of the reasonable accommodation requirement is difficult in several respects. First, the notion of what accommodation may be "reasonable" necessarily is imprecise. This task becomes even more difficult since the ADA excuses employers from undertaking even reasonable accommodations if they impose an "undue hardship." Both concepts employ fuzzy adjectives. Second, the reasonable accommodation/undue hardship inquiry is fact specific with respect to each individual employer. An accommodation that may be reasonable for one employer may impose an undue hardship on another. Finally, some critics see the reasonable accommodation requirement as a form of affirmative action. Although I believe that significant differences exist between the reasonable accommodation and affirmative action concepts, some courts have declined to require accommodations that they view as providing preferential treatment for the disabled.

While reasonable accommodation issues are problematic in general, the most difficult accommodation issues involve reassignments and leaves of absence. A "reassignment," for purposes of the ADA, involves the transfer of a current employee to a different, vacant position with the same employer. A "leave of absence" refers to an employer's grant of a temporary period of absence from the workforce accompanied with an expectation that the employee will return to the same employment position. These accommodations involve a

10. PGA Tour, Inc. v. Martin, 532 U.S. 661, 690-91 (2001) (holding that certain professional golf tournaments must permit a disabled golf professional to ride in a golf cart so as to enable him to participate in the tournaments, and that such a reasonable modification would not fundamentally alter the nature of those events).


13. See id. § 12111(10); Befort & Thomas, supra note 5, at 70.


15. Stephen F. Befort & Tracey Holmes Donesky, Reassignment Under the Americans with Disabilities Act: Reasonable Accommodation, Affirmative Action, or Both?, 57 WASH. & LEE L. REV. 1045, 1086 (2000) (stating that "although similarities can be drawn between affirmative action and reasonable accommodation, significant differences justify keeping the two concepts separate").


18. See generally EEOC, Enforcement Guidance: Reasonable Accommodation and Undue Hardship under the Americans with Disabilities Act, EEOC
greater restructuring of the work environment than do other types of reasonable accommodations and place more burdens on employers and co-employees.\(^{19}\)

This Article attempts a critical analysis of the reassignment and leave of absence accommodations. The Article does so initially by examining the regulatory and judicial debate concerning the proper application of these accommodations. It then goes on to make a number of suggestions designed to reduce the uncertainty currently surrounding these two accommodations.

Part I of this Article provides an overview of the reasonable accommodation requirement under the ADA. Part II explores the reasons why reassignments and leaves of absence, among all the possible types of accommodation for the disabled, have fueled the most controversy. Part III discusses the reassignment accommodation in particular and reviews the four issues on which the circuit courts and/or the Equal Employment Opportunity Commission (EEOC) have reached differing viewpoints. Part IV similarly discusses the leave of absence accommodation and summarizes the uncertain state of the case law. Part V then suggests more predictable guidelines for determining the appropriate applications of these two types of accommodations.

I. THE REASONABLE ACCOMMODATION REQUIREMENT

A. The Role of Reasonable Accommodation.

The ADA prohibits discrimination against a "qualified individual with a disability."\(^{20}\) The ADA's discrimination prohibition differs from that of other employment discrimination statutes, however, in that it requires an employer to gauge an employee's qualifications only after providing a reasonable accommodation designed to assist the employee's performance.\(^{21}\) The ADA defines a "qualified individ-

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19. See infra notes 52-63 and accompanying text.

20. 42 U.S.C. § 12112(a) (1994). An individual has a "disability" for purposes of the ADA if he or she has "a physical or mental impairment that substantially limits one or more of the major life activities of such individual." Id. § 12102(2)(A).

21. The reasonable accommodation requirement is unique to disability law. In addition to the ADA, the Rehabilitation Act of 1973, applicable only to federal employees, contractors, and grant recipients, included a similar reasonable accommodation requirement. 29 U.S.C. §§ 791-96 (1994). With the exception of persons claiming discrimination on the basis of religion, neither Title VII, 42 U.S.C. § 2000e(j), nor ADEA, 29 U.S.C. §§ 621-34, entitles persons protected by either statute to demand accommodations in their favor. The Supreme Court has construed the reasonable accommodation requirement for religion very narrowly, holding that an employer need not incur more than a de minimus hardship in providing an accommodation for religious purposes. TWA, Inc. v. Hardi-
ual with a disability" as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." This definition requires employers to engage in a two-step inquiry: (1) identify the essential functions of the job in question and (2) determine whether the individual can perform those essential functions with or without reasonable accommodation.

The EEOC, the administrative agency charged with promulgating regulations to implement the statutory language of the ADA, defines "essential functions" as the "fundamental job duties" of the employment position, but excludes those functions that are merely "marginal" in nature. The regulations state that a job function may be considered essential because the position exists to perform that function, only a limited number of employees are available to perform the job function, and/or the function involves a high degree of specialization.

Once the essential functions of the position are identified, the employer next must ask whether the disabled individual can perform these essential functions without reasonable accommodation. If the answer is in the affirmative, then the individual is "qualified" under the statute. If the answer is in the negative, then the employer has an affirmative obligation to provide the individual with a reasonable accommodation, unless doing so would cause the employer to suffer an undue hardship.

B. Types of Reasonable Accommodation

Reasonable accommodation is defined generally as "any change in the work environment or in the way things are customarily done that enables an individual with a disability to enjoy equal employment opportunities." The ADA states that a reasonable accommodation may include:

[References and footnotes are included at the bottom of the page.]
(A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and

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

The EEOC's Interpretive Guidance states that "[t]his listing is not intended to be exhaustive of accommodation possibilities."  

The range of contemplated ADA reasonable accommodations may be grouped into five functional categories. They are:

1. Making changes to existing facilities. An employer's duty to modify its facilities includes making both work and non-work areas used by employees accessible to a disabled employee. Modifications to restrooms, break rooms, and lunchrooms thus may be required as reasonable accommodations.

2. Providing assistive devices or personnel. The statute lists the "acquisition or modification of equipment or devices" and "the provision of qualified readers or interpreters" as reasonable accommodations. The Interpretive Guidance further suggests that an employer may be required to permit a disabled employee to utilize his or her own equipment or aids, such as a guide dog for an individual who is blind, even though the employer itself may not be required to provide such an accommodation.

3. Job restructuring. This type of accommodation entails making changes to an employee's current job. While an employer is not required to reallocate essential job functions, an employer may need to reallocate or redistribute nonessential, marginal job functions that a qualified individual with a disability is unable to perform. An employer also may be required to change when and how

30. 42 U.S.C. § 12111(9).
31. 29 C.F.R. app. § 1630.2(o).
32. Id.
33. Id.
34. 42 U.S.C. § 12111(9)(B).
35. 29 C.F.R. app. § 1630.2(o).
37. 29 C.F.R. app. § 1630.2(o) ("An employer or other covered entity is not required to reallocate essential functions.").
38. Id. The EEOC's Interpretive Guidance demonstrates this type of accommodation by way of the following illustration:
a job function is performed, such as by authorizing modified or part-
time work schedules.39

4. Reassignment to a vacant position. The reassignment ac-
commodation involves placing the disabled employee in a new posi-
tion. This type of accommodation goes a step beyond those listed
above in that, instead of making adjustments to enable an employee
to perform his or her current job, it transfers the disabled employee
to an entirely different job.

5. Leave of absence. Although not listed in the statute, both the
EEOC40 and the courts41 recognize that a leave of absence may serve
as an additional type of reasonable accommodation. A leave of
absence may enable a disabled employee, through rest and/or rehabili-
tation, to return to productive work.

C. The Interactive Process

The EEOC regulations state that, once an individual with a dis-
ability requests an accommodation, the employer should consult
with that employee in ascertaining an appropriate reasonable ac-
commodation.42 The regulations envision that the employer will ini-
tiate an “informal, interactive process” with a qualified applicant or
employee to “identify the precise limitations resulting from the dis-
ability and potential reasonable accommodations that could over-
come those limitations.”43

The EEOC’s Interpretive Guidance provides more detail as to
the suggested structure of this process. The Guidance states that it
should be a “flexible” process that involves “the individual assess-
ment of both the particular job at issue, and the specific physical or

39. See id. (“For example, an essential function customarily performed in
the early morning hours may be rescheduled until later in the day as a reason-
able accommodation to a disability that precludes performance of the function
at the customary hour.”).

