IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

MARYTZA GOLDEN, **Plaintiff,** **v.** **INDIANAPOLIS HOUSING AGENCY,** **Defendant.**	**CIVIL NO. 1:15-cv-00766-RLY-DML**

STATEMENT OF INTEREST OF THE UNITED STATES OF AMERICA

INTRODUCTION

Marytza Golden alleges that Indianapolis Housing Agency ("IHA") violated Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 ("Section 504"), when IHA denied her request for additional, unpaid leave to complete her cancer treatment and terminated her upon expiration of 16 weeks of medical leave (including 12 weeks of Family and Medical Leave Act (FMLA) leave). IHA maintains that, under its medical leave policy, it is proper to terminate all employees who are unable to return to work after taking 16 weeks of medical leave regardless of whether an employee may need additional leave because of a disability. IHA also maintains that, because Ms. Golden was unable to perform the essential functions of her job at the end of 16 weeks of leave, she was no longer "qualified" for the position and termination was permissible.

The United States respectfully submits this Statement of Interest to clarify the proper interpretation of Section 504 and the Americans with Disabilities Act ("ADA") with respect to an employer's obligation to consider a request for additional, unpaid leave as a reasonable accommodation and its obligation to evaluate whether an employee who seeks an accommodation is qualified.

LEGAL AUTHORITY TO FILE STATEMENT OF INTEREST

The United States submits this Statement of Interest pursuant to 28 U.S.C. § 517, which authorizes the Attorney General to send an officer of the Department of Justice "to attend to the interests of the United States in a suit pending in a court of the United States . . . ." This litigation implicates the proper interpretation and application of Section 504 of the Rehabilitation Act in the employment context. Because employment actions under Section 504 require the application of the standards under title I of the ADA, *see* 29 U.S.C. § 794(d), the resolution of this action also implicates the proper interpretation and application of title I of the ADA, 42 U.S.C. §§ 12111-12117, and the regulation implementing title I, 29 C.F.R. pt. 1630.[1]

The United States has a strong interest in supporting the proper interpretation and application of title I of the ADA; furthering the ADA's explicit congressional intent to provide clear, strong, consistent, and enforceable standards addressing discrimination against individuals with disabilities; and ensuring that the Federal government plays a central role in enforcing the standards established under title I.[2] *See* 42 U.S.C. § 12101(b). Accordingly, the United States respectfully requests that this Court consider the interpretation and application of title I, as set forth in this Statement of Interest, in resolving Defendant's and Plaintiff's cross-motions for summary judgment.

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[1] Thus, references throughout this Statement of Interest to either Section 504 or title I of the ADA should be read as references to both laws.

[2] Congress delegated to the Equal Employment Opportunity Commission (EEOC) the authority to promulgate regulations under title I, 42 U.S.C. §12116. Accordingly, the EEOC's regulation, and its guidance regarding the title I regulation, are entitled to deference. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984); *Auer v. Robbins*, 519 U.S. 452, 463 (1997).

RELEVANT FACTUAL BACKGROUND

Marytza Golden commenced her 15-year employment as a Public Safety Officer with Indianapolis Housing Agency (IHA) in June 1999 and was terminated from her position as Sergeant on April 14, 2015. (Plaintiff's Amended Complaint and Demand for Jury Trial ("Am. Compl.") ¶¶ 1, 11, 12, 30; Defendant Indianapolis Housing Agency's Answer to Amended Complaint and Affirmative Defenses ("Answer") ¶¶ 11, 12, 30).