40. See ENFORCEMENT GUIDANCE, supra note 18, at 5447-48.

41. See, e.g., Cehrs v. N.E. Ohio Alzheimer’s Research Ctr., 155 F.3d 775,
783 (6th Cir. 1998); Criado v. IBM Corp., 145 F.3d 437, 443 (1st Cir. 1998).

42. 29 C.F.R. app. § 1630.9.

43. Id. § 1630.2(o)(3).
mental limitations of the particular individual in need of reasonable accommodation." The Guidance goes on to recommend that the parties jointly engage in a four-step "problem solving approach" leading to the selection of "the accommodation that is most appropriate for both the employee and the employer."

Some appellate court decisions suggest that independent liability may exist under the ADA for a party who fails to participate in the interactive process. Most courts, however, reject this position and hold that liability will arise only where an employer has failed as a matter of substance to identify and implement a reasonable accommodation that would enable a disabled employee to perform adequately in the workplace.

D. The Undue Hardship Defense

The ADA excuses an employer from accommodating an individual with a disability if the accommodation would impose an undue hardship on that employer. The statute defines undue hardship as "an action requiring significant difficulty or expense," and provides a list of factors to consider in determining whether the proposed ac-

44. Id. app. § 1630.9.
45. Id. The regulations state:
   When a qualified individual with a disability has requested a reasonable accommodation to assist in the performance of a job, the employer, using a problem solving approach, should:
   (1) Analyze the particular job involved and determine its purpose and essential functions;
   (2) Consult with the individual with a disability to ascertain the precise job-related limitations imposed by the individual's disability and how those limitations could be overcome with a reasonable accommodation;
   (3) In consultation with the individual to be accommodated, identify potential accommodations and assess the effectiveness each would have in enabling the individual to perform the essential functions of the position; and
   (4) Consider the preference of the individual to be accommodated and select and implement the accommodation that is most appropriate for both the employee and the employer.

Id.

46. See, e.g., Taylor v. Phoenixville Sch. Dist., 174 F.3d 142, 162 (3rd Cir. 1999); Beck v. Univ. of Wis. Bd. of Regents, 75 F.3d 1130, 1135-36 (7th Cir. 1996).
47. See, e.g., Rehling v. City of Chicago, 207 F.3d 1009, 1016 (7th Cir. 2000); Barnett v. U.S. Air, Inc., 196 F.3d 979, 993-94 (9th Cir. 1998); Willis v. Conopco, Inc., 108 F.3d 282, 285 (11th Cir. 1997); cf. Fjellestad v. Pizza Hut of Am., Inc., 188 F.3d 944, 952 (8th Cir. 1999) (finding that an employer's failure to engage in the interactive process constitutes prima facie evidence of bad faith sufficient to deny an employer's motion for summary judgment).
48. 42 U.S.C. § 12112(b)(5)(A) (1994) (stating that an employer does not violate the ADA for failing to provide a reasonable accommodation if the employer "can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity").
49. Id. § 12111(10)(A).
commodation would cause a particular employer to suffer an undue hardship.\footnote{50} Unless this defense is shown to exist, an employer’s failure to provide an accommodation that is available and reasonable results in a violation of the statute.\footnote{51}

II. THE MOST DIFFICULT ACCOMMODATIONS

Of all the accommodations listed in the ADA, the reassignment and leave of absence accommodations have proven to be the most difficult. These two types of accommodations require a greater degree of workplace reorganization and impose extra burdens on both employers and fellow workers.

The other types of accommodations recognized under the ADA\footnote{52} involve relatively minor adjustments that enable a disabled employee to remain in his or her current position. Changes made to existing facilities and the provision of assistive devices, for example, may impact the manner in which work is performed, but generally

\footnotetext{50}{Id. § 12111(10)(B) provides: \begin{quote} In determining whether an accommodation would impose an undue hardship on a covered entity, factors to be considered include—\(\text{i}\) the nature and cost of the accommodation needed under this chapter; \(\text{ii}\) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility; \(\text{iii}\) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and \(\text{iv}\) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity. \end{quote} See also Befort & Thomas, supra note 5, at 37 ("describing the undue hardship defense as a floating concept that varies with the nature and cost of the proposed accommodation, the impact of the proposed accommodation upon the operation of the facility, and the overall resources of both the facility in question and the employer in general").}

\footnotetext{51}{42 U.S.C. § 12112(b)(5)(A) (defining discrimination under the ADA to include "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."). The federal courts of appeal are split as to the requisite burdens of proof in establishing a reasonable accommodation. Compare Barnett, 196 F.3d at 988-89 (holding that the plaintiff bears the burden of persuasion to show both the existence and reasonableness of a proposed accommodation), with Stone v. City of Mount Vernon, 118 F.3d 92, 98 (2nd Cir. 1997) (holding that the plaintiff need only establish the existence of a plausible accommodation with the defendant then bearing the burden of proving that the proposed accommodation is unreasonable).}

\footnotetext{52}{See supra notes 32-41 and accompanying text.}
do not alter the quantity and quality of such work. These accommoda-
tions impose some obligations on the employer but have no imme-
diate impact on non-disabled co-employees. 53 Similarly, job restruc-
turing involves making adjustments for a disabled employee in his
current position that, again, would have little impact upon the
rights of other employees. 54 Although an employer's reallocation of
marginal functions may alter some of the tasks performed by other
employees in the workplace, such an accommodation does not neces-
sarily result in a net increase of work duties for non-disabled em-
ployees. 55 Thus, with respect to each of these accommodations, the
disabled employee continues to perform the essential duties of his or
her assigned job. The employer reaps the benefit of the work that is
performed, and fellow employees are not burdened with the realloca-
tion of any essential duties.

In contrast, reassignment and leaves of absence remove the dis-
abled employee from his or her current position. A reassignment
places the employee in a new position that invariably entails differ-
ent duties than that which the employee performed in the previous
position. A leave of absence temporarily removes the employee from
the workforce altogether. In short, these accommodations necessi-
tate a greater reshuffling of the workplace environment.

This reshuffling imposes greater burdens on employers and co-
workers than do the other types of accommodation recognized by the
ADA. For the employer, the reassignment and leave of absence ac-
ccommodations mean that it will not receive the work effort of em-
ployees who are trained and experienced in their current positions.
The employer will need to identify and train a new worker to per-
form these tasks. Reassignment additionally limits an employer's
discretion in filling vacant positions, while a leave of absence adds
the uncertainty of when the disabled worker will be able to return to
work. These accommodations, accordingly, detrimentally affect
management's overall flexibility and productivity.

These two accommodations also impose burdens on fellow
employees. A reassignment mandated by the ADA may translate
into a tangible loss for other employees because the placement of a
disabled employee into a vacant position necessarily deprives other
employees of the possibility of filling that position. 56 A leave of ab-

53. Aka, 156 F.3d at 1314 (Silberman, J., dissenting).
54. Id. at 1314-15 (observing that "job restructuring" and 'part-time and
modified work schedules' involve accommodations [of an employee's current po-
sition and] have no direct effect on non-disabled employees or applicants").
55. The reallocation is a trade-off of marginal job functions between the
disabled and non-disabled employee: the non-disabled employee picks up those
marginal functions that the disabled employee cannot perform and the disabled
employee picks up those functions that he or she can perform from the non-
disabled employee. See supra note 38 and accompanying text.
56. See Aka, 156 F.3d at 1315 (Silberman, J., dissenting) (noting that, in
contrast to other types of accommodations listed in the ADA, reassignment in-
sence may necessitate the transfer of a co-worker to perform the functions of the absent, disabled employee. The transferred employee not only must learn how to perform new work tasks, but faces the prospect of being “bumped” upon the disabled employee’s return.  

The reassignment accommodation also poses a unique additional problem. The reassignment obligation is a duty that was not recognized prior to the adoption of the ADA. Although the ADA closely tracks the statutory language of the Rehabilitation Act of 1973 and its interpretive case law, the ADA departs from its older statutory sibling by expressly including “reassignment to a vacant position” in its list of reasonable accommodations. The Rehabilitation Act required reassignment only if it was available under an employer’s existing policies. Otherwise, reassignment was a permissible, but not a required, accommodation. The lack of clearly delineated standards for reassigning qualified individuals with disabilities under the Rehabilitation Act may explain some of the current struggle that the federal courts are experiencing in defining the scope of this new ADA accommodation.
III. REASSIGNMENT

A. EEOC Guidelines on Reassignment

The EEOC has issued several interpretive aids that provide guidance concerning the scope of the reassignment accommodation. These include formal regulations,64 the Interpretive Guidance of Title I,65 Technical Assistance Manual,66 and Enforcement Guidance on Reasonable Accommodation and Undue Hardship (Enforcement Guidance).67 Taken together, these guidelines establish a number of basic principles that courts generally have accepted as establishing the parameters of the reassignment accommodation.68

First, "[r]eassignment is the reasonable accommodation of last resort."69 The Enforcement Guidance, for example, provides that reassignment "is required only after it has been determined that: (1) there are no effective accommodations that will enable the employee to perform the essential functions of his/her current position, or (2) all other reasonable accommodations would impose an undue hardship."70

Second, an employer is under no obligation to reassign a disabled employee except to a position that is truly vacant.71 The Enforcement Guidance defines a vacancy as a position that is either available when the employee requests a reasonable accommodation or one that the employer is aware will become available within a reasonable time.72 The regulations further explain that a position is considered vacant "even if an employer has posted a notice or announcement seeking applications for that position."73 An employer is not required to "bump" another employee in order to create a vacancy,74 nor is an employer required either to create a new position for a disabled employee or to promote a disabled employee to a

65. Id. app. §§ 1630.1-1630.16.
66. TECHNICAL ASSISTANCE MANUAL, supra note 1.
67. ENFORCEMENT GUIDANCE, supra note 18.
68. See John E. Murray & Christopher J. Murray, Enabling the Disabled: Reassignment and the ADA, 83 MARQ. L. REV. 721, 731-32 (2000) (noting a consensus among federal courts concerning certain steps that employers are not obligated to take in order to comply with the reassignment requirement).
69. ENFORCEMENT GUIDANCE, supra note 18, at 5453; see also 29 C.F.R. app. § 1630.2(o).
70. ENFORCEMENT GUIDANCE, supra note 18, at 5453; see also 29 C.F.R. app. § 1630.2(o) (stating that "[i]n general, reassignment should be considered only when accommodation within the individual's current position would pose an undue hardship").
71. ENFORCEMENT GUIDANCE, supra note 18, at 5453 (defining "vacant").
72. Id.; see also 29 C.F.R. app. § 1630.2(o) (2001) (suggesting that what constitutes a reasonable amount of time should be determined in light of the totality of the circumstances).
73. ENFORCEMENT GUIDANCE, supra note 18, at 5453.
74. Id. at 5453-54.
higher graded position.\textsuperscript{75}

Third, even if the "vacancy" of a position is established, an employer need not reassign a disabled individual unless he or she is "qualified" for the new position.\textsuperscript{76} Otherwise stated, the disabled employee must demonstrate that he or she satisfies the requisite job requirements and is capable of performing the position's essential functions with or without reasonable accommodation.\textsuperscript{77}

Fourth, as with all the accommodations listed in the ADA, an employer is excused from the obligation of reassigning a disabled employee if doing so would result in an undue hardship.\textsuperscript{78}

Fifth, according to the Enforcement Guidance, a disabled employee gets the vacant position if he or she is qualified for it.\textsuperscript{79} The EEOC position is that an employer does not satisfy the reassignment duty merely by permitting a disabled employee to compete with others for a vacant position.\textsuperscript{80}

B. Four Contentious Reassignment Issues

Courts have experienced considerable difficulty in determining the reach of the reassignment accommodation. This difficulty is illustrated by the fact that the circuit courts of appeal have reached different conclusions with respect to four reassignment issues. Each of these four issues is summarized below.

1. \textit{Is the reassignment accommodation available only to disabled employees who are qualified to perform their current job?}

The Rehabilitation Act, prior to its 1992 amendments, did not list reassignment to a vacant position as a reasonable accommoda-

\textsuperscript{75} Id. An employer, however, may have a duty to reassign a disabled employee to a lower graded position as a reasonable accommodation. See 29 C.F.R. app. § 1630.2(o) ("An employer may reassign an individual to a lower graded position if there are no accommodations that would enable the employee to remain in the current position and there are no vacant equivalent positions for which the individual is qualified with or without reasonable accommodation.").

\textsuperscript{76} See ENFORCEMENT GUIDANCE, supra note 18, at 5453.

\textsuperscript{77} See id.; see also Dalton v. Subaru-Isuzu Auto., Inc., 141 F.3d 667, 678 (7th Cir. 1998). Dalton stated that in determining those positions for which a disabled employee may be qualified:

\[\text{[t]he employer must first identify the full range of alternative positions for which the individual satisfies the employer's legitimate, non-discriminatory prerequisites, and then determine whether the employee's own knowledge, skills, and abilities would enable her to perform the essential functions of any of those alternative positions, with or without reasonable accommodations.}\]

\textit{Id.}

\textsuperscript{78} See supra notes 48-51 and accompanying text (discussing the undue hardship defense).

\textsuperscript{79} See ENFORCEMENT GUIDANCE, supra note 18, at 5455-56.

\textsuperscript{80} See id.
tion. Cases interpreting the Rehabilitation Act concluded that employers were not required to reassign a disabled employee who could not perform the essential functions of his or her current position unless such a transfer was consistent with the employer's existing personnel policies.\textsuperscript{81}

Some courts have continued to apply the Rehabilitation Act rule under the ADA. In \textit{Smith v. Midland Brake, Inc.},\textsuperscript{82} for example, a Tenth Circuit panel initially held that the ADA did not obligate an employer to reassign an employee who could not perform the essential functions of his or her current job.\textsuperscript{83} The \textit{Smith} court noted that the ADA is not designed to require employers to accommodate every disabled employee, only those who are "qualified individuals" capable of still performing their current jobs in spite of their disabilities.\textsuperscript{84} While \textit{Smith} has been overturned by a June 1999 en banc ruling,\textsuperscript{85} other courts continue to adhere to this position.\textsuperscript{86}

A majority of circuit courts now have reached the opposite conclusion and found that the ADA compels a different result with respect to reassignment than did the pre-1992 Rehabilitation Act. These courts find that reassignment to a vacant position is a reasonable accommodation required under the ADA so long as the employee is qualified to perform the essential job functions of the position desired for reassignment even though he or she no longer is able to perform the essential functions of the current job.\textsuperscript{87} The pertinent legislative history appears to support this majority viewpoint.\textsuperscript{88}

2. \textit{Is reassignment of a disabled employee required by the ADA where such result would violate the seniority rights of another employee under a collective bargaining agreement provision?}

The EEOC, in both its Interpretive Guidance and the Technical Assistance Manual, suggests that the terms of a collective bargain-

\textsuperscript{81} See, e.g., Bradley v. Univ. of Tex. M.D. Anderson Cancer Ctr., 3 F.3d 922, 925 (5th Cir. 1993); Jasany v. United States Postal Serv., 755 F.2d 1244, 1251-52 (6th Cir. 1985).
\textsuperscript{82} 138 F.3d 1304 (10th Cir. 1998).
\textsuperscript{83} \textit{Id.} at 1308-09.
\textsuperscript{84} \textit{Id.} at 1309.
\textsuperscript{85} Smith v. Midland Brake, Inc., 180 F.3d 1154 (10th Cir. 1999) (en banc).
\textsuperscript{87} See Cravens v. Blue Cross & Blue Shield, 214 F.3d 1011, 1018 (8th Cir. 2000); Jackan v. New York State Dep't of Labor, 205 F.3d 562, 566 (2d Cir. 2000); Smith, 180 F.3d at 1161, 1164-66; Feliciano v. Rhode Island, 160 F.3d 780, 786 (1st Cir. 1998); Aka, 156 F.3d at 1301; Gaul v. Lucent Techs., Inc., 134 F.3d 576, 579-580 (3d Cir. 1998); Gile v. United Airlines, Inc., 95 F.3d 492, 498 (7th Cir. 1996).
ing agreement (CBA) may be relevant in determining whether an accommodation would impose an "undue hardship." This position finds support in the ADA's legislative history, which indicates that collective bargaining provisions are relevant, but not determinative, on the reassignment issue.90