A. Ms. Golden's Cancer Diagnosis and Medical Leave

In November 2014, Ms. Golden was diagnosed with breast cancer. (Am. Compl. ¶ 15; Defendant's Designation of Evidence in Support of Motion for Summary Judgment ("Def.'s Evid.") Ex. A at 51, 89). Ms. Golden informed IHA of her medical condition and requested and received medical leave under the Family and Medical Leave Act ("FMLA"). (Defendant's Brief in Support of Motion for Summary Judgment ("Def.'s Br.") at 5). Ms. Golden's 12 weeks of medical leave under FMLA began on December 17, 2014, and expired March 16, 2015. (Am. Compl. ¶ ¶ 18, 20; Answer ¶¶ 18, 20). At the time her FMLA leave expired, Ms. Golden was unable to return to work due to her cancer and treatment, so she sought extended medical leave from IHA. (Am. Compl. ¶¶ 21, 22; Answer ¶¶ 21, 22). In accordance with its customary practice, IHA allowed Ms. Golden an additional four weeks of leave, ending on April 14, 2015, and told her she would be terminated if she did not return by April 14, 2015. (Def.'s Br. at 6; Def.'s Evid. Ex. 6; Am. Compl. ¶ 28; Answer ¶ 28).

On Monday, April 13, 2015, Ms. Golden emailed Kathy Walden (Executive Director of HR), Simmons, and other managers, stating:

> I am requesting an unpaid leave of absence per city policy. If you have additional questions please contact me as you are aware I am off work due to diagnosis of cancer and I was informed today by Human Resources that Tuesday, April 14, 2015 will be my last day of employment.

(Def.'s Evid. Ex. 19). On Wednesday, April 15, 2015, at 3:22 PM, Walden responded:

> Your unpaid leave of absence request has been denied. If you have any additional questions, I can be reached at 317-261-7238.

(Def.'s Evid. Ex. 20). In a letter dated April 20, 2015, IHA informed Ms. Golden that her employment had been terminated effective April 14, 2015, because she had exceeded the maximum allowable period of sixteen (16) weeks of medical leave permitted by IHA. (Def.'s Evid. Ex. 21).

B. IHA's Leave Policies

IHA has an unwritten policy and practice of automatically terminating employees if they are not released to return to work after 16 weeks of medical leave. (Def.'s Br. at 10-11; Def.'s Evid. Ex. H; Plaintiff's Appendix ("Pl.'s App."), Ex. F at 27, 31-32). As Walden testified regarding Ms. Golden's request for additional leave:

> Q: What is the reason you denied the request?
> A: Because it's stated in the FMLA and in our policy after you exhaust your 12 weeks of FMLA that's granted by the federal government and then you exhaust the 4 additional weeks that's granted by the agency, you're no longer an employee of the agency.
> Q: And there's no exceptions to that?
> A: No exceptions.

(Pl.'s App. Ex. F at 50-51). Simmons, who also has authority to approve or deny medical leaves, corroborated IHA's practice of terminating an employee after she has used 16 weeks of consecutive medical leave, regardless of an employee's personal circumstances:

> Q: And so, at IHA, after 16 weeks of continuous leave, automatically terminated if you can't return to work?
> A: For medical reasons, yes.
> Q: Regardless of the individual circumstances at play?
> A: Regardless.

(Def.'s Evid. Ex. D at 47; Pl.'s App. Ex. G at 47).

IHA also has a written policy entitled "General Leave of Absence (Unpaid Leave)" that provides: "[t]he Director of Human Resources in conjunction with the Department Director, may approve a leave without pay for a specified period of time (not to exceed six (6) months) when it is determined that no other leave form is appropriate." (Def.'s Evid. Ex. 18). Under the General Leave of Absence policy, leave is unpaid and the employee is required to pay his or her own insurance premiums. (Def.'s Evid. Ex. 18).

DISCUSSION

I. REHABILITATION ACT AND ADA STANDARDS

Section 504 provides that "no otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. . . ." 29 U.S.C. § 794(a); *see also* 28 C.F.R. § 42.510 ("[n]o qualified handicapped person shall on the basis of handicap be subjected to discrimination in employment under any program or activity receiving Federal financial assistance"); *Silk v. City of Chicago*, 194 F.3d 788, 798 (7th Cir. 1999). Because Ms. Golden's Section 504 claim arises in the employment context, the standards used to determine whether Section 504 has been violated "shall be the standards applied under title I of the Americans with Disabilities Act of 1990 [ADA] . . . as such sections relate to employment." 29 U.S.C. § 794(d).