In Eckles v. Consolidated Rail Corp.,91 however, the Seventh Circuit adopted a per se rule that an employer is not required to violate a seniority system agreed upon in a CBA in order to reassign a disabled employee as a reasonable accommodation.92 The majority of circuit courts have now adopted this position.93

At least two court decisions have rejected the per se approach in favor of a balancing one. In Emrick v. Libbey-Owens-Ford Co.,94 the Federal District Court for the Eastern District of Texas ruled that a collective bargaining agreement should be a factor to consider when determining "the reasonableness of the proposed accommodation," but that a per se rule should not apply to ADA cases.95 Similarly, in Aka v. Washington Hospital Center,96 a panel of the D.C. Circuit adopted a balancing standard that would weigh the need for an accommodation with the degree of hardship imposed by the infringement on "seniority rights."97 The court noted that this balance should be based on the particular circumstances of each case, with a potential "continuum" of results.98 The Aka decision subsequently was vacated and decided en banc on different grounds.99

3. Does the ADA require an employer to transfer a disabled employee to a vacant position despite the superior qualifications of another applicant or employee who also desires that position?

a. Cases in which the disabled employee prevailed.

i. Aka v. Washington Hospital Center.100 The plaintiff, Etim

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89. See TECHNICAL ASSISTANCE MANUAL, supra note 1, at §§ 3.9, 7.11.
91. 94 F.3d 1041 (7th Cir. 1996).
92. Id. at 1051.
93. See Lujan v. Pac. Mar. Ass'n., 165 F.3d 738, 742 (9th Cir. 1999); Kralik v. Durbin, 130 F.3d 76, 82-83 (3rd Cir. 1997); Foreman v. Babcock & Wilcox Co., 117 F.3d 800, 810 (5th Cir. 1997); Milton v. Scrivner, Inc., 53 F.3d 1118, 1125 (10th Cir. 1995); Benson v. Northwest Airlines, Inc., 62 F.3d 1108, 1114 (8th Cir. 1995).
95. Id. at 396-97.
96. 116 F.3d 876 (D.C. Cir. 1997).
97. Id. at 895-97.
98. Id. at 896.
100. 156 F.3d at 1284.
Aka, a 56-year-old Nigerian immigrant, had worked as an operating room orderly at Washington Hospital Center for nineteen years before undergoing bypass surgery as a result of heart and circulatory problems. After spending approximately six months in rehabilitation, Aka's doctor told him he could return to work provided that his job involved only "a 'light or moderate level of exertion.'" The physical demands of Aka's job as an orderly did not meet this limitation, so Aka requested a transfer "to a job that was compatible with his medical restrictions." The hospital declined Aka's transfer request but permitted him to apply for future job postings. Aka applied for numerous positions within the hospital and, although he "met the minimal qualifications for" these positions, he was rejected each time in favor of a more qualified, non-disabled co-worker.

In an en banc decision, the D.C. Circuit expressed the view that reassignment under the ADA requires something more of an employer than simply allowing a disabled employee to compete equally with other applicants for a vacant position. The court looked at the ADA's statutory text and concluded that the natural meaning of the word "reassign" necessarily implies the need for "some active effort on the part of the employer." The court, however, did not specify what type of "active effort" was necessary for an employer to comply with the ADA's reassignment duty. Judge Silberman, in dissent, disagreed stating "that a disabled employee is never entitled to any more consideration for a vacant position than an ordinary applicant, because according to the disabled employee any kind of help would be a prohibited preference."

ii. Smith v. Midland Brake, Inc. The Tenth Circuit Court of Appeals in this decision agreed with the D.C. Circuit in Aka that the reassignment accommodation requires employers to do "something more" than allow disabled employees to compete equally with other job applicants. The Smith court, however, went beyond Aka to define more precisely what "something more" entails by stating that: "The disabled employee has a right in fact to the reassignment, and not just to the consideration process leading up to the potential re-

101. Id. at 1286.
102. Id.
103. Id.
104. Id.
105. Id. at 1287.
106. Id. at 1304.
107. Id.
108. Id. at 1305.
109. Id. at 1304 (noting in the majority opinion that this argument was made by the dissent).
110. 180 F.3d 1154 (10th Cir. 1999) (en banc).
111. Id. at 1180.
To eliminate any doubt as to the majority's interpretation of the statute, the opinion summarized an employer's reassignment obligation as follows:

The unvarnished obligation derived from the statute is this: an employer *discriminates* against a qualified individual with a disability if the employer fails to offer a reasonable accommodation. If no reasonable accommodation can keep the employee in his or her existing job, then the reasonable accommodation may require reassignment to a vacant position so long as the employee is qualified for the job and it does not impose an undue burden on the employer. Anything more, such as requiring the reassigned employee to be the best qualified employee for the vacant job, is judicial gloss unwarranted by the statutory language or its legislative history. 113


i. *EEOC v. Humiston-Keeling, Inc.* 114 Nancy Houser started work for the employer as a picker, a warehouse position requiring employees to pick health and pharmaceutical products off an assembly line. 115 She subsequently injured her right arm and was diagnosed later with tennis elbow. 116 Despite numerous accommodations, Houser became unable to perform the essential functions of the picker position. 117 Houser then applied and was interviewed for a total of eight office jobs within the company, but in each case, the employer selected another employee to transfer into the position. 118

In deciding for the employer, the Seventh Circuit Court of Appeals expressly rejected the EEOC's interpretation that a disabled employee should be afforded a priority in filling vacant positions. 119 The Seventh Circuit, in a decision authored by Judge Posner, criticized the EEOC's position as giving "bonus points" to individuals with disabilities even where an employee's disability puts her at no disadvantage in bidding for an open position. 120 Such a result, according to Judge Posner, would constitute "affirmative action with a vengeance." 121 The court, instead, concluded that: "[T]he ADA does not require an employer to reassign a disabled employee to a job for

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112. Id. at 1166.
113. Id. at 1169.
114. 227 F.3d 1024 (7th Cir. 2000).
115. Id. at 1026.
116. Id.
117. Id.
118. Id. at 1026-27.
119. Id. at 1027. The EEOC's interpretation is discussed supra notes 79-80 and accompanying text.
120. *Humiston-Keeling, Inc.*, 227 F.3d at 1027.
121. Id. at 1029.
which there is a better applicant, provided it's the employer's consistent and honest policy to hire the best applicant . . . in question.\textsuperscript{122}

4. \textit{Does the ADA's reassignment accommodation compel employers to make exceptions to non-discriminatory transfer and assignment policies?}

Similar issues arise when the reassignment of a disabled employee would conflict with a well-established, non-discriminatory employer policy. The type of policy at issue here generally concerns an employer's protocol for filling vacant positions. Examples of such transfer and assignment policies are those that use either competitive bidding or seniority as a preferential mechanism for selecting a position's new occupant. On the one hand, interpreting the ADA so as to require employers to treat disabled employees differently than non-disabled employees by making an exception to such policies looks like a preference in favor of the disabled and cuts against the equal treatment model reflected in most anti-discrimination statutes. On the other hand, the text, history, and purpose of the ADA suggest that preferential treatment for the disabled not only may be appropriate, it also may be required.

a. \textit{Cases in which disabled employee prevails.}

i. \textit{Davoll v. Webb.}\textsuperscript{123} Several police officers employed by the City of Denver were forced into retirement after disabling conditions rendered them unable to perform their current jobs and a city-wide policy against employee transfers precluded their placement into other vacant positions.\textsuperscript{124} The Tenth Circuit Court of Appeals affirmed a jury verdict in favor of the officers and, relying heavily on its holding in \textit{Smith}, ruled that a "disabled employee has a right in fact to the reassignment, and not just to the consideration process leading up to the potential reassignment."\textsuperscript{125} Thus, the city's failure to reassign the plaintiffs, irrespective of an otherwise valid no-transfer policy, was found to be discriminatory under the ADA.\textsuperscript{126}

ii. \textit{Ransom v. Arizona Board of Regents.}\textsuperscript{127} Eileen Ransom worked for the University of Arizona as an administrative assistant in the College of Nursing.\textsuperscript{128} When Ransom's carpal tunnel and myofascial pain syndrome worsened to the point where she was unable to perform her word processing duties, she requested a reassign-

\begin{itemize}
\item \textsuperscript{122} \textit{Id.}
\item \textsuperscript{123} 194 F.3d 1116 (10th Cir. 1999).
\item \textsuperscript{124} \textit{Id.} at 1125.
\item \textsuperscript{125} \textit{Id.} at 1131-32.
\item \textsuperscript{126} \textit{Id.} at 1134.
\item \textsuperscript{127} 983 F. Supp. 895 (D. Ariz. 1997).
\item \textsuperscript{128} \textit{Id.} at 898.
\end{itemize}
ment to a position with lighter word processing demands.\textsuperscript{129} This request, however, ran afoul of a policy requiring that "all employees, including those with disabilities, must compete for job reassignments through the competitive hiring process."\textsuperscript{130} Ransom was unable to secure another position through this process, and the University terminated her employment.\textsuperscript{131}

The court held, as a matter of law, that the employer's competitive reassignment policy violated the ADA.\textsuperscript{132} The court rejected the University's contention that disabled employees are entitled to reassignment "only in the same way as an employer provides for reassignment of nondisabled employees."\textsuperscript{133} Instead, the court found that the defendant's competitive transfer policy effectively prevents the reassignment of disabled employees and, therefore, "discriminates against 'qualified individuals with disabilities.'"\textsuperscript{134}

b. Cases finding no preference required.

i. \textit{Daugherty v. City of El Paso.}\textsuperscript{135} Carl Daugherty worked as a part-time city bus driver until he was diagnosed with insulin-dependent diabetes.\textsuperscript{136} Because the diabetes rendered him unable to perform his current job, Daugherty sought reassignment to a different full-time position.\textsuperscript{137} Although the city charter governing reassignments gave him a preference because of his disability, Daugherty was unable to secure another position because that same policy gave full-time employees priority over part-time workers.\textsuperscript{138} The city defended its policy on the ground that giving Daugherty, a part-time employee, a full-time job would cause complaints from other full-time employees who had been waiting for that position and had more seniority than Daugherty.\textsuperscript{139}

The court agreed with the employer, concluding that the city was not required to make an exception for Daugherty under its existing transfer and assignment policies.\textsuperscript{140} The court further explained:

[W]e do not read the ADA as requiring affirmative action in favor of individuals with disabilities, in the sense of requiring that disabled persons be given priority in hiring or reassign-
ment over those who are not disabled. It prohibits employ-
ment discrimination, against qualified individuals with dis-
abilities, no more and no less.\footnote{Id.}

ii. Dalton v. Subaru-Isuzu Automotive, Inc.\footnote{141 F.3d 667 (7th Cir. 1998).} In Dalton, the
Seventh Circuit Court of Appeals rejected the plaintiffs’ request that
they receive permanent positions within the employer’s established
temporary job placement program for employees with temporary
disabilities.\footnote{Id. at 679-80.} The court, after reviewing the statute and existing
case law, concluded that the ADA does not compel an employer “to
abandon its legitimate, nondiscriminatory company policies defining
job qualifications, prerequisites, and entitlements to intra-company
transfers.”\footnote{Id. at 678.} The court expressed the belief that: “The contrary rule
would convert a nondiscrimination statute into a mandatory prefer-
ence statute, a result which would be both inconsistent with the
nondiscriminatory aims of the ADA and an unreasonable imposition
on the employers and coworkers of disabled employees.”\footnote{Id. at 679.}
The Seventh Circuit cautioned, however, that an employer’s
blanket “no transfer” policy might have to give way to the ADA’s re-
assignment duty if such a policy unduly restricted the range of jobs
available for reassignment.\footnote{Id. at 679.}

iii. Duckett v. Dunlop Tire Corp.\footnote{147. 120 F.3d 1222 (11th Cir. 1997).} Similarly, the Eleventh
Circuit Court of Appeals has held that the ADA does not require an
employer to violate its “no roll back” policy that prohibited employ-
ees from transferring from salaried positions to production positions
within the bargaining unit.\footnote{Id. at 1225.}

c. A Middle Position – Barnett v. U.S. Air, Inc.\footnote{149. 228 F.3d 1105 (9th Cir. 2000).}
The employer in this case denied a disabled employee’s request
for reassignment based upon a long-standing seniority policy.\footnote{Id. at 1108-09.}
This policy was unilaterally established and not grounded in a col-
lective bargaining agreement.\footnote{Id. at 1118-19.}

The Ninth Circuit held that a unilaterally established seniority
policy does not operate as a per se bar to reassignment under the
ADA.\footnote{Id. at 1120.} Instead, the impact on such a policy should be considered as
a factor in determining whether the reassignment of a disabled em-

141. Id.
142. 141 F.3d 667 (7th Cir. 1998).
143. Id. at 679-80.
144. Id. at 678.
145. Id. at 679.
146. Id.
147. 120 F.3d 1222 (11th Cir. 1997).
148. Id. at 1225.
149. 228 F.3d 1105 (9th Cir. 2000).
150. Id. at 1108-09.
151. Id. at 1118-19.
152. Id. at 1120.
ployee would constitute an undue hardship. The court explained that:

A case-by-case fact intensive analysis is required to determine whether any particular reassignment would constitute an undue hardship to the employer. If there is no undue hardship, a disabled employee who seeks reassignment as a reasonable accommodation, if otherwise qualified for a position, should receive the position rather than merely have an opportunity to compete with non-disabled employees.

IV. LEAVES OF ABSENCE

The ADA does not expressly include a leave of absence among its exemplary list of reasonable accommodations. Despite the lack of express statutory authority, both the EEOC and the federal appellate courts have followed the ADA's legislative history and recognized leave as an appropriate type of reasonable accommodation.

A literal reading of the ADA would seem to require that any reasonable accommodation must be effective immediately in terms of enabling an employee to perform the essential functions of the job. Courts, however, have found such a strict interpretation to be unreasonably narrow and impractical. A preferable interpretation is that a reasonable accommodation is one that "presently, or in the immediate future, enables the employee to perform the essential functions of the job in question." One court posited that leave

153. Id.
155. See ENFORCEMENT GUIDANCE, supra note 18, at 5447-48.
156. See, e.g., Cehrs v. N.E. Ohio Alzheimer's Research Ctr., 155 F.3d 775, 782-83 (6th Cir. 1998); Criado v. IBM Corp., 145 F.3d 437, 443-44 (1st Cir. 1998).
158. The notion of a leave of absence serving as a reasonable accommodation also finds support in studies that have shown that it often is more costly for an employer to replace an employee than to accommodate a disabled employee with a leave of absence. See S. REP. No. 103-3, at 17-18 (1993), reprinted in 1993 U.S.C.C.A.N. 3, 19-20. See also Stacy A. Hickox, Absenteeism Under the Family and Medical Leave Act and the Americans with Disabilities Act, 50 DEPAa, L. Rev. 183, 215-16 (2000).
159. See 42 U.S.C. § 12111(8) (1994) (defining a qualified individual with a disability as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires") (emphasis added).
should qualify as a reasonable accommodation if it fulfills two requirements: (1) it must effect or advance a change in the employee's disabled status such that he or she will be enabled to perform their job, and (2) "the employee's return to work must be relatively proximate in a temporal sense."\textsuperscript{162}

A. \textit{EEOC Guidelines on Leaves of Absence}

The EEOC's Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the Americans with Disabilities Act provides several recommendations concerning the scope of an employer's obligation to afford leave as a reasonable accommodation.\textsuperscript{163} The guidance suggests that:

1. an employee who needs a leave of absence is entitled to such leave if there is no other effective accommodation and the leave will not cause an undue hardship;\textsuperscript{164}

2. an employer should allow a disabled individual to use accrued paid leave first and then provide such unpaid leave as may be appropriate;\textsuperscript{165}