Title I of the ADA prohibits discrimination against a "qualified individual on the basis of disability," and also defines such discrimination to include "not making reasonable accommodations to the known physical or mental limitation of an otherwise qualified individual with a disability," unless the employer can demonstrate that the accommodation would impose an "undue hardship." 42 U.S.C. §§ 12112(a), (b)(5)(A). Under title I, a "qualified individual" is

defined as someone who "with or without a reasonable accommodation, can perform the essential functions" of the job she holds or desires. 42 U.S.C. § 12111(8).

While the ADA and its implementing regulations do not define "reasonable accommodations," they provide a non-exhaustive list of examples. 42 U.S.C. § 12111(9); 29 C.F.R. § 1630.2(o)(2). A temporary leave of absence has been recognized as a type of reasonable accommodation. *See* 29 C.F.R. pt. 1630, App. § 1630.2(o) ("other accommodations could include . . . providing additional unpaid leave for necessary treatment"); s*ee also, e.g.*, *Basith v. Cook Cnty.*, 241 F.3d 919, 932 (7th Cir. 2001) (agreeing that the several medical leaves the employer provided the employee for months at a time "qualifies as a reasonable accommodation").

To establish a prima facie case of failure to accommodate under the ADA, a plaintiff must show that: "(1) she is a qualified individual with disability; (2) the employer was aware of her disability; and (3) the employer failed to reasonably accommodate the disability." *Cloe v. City of Indianapolis*, 712 F.3d 1171, 1176 (7th Cir. 2013) (citing *Kotwica v. Rose Packing Co.*, 637 F.3d 744, 747-48 (7th Cir. 2011)). In this case, IHA concedes that it was aware that Ms. Golden had a disability—specifically, that she was diagnosed with breast cancer and was undergoing treatment that required her to take a medical leave of absence. (Def.'s Br. at 15). Thus, this Statement of Interest focuses on the appropriate legal standard IHA should have applied when considering Ms. Golden's request for additional, unpaid leave as a reasonable accommodation and when evaluating whether Ms. Golden was qualified after she requested this accommodation.

II. UNDER THE ADA, AN EMPLOYER MUST CONSIDER AN EMPLOYEE'S REQUEST FOR ADDITIONAL, UNPAID LEAVE AS A REQUEST FOR A REASONABLE ACCOMMODATION

Under the ADA, an employer must consider an employee's request for additional, unpaid leave as a request for a reasonable accommodation if the additional leave is necessary to enable an employee with a disability to return to work after treatment and care of a disability-related condition. As the EEOC has explained in its enforcement guidance, "permitting the use of . . . unpaid leave is a form of reasonable accommodation when necessitated by an employee's disability." *Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act*, 2002 WL 31994335, at *14 (Oct. 17, 2002) ("*EEOC Enforcement Guidance*"); *see also EEOC, Employer-Provided Leave and the Americans with Disabilities Act*, available at https://www.eeoc.gov/eeoc/publications/ada-leave.cfm (May 9, 2016). The process for considering a reasonable accommodation request includes several steps. First, in making such a request, the employee only needs to use ordinary language that allows the employer to ascertain that she is requesting leave because of her disability. Second, once the request for leave is made, the employer must engage with the employee in an interactive process to identify the appropriate accommodation. Third, the requested leave must be reasonable in the run of cases. Finally, if the request for leave is reasonable, the leave request must be granted unless the employer can show that there is another effective accommodation or that granting the additional leave would cause an undue hardship under the circumstances.

The Request. First, in making a request for a reasonable accommodation, an employee is not required to make a formal request or use the words "reasonable accommodation." *EEOC Enforcement Guidance*, at *4 (Oct. 17, 2002) ("[t]o request accommodation, an individual may use 'plain English' and need not mention the ADA or use the phrase 'reasonable

accommodation.'"). All the employee must do is make a request that allows the employer to understand what the employee is requesting and ensure that the request is linked to the employee's disability. *See Hendricks-Robinson v. Excel Corp.*, 154 F.3d 685, 694 (7th Cir. 1998) ("[a] request as straightforward as asking for continued employment is a sufficient request for accommodation"). When considering these cross-motions for summary judgment, this Court should, therefore, evaluate whether Ms. Golden's April 13, 2015, email "requesting an unpaid leave of absence per city policy" and reminding her employer that she was "off work due to diagnosis of cancer" was enough information for IHA to know both of her disability and her desire for an accommodation.