3. an employer may not apply a no-fault leave policy, under which employees are automatically terminated after a certain period of absence, to deny a request for leave unless either another effective accommodation is available or granting the requested leave would cause an undue hardship;\textsuperscript{166}

4. an employee with a disability who is granted leave as a reasonable accommodation is entitled to return to his or her same position unless holding open that position would impose an undue hardship;\textsuperscript{167} and

5. providing leave to an employee who cannot provide a fixed date of return is a reasonable accommodation unless the lack of a

\begin{thebibliography}{166}
\bibitem{162} Garcia-Ayala, 212 F.3d at 655 (O'Toole, J., dissenting).
\bibitem{163} ENFORCEMENT GUIDANCE, supra note 18, at 5447-48.
\bibitem{164} \textit{Id.} at 5447.
\bibitem{165} \textit{Id.} The employer does not have to provide paid leave beyond that which is provided to similarly situated employees. \textit{Id.}
\bibitem{166} \textit{Id.} at 5447-48; \textit{see also} TECHNICAL ASSISTANCE MANUAL, supra note 1, at § 7.10 (stating that a uniform leave policy does not violate the ADA because it has a more severe effect on an individual because of his or her disability, however if a modification of such a policy is requested, an employer may be required to provide it as a reasonable accommodation).
\bibitem{167} ENFORCEMENT GUIDANCE, supra note 18, at 5447. If holding open the employee's position constitutes an undue hardship, the employer should reassign the employee to a vacant position for which the employee is qualified. \textit{Id.}
\end{thebibliography}
fixed return date would result in an undue hardship. 168

B. Types of Leave

1. Determinant Leave

The least difficult type of leave request is one for a determinate period of time. This is due to the fact that such a request estimates a reasonably definite time period during which the employee will be absent, and the employer can take steps to mitigate the inconvenience resulting from the temporary unavailability of the employee's services.

In order to satisfy the requirement that a leave effect or advance a change in the employee's disabled status, 169 an employee requesting leave typically will need to obtain a medical professional's opinion that a specified leave period may enable the employee satisfactorily to perform the job upon return to work. 170 According to the Ninth Circuit Court of Appeals, the appropriate standard is not whether the requested leave "is certain or even likely to be successful," but rather whether the leave period could "plausibly enable" adequate future performance. 171 A request by an employee which is supported by such a medical opinion is a presumptively reasonable accommodation, but the employer can obtain an independent medical opinion showing that the employee will not be qualified to return to work following the requested leave period. 172 In any event, the employer cannot deny a determinant leave request on the mere belief that the employee will not be able to perform the job upon return, but must have some factual basis for such a belief. 173

The more difficult issue is whether the length of the requested leave is reasonable. Where an employee's request is consistent with documented employer leave policies, the courts are more likely to find that the leave is a reasonable accommodation. 174 On the other

168. Id. at 5448.
169. See supra note 162 and accompanying text.
170. Compare Haschmann v. Time Warner Entm't Co., 151 F.3d 591, 601 (7th Cir. 1998) (finding leave request reasonable where doctor stated he was optimistic that lupus flare would be short-lived and request was for two four-week period of leave), and Criado v. IBM Corp., 145 F.3d 437, 444 (1st Cir. 1998) (finding leave request reasonable where employee's doctor was optimistic that leave would ameliorate her disability), with Walsh v. United Parcel Serv., 201 F.3d 713, 725-26 (6th Cir. 2000) (finding leave request not reasonable where employee repeatedly failed to provide medical documentation).
171. Humphrey v. Mem'l Hosps. Ass'n, 239 F.3d 1128, 1136 (9th Cir. 2001).
172. Haschmann, 151 F.3d at 601. Alternatively, the employer may deny the leave request if it would impose an undue hardship. See 42 U.S.C. § 12112(b)(5)(A) (2000).
173. See, e.g., Haschmann, 151 F.3d at 605 (finding leave request reasonable where employer never availed itself of opportunity to contact employee's doctor to discuss employee's condition).
174. See, e.g., Nunes v. Wal-Mart Stores, Inc., 164 F.3d 1243, 1249 (9th Cir.
hand, courts tend to find that a leave request that exceeds existing employer policies is not reasonable.\textsuperscript{175}

The First Circuit Court of Appeals in Garcia-Ayala v. Lederle Parenterals, Inc.,\textsuperscript{176} however, rejected the argument that the ADA will never impose a leave obligation beyond that provided by an employer's policy.\textsuperscript{177} In Garcia-Ayala, the court looked to the totality of the circumstances and found that the employer had failed to show that the longer leave period would cause an undue hardship.\textsuperscript{178} The court noted that the employer failed to present evidence showing that the temporary replacement employees used during the employee's absence were either more costly or less productive than the employee on leave.\textsuperscript{179}

In the absence of a specific leave policy, it is difficult to predict the temporal boundaries of a determinant leave request. The reasonableness of such a request necessarily varies with the size, structure, and circumstances of each employing entity.\textsuperscript{180} Two decisions, however, have reviewed the pertinent case law, and reported that the courts tend to view one year as a rational dividing line in determining the reasonableness of leave requests. In Walsh v. United Parcel Service,\textsuperscript{181} the Sixth Circuit Court of Appeals stated that its review of the case law found no decision in which an employer was required to permit an employee to take a leave of absence "for well in excess of a year."\textsuperscript{182} The federal District Court for the Southern District of New York expressed the issue somewhat differently in stating that courts generally have found leave requests for periods

\textsuperscript{175} See, e.g., Gantt v. Wilson Sporting Goods Co., 143 F.3d 1042, 1045-46 (6th Cir. 1998) (finding leave request unreasonable where employee's absence exceeded the employer posted policy restricting leaves to a one-year maximum period of absence).
\textsuperscript{176} 212 F.3d 638 (1st Cir. 2000).
\textsuperscript{177} Id. at 646.
\textsuperscript{178} Id. at 650.
\textsuperscript{179} Id. at 649. Despite the fact that the court ruled that the leave request was not for an indefinite period of time, it seems as though the factor that most influenced the court was the fact that the employer in Garcia-Ayala offered no evidence of undue hardship. See Pamela L. Hemminger, ADA, FMLA, FEHA and Worker's Compensation: Selected Leaves of Absence Issues, 638 PL/LIT 663, 718 (2000).
\textsuperscript{180} 42 U.S.C. § 12112(b)(5)(A) (1994) (excusing employer from providing a reasonable accommodation where such would impose an undue hardship on that particular employer).
\textsuperscript{181} 201 F.3d 718 (6th Cir. 2000).
\textsuperscript{182} Id. at 727.
beyond one year in duration to be unreasonable as a matter of law. Of course, a shorter leave, even if determinate in length, may be unreasonable or impose an undue hardship under the particular circumstances in question.

2. Indefinite Leave

At the opposite end of the leave spectrum are requests for leave for an indefinite duration. An employer in this context faces the prospect of not knowing when or if the employee will return to the job. Despite the fact that the EEOC maintains that a request for a leave of indefinite absence is a reasonable accommodation, the majority of courts that have addressed the issue have concluded that indefinite leave is unreasonable.

In Nowak v. St. Rita High School, a teacher was absent for a period of eighteen months, and did not contact school administrators to let them know when he intended to return to work. In ruling that such a leave was not a reasonable accommodation, the Seventh Circuit stated that "[t]he ADA does not require an employer to accommodate an employee who suffers a prolonged illness by allowing him an indefinite leave of absence." Similarly, in Monette v. Electronic Data Systems Corp., the employer had no way of knowing when, or even if, the employee would return to work. In ruling against the employee, the Sixth Circuit Court of Appeals stated "employers simply are not required to keep an employee on staff indefinitely... in order to reasonably accommodate the disabled individual."
3. *Successive Leave Requests*

Employees who have been granted an initial leave period sometimes request an extension of the leave for an additional period of time. These successive leave requests are a species of determinant leave in terms of asking for leave of a specified duration. They bear a resemblance to indefinite leave, however, in that the inability of the disabled employee to return to work following the initial leave of absence may raise legitimate concerns about the likely success of a further leave period. Thus, as a hybrid form of leave, it is not surprising that the courts tend to treat successive leave requests as falling somewhere between determinate and indefinite leave in terms of reasonableness.

The reasonableness of a successive leave request is a fact-intensive inquiry that is best illustrated by example. In *Rascon v. United States West Communications*, the Tenth Circuit Court of Appeals found reasonable a request for thirty-days leave in addition to a prior ninety days of leave. In ruling that the leave was reasonable, the court noted that the employer did not demonstrate that the accommodation would have imposed an undue hardship. Similarly, in *Ralph v. Lucent Technologies, Inc.*, the First Circuit Court of Appeals found reasonable a four-week leave request made by an employee following a fifty-two week leave period authorized by the employer's benefit plan. In its opinion, the court noted that the duty to provide reasonable accommodation is an ongoing one. Finally, in *Powers v. Polygram Holding, Inc.*, the federal court for the Southern District of New York found that a material question of fact existed in a request for one month of leave in addition to thirteen prior weeks of leave.

On the other hand, the Sixth Circuit Court of Appeals, in *Walsh v. United Parcel Service*, ruled that a request for leave beyond a previously granted leave of eighteen-months duration was unreasonable. In its ruling, the court stated that "it would be very unlikely for a request for medical leave exceeding a year and a half in length to be reasonable." Likewise, in *Taylor v. Pepsi-Cola*...

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194. 143 F.3d 1324 (10th Cir. 1998).
195. Id. at 1328-29, 1334-35.
196. Id. at 1335.
197. 135 F.3d 166 (1st Cir. 1998).
198. Id. at 172.
199. Id.
201. Id. at 197, 202; see also *Cehrs v. N.E. Ohio Alzheimer's Research Ctr.*, 155 F.3d 775, 778, 783 (6th Cir. 1998) (finding a genuine issue of material fact as to whether an eight-week absence followed by a request for an additional one-month leave was a reasonable accommodation).
202. 201 F.3d 718 (6th Cir. 2000).
203. Id. at 726.
204. Id. at 727.
Co., the Tenth Circuit ruled that a request for a ten-month leave in addition to a prior one-year leave was unreasonable. And, in *Duckett v. Dunlop Tire Corp.*, the Eleventh Circuit ruled that a request for a two-month leave in addition to a prior ten-month leave of absence was unreasonable. Significantly, the court noted that the employee had no way of knowing when he would be able to return to work in any capacity.

As a practical matter, the reasonableness of a successive leave request often will turn on whether it more closely resembles determinate leave or indefinite leave under all of the circumstances. That determination, of course, necessarily requires a detailed case-by-case analysis.

4. *Intermittent Leave*

A fourth type of leave involves sporadic absences typically resulting from a chronic health condition. Intermittent leave is especially burdensome for employers because of the difficulty of predicting when an individual who requires such an accommodation will be present at work.

Many courts have addressed the issue of intermittent leave under the ADA by asking whether attendance is an essential function of the job. Most courts that have posed this question have ruled that regular and predictable attendance is an essential function of almost every job. This outcome is particularly likely in cases where the employer has a neutral policy regarding attendance or tardiness. Numerous courts, accordingly, have concluded that an employer need not accommodate unpredictable absences by granting unplanned, intermittent leave.
This view, however, is not universal. Some decisions have required an inquiry into the particular circumstances of the employment relationship before determining whether intermittent leave is a reasonable accommodation.\textsuperscript{214} In \textit{Cehrs v. Northeast Ohio Alzheimer's Research Center},\textsuperscript{215} the Sixth Circuit Court of Appeals stated that "[t]he presumption that uninterrupted attendance is an essential job requirement improperly dispenses with the burden shifting analysis" for determining ADA violations,\textsuperscript{216} and "eviscerates the individualized attention that the Supreme Court has deemed 'essential' in each disability claim."\textsuperscript{217} The EEOC\textsuperscript{218} and some commentators\textsuperscript{219} agree with the \textit{Cehrs} court.

C. \textit{Interplay With The Family and Medical Leave Act}

Any discussion of leaves of absence must include an examination of the Family and Medical Leave Act (FMLA).\textsuperscript{220} Although the FMLA statute imposes obligations that are wholly independent from the ADA, the FMLA leave provisions both differ from and overlap with the ADA's reasonable accommodation requirement.\textsuperscript{221} Employers, accordingly, must be careful to coordinate compliance with these two statutes in handling leave requests.

The FMLA entitles covered employees to up to twelve weeks of unpaid leave per year: (a) to care for a newborn child or a child newly placed with the employee for adoption or foster care; (b) to care for an employee's child, parent, or spouse with a serious health condition; or (c) to care for an employee's own serious health condition.\textsuperscript{222} The FMLA applies only to employers with 50 or more employees,\textsuperscript{223} and to employees who have worked for the employer for at least twelve months, and for at least 1250 hours during the preced-
ing twelve-month period.\footnote{224} The FMLA requires the employer to maintain health insurance benefits during the leave period, and to return the employee to his or her previous position, or a position with equivalent benefits, pay, and other terms and conditions of employment following the end of the leave period.\footnote{225}

In some circumstances, an employee may be entitled to leave under both the FMLA and the ADA. Thus, an employee who has a serious health condition for purposes of the FMLA\footnote{226} that also qualifies as a disability under the ADA\footnote{227} would be eligible for protection under both acts. Regulations adopted by the Department of Labor suggest that an employer must allow an employee in this situation to take leave under the FMLA first, so as not to jeopardize the employee's full statutory protection, although it is permissible for the two types of leave to run concurrently.\footnote{228}

Despite this area of overlap, the two statutes differ in a number of fundamental respects. First, the threshold requirements for establishing a "serious health condition" for purposes of the FMLA generally are lower than those for establishing "disability" status under the ADA.\footnote{229} A temporary incapacity lasting four or more days, for example, may qualify as a "serious health condition," but generally will not constitute a "disability" unless it is a manifestation of a more longstanding impairment that substantially limits one or more major life activities.\footnote{230} An employee, accordingly, is more likely to

\footnote{224} Id. § 2611(2)(A).
\footnote{225} Id. § 2614(c)(1). If an employee believes that his or her employer has violated the provisions of the FMLA, the employee may bring an action in federal or state court for damages, equitable relief, and attorney's fees and costs. \textit{Id.} § 2617(a).
\footnote{226} See 29 U.S.C. § 2611(11). The Department of Labor's regulations under the FMLA define a "serious health condition" to include "an illness, injury, impairment, or physical or mental condition" that (a) requires inpatient care; (b) results in a period of incapacity for more than three days with continuing treatment by a health care provider; (c) for any period of incapacity due to pregnancy; (d) for any period of incapacity or treatment due to a chronic serious health condition; (e) for a period of incapacity which is long-term due to a condition for which treatment may not be effective; or (f) for any period of absence to receive multiple treatments for a condition that likely would result in a period of incapacity of more than three days in the absence of medical treatment. \textit{29 C.F.R.} § 825.114.
\footnote{227} See 42 U.S.C. § 12102(2) (1994) (defining a covered "disability" to include an individual with "a physical or mental impairment that substantially limits one or more of the major life activities of such individual").
\footnote{228} \textit{29 C.F.R.} § 825.702(a) (stating that "an employer must ... provide leave under whichever statutory provision provides the greater rights to employees"). If an employee were required to take ADA leave first, the employee may lose protection under the FMLA by virtue of not having worked the requisite 1250 hours with that employer during the preceding twelve-month period. \textit{See 29 U.S.C.} § 2611(2)(A).
\footnote{229} \textit{See supra} notes 226-27 (describing the definitions of "serious health condition" and "disability").
\footnote{230} \textit{29 C.F.R.} app. § 1630.2(j) (stating that "temporary, non-chronic im-
qualify for coverage under the FMLA than under the ADA.\textsuperscript{231}

Second, unlike the ADA, the FMLA authorizes leave as an entitlement rather than as a means to remedy discrimination.\textsuperscript{232} Thus, an employer cannot deny FMLA leave on the grounds that it would impose an undue hardship\textsuperscript{233} or because the employer has a no-fault attendance policy that is applied in a non-discriminatory manner.\textsuperscript{234}

Third, the FMLA regulations expressly recognize that qualifying FMLA leave may be taken on an intermittent basis.\textsuperscript{235} The regulations state that intermittent absences needed for certain types of medical care or for temporary periods of incapacity owing to chronic conditions are within the FMLA's leave entitlement even when unplanned and sporadic.\textsuperscript{236} The FMLA, accordingly, is more likely to support intermittent leave requests than does the ADA.\textsuperscript{237}

Finally, leave under the ADA may be a necessary accommodation even when it extends beyond the period mandated for FMLA leave.\textsuperscript{238} The EEOC's Enforcement Guidance states where a disabled employee has exhausted his or her FMLA entitlement, an "employer cannot deny the request for [additional] leave unless it can show undue hardship."\textsuperscript{239}

V. REDUCING UNCERTAINTY WITH RESPECT TO THE REASSIGNMENT AND LEAVE ACCOMMODATIONS

As the preceding two sections have illustrated, considerable uncertainty currently exists as to the proper application of the reassignment and leave accommodations. A greater degree of predictability is sorely needed. The problems plaguing these two accommodations, however, are different in nature and, as such, call

\begin{footnotesize}
\begin{enumerate}
\item See Robert B. Gordon & Christopher L. Ekman, Attendance Control Issues Under the ADA and FMLA, 13 LAB. LAW. 393, 405 (1997); Passamano, supra note 219, at 895.
\item Diaz v. Fort Wayne Foundry Corp., 131 F.3d 711, 712-13 (7th Cir. 1997).
\item Passamano, supra note 219, at 898.
\item 29 C.F.R. § 825.220(c); see also Hickox, supra note 158, at 187.
\item 29 C.F.R. § 825.203. The Eighth Circuit Court of Appeals has recently ruled that an employee who is unable to perform the essential functions of the job, apart from an inability to work a full-time schedule, is not entitled to intermittent leave under the FMLA. Hatchett v. Philander Smith Coll., 251 F.3d 670, 677 (8th Cir. 2001).
\item 29 C.F.R. § 825.203.
\item See supra notes 210-19 and accompanying text (discussing intermittent leave under the ADA).
\item This is due to the fact that even after taking the maximum FMLA leave available, an employee may still qualify as a disabled person under the ADA, and an employer must grant leave under whatever statute provides greater rights. See 29 C.F.R. § 825.702(a).
\item See ENFORCEMENT GUIDANCE, supra note 18, at 5448.
\end{enumerate}
\end{footnotesize}
for different solutions.

A. Reassignment

With respect to the reassignment accommodation, the predictability objective is best fostered through a resolution of the legal issues that currently divide the courts concerning the appropriate scope of the reassignment duty. This resolution, of course, should be accomplished with a policy-directed objective of balancing the relative needs of disabled employees, employers, and other workers.

As to the first two disputed reassignment issues, the courts appear to be headed in the right direction. The reassignment accommodation should not be reserved solely for those who are capable of performing the essential functions of their current position. This view would make the reassignment accommodation available only for those who do not need it. The text of the ADA and its legislative history support an interpretation that reassignment also should be available to those disabled employees who no longer are capable of performing in their current positions, but who would be qualified in a vacant position that they desire to occupy. 240

Similarly, the emerging majority position with respect to the second disputed issue is worthy of endorsement. While the clash between the seniority provisions of a collective bargaining agreement and the reasonable accommodation requirement of the ADA is supported by legitimate arguments on both sides of the ledger, this issue necessarily needs a bright-line rule. The prevailing preference for deferring to the seniority provisions of collective bargaining agreements serves this objective. 241

The third issue poses a difficult choice between filling a vacant position with a qualified, disabled employee or a better-qualified, non-disabled fellow employee. Although affirmative action rhetoric has clouded this debate, 242 the ADA's central purpose of helping disabled individuals to participate fully in the American workplace supports preferring the reassignment rights of the disabled employee. 243

In this regard, consider the fate of each employee if he or she does not obtain the vacant position. If the disabled employee is denied the requested transfer, he or she is out of a job. Since reassignment is the accommodation of last resort, the opportunity to be placed in this vacant position represents the disabled employee's "last chance" to remain employed with that particular employer. 244 In contrast, the consequences suffered by a more qualified employee

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240. See supra notes 81-88 and accompanying text concerning this issue.
241. See supra notes 89-99 and accompanying text concerning this issue.
242. See supra notes 120-22 and accompanying text.
244. See supra notes 69-70 and accompanying text.
who does not obtain the desired transfer are less severe. The non-disabled worker remains employed in his or her current position, and the chance to move into a more desirable position is deferred rather than lost. Given this significant disparity in consequences, the scale generally should tip in favor of the disabled employee in the absence of a showing of an undue hardship.

The Tenth Circuit's en banc decision in *Smith v. Midland Brake, Inc.*\(^{246}\) provides a useful road map for resolving the fourth reassignment issue of when employers must set aside or make exception to non-discriminatory employer policies. In that case, the court stated that employers should not be required to abandon neutral transfer and assignment policies in order to reassign a disabled employee, unless the policy in question would "essentially vitiate" the employer's express statutory obligation under the ADA to reassign qualifying employees as a form of reasonable accommodation.\(^{246}\)

This general rule preserves an employer's ability to adopt facially neutral policies in the management of the enterprise without eclipsing employee expectations that have developed in reliance on such policies.\(^{248}\) On the other hand, a no-transfer policy,\(^{249}\) or a policy requiring all employees to compete for vacant positions,\(^{250}\) would appear to "essentially vitiate" the ADA's reassignment obligation.\(^{251}\) As such, an employer should be required to make an exception to such policies in order to reassign a qualified individual with a disability.

**B. Leaves of Absence**

With respect to the leave of absence accommodation, the problem of uncertainty reflects factual more than legal concerns. Here, the lack of predictability flows less from deep legal fissures than from a lack of predictable rules for determining the reasonableness of individual leave requests.

The following suggested guidelines are offered as a possible basis for enhancing such predictability:

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245. 180 F. 3d 1154 (10th Cir. 1999) (en banc).
246. *Id.* at 1175-76.
247. A rule recognizing the validity of non-discriminatory transfer and assignment policies essentially is similar in nature to the business necessity defense recognized for cases of disparate impact under Title VII. *See* 42 U.S.C. § 2000e-2(k)(1)(A)(i) (providing defense to claim of disparate impact in which "the challenged practice is job related for the position in question and consistent with business necessity").
251. *Smith*, 180 F.3d at 1176.
1. A leave request generally should be deemed reasonable when sought for a determinant period of time and supported by a medical opinion that the disabled employee *plausibly* will be qualified to return to work at the end of the leave period;

2. A leave request for an indefinite period generally should be deemed reasonable only for a period of time that does not exceed one year and when supported by a medical opinion that the disabled employee *likely* will return to work at the end of the leave period;

3. A successive leave request generally should be deemed reasonable only if for a relatively short period of time, as compared to the initial leave request, and when supported by a medical opinion that the disabled employee *likely* will return to work at the end of the leave period; and

4. A request for intermittent leave should be granted if required by the FMLA. Given the burdens imposed on employers by the unpredictability of intermittent leave, the ADA generally should not compel such leave beyond that required by the FMLA.

5. These guidelines should be subject to modification based upon evidence concerning: (a) documented employer leave policies; (b) second medical opinions provided in circumstances where the employer has legitimate doubts concerning either the employee's condition or the likelihood that a leave will facilitate future satisfactory performance; or (c) where the employer establishes that the requested leave would result in an undue hardship.

**CONCLUSION**

The ADA has engendered considerable controversy during the first decade of its existence. The locus of this debate increasingly is shifting to the ADA's reasonable accommodation requirement. While determining when and how an employer must provide a reasonable accommodation to a disabled employee frequently is a complicated endeavor, the most difficult questions are posed by the reassignment and leave of absence accommodations. These two accommodations entail a greater restructuring of the workplace than do other types of reasonable accommodations and place the heaviest burdens on employers and co-employees.

This Article has examined the current uncertain state of the legal landscape relating to the reassignment and leave of absence accommodations. After identifying various sources that contribute to the present uncertainty, this Article has made several proposals designed to enhance predictability while still serving the fundamental policy objective underlying the ADA. Hopefully, these proposals will contribute to an improved disability accommodation process in the
years to come.