The Interactive Process. Second, once an employee requests a reasonable accommodation because of a disability, the employer must then engage with the employee in a flexible, interactive process to determine the appropriate accommodation under the circumstances. *Kauffman v. Peterson Health Care*, 769 F.3d 958, 963 (7th Cir. 2014); *Basden v. Prof'l Transp., Inc.*, 714 F.3d 1034, 1038-39 (7th Cir. 2013). As set forth in the title I regulation, "[t]his process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations." 29 C.F.R. § 1630.2(o)(3). As part of the interactive process, the employer may ask for further information or medical documentation that it needs to make a determination about the reasonable accommodation request. *See* 29 C.F.R. § pt. 1630, App. § 1630.9 ("in some instances neither the individual requesting the accommodation nor the employer can readily identify the appropriate accommodation. . . . Under such circumstances, it may be necessary for the employer to initiate a more defined problem solving process . . . as part of its reasonable effort to identify the appropriate reasonable accommodation.")

The failure to engage in the interactive process required by the ADA is not an independent basis for liability under the statute. *Rehling v. City of Chicago*, 207 F.3d 1009, 1015-16 (7th Cir. 2000). However, failure to engage in the interactive process may prevent the employer from identifying and providing an appropriate accommodation for a qualified individual. *Id.* at 1016.

Is the Request Reasonable? Third, the requested leave must be reasonable in the run of cases. *See U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 401-02 (2002). As the Supreme Court has explained, an employee who seeks a reasonable accommodation "need only show that an 'accommodation' seems reasonable on its face, *i.e.*, ordinarily or in the run of cases." *Barnett*, 535 U.S. at 401-02 (citations omitted); *see also id.* at 401-02 (citing *Reed v. LePage Bakeries, Inc.*, 244 F.3d 254, 259 (1st Cir. 2001), and finding plaintiff meets burden on reasonableness by showing that, "at least on the face of things," the accommodation will be feasible for the employer); *E.E.O.C. v. United Airlines, Inc.*, 693 F.3d 760, 762-63 & n.1 (7th Cir. 2012) (citing *Barnett* and holding plaintiff must show he seeks a "reasonable method of accommodation"); *Solomon v. Vilsack*, 763 F.3d 1, 9-10 (D.C. Cir. 2014) (noting that "it is rare that any particular type of accommodation will be categorically unreasonable as a matter of law").

The Seventh Circuit has held that paid or unpaid leave may be a reasonable accommodation under the ADA. In *Haschmann v. Time Warner Entertainment Co.*, 151 F.3d 591, 601-02 (7th Cir. 1998), for example, the Seventh Circuit upheld a jury's finding that granting the plaintiff a second medical leave to manage a lupus flare-up would have been a reasonable accommodation. Similarly, in *Basith v. Cook County*, 241 F.3d 919, 932 (7th Cir. 2001), the Seventh Circuit agreed with the district court that the months of leave granted plaintiff "qualifies as a reasonable accommodation."

Other circuits likewise recognize that a temporary leave of absence may be a reasonable accommodation. *See, e.g.*, *Nunes v. Wal-Mart Stores, Inc.*, 164 F.3d 1243, 1247 (9th Cir. 1999) ("[u]npaid medical leave"—"[e]ven an extended medical leave, or an extension of an existing leave period"—"may be a reasonable accommodation [under the ADA]"); *Garcia-Ayala v. Lederle Parenterals, Inc.*, 212 F.3d 638, 647 (1st Cir. 2000) (holding that plaintiff's request for extended medical leave was a reasonable accommodation under ADA and noting that other circuits, including the Seventh Circuit, have reached same conclusion); *Cehrs v. Northeast Ohio Alzheimer's Research Ctr.*, 155 F.3d 775, 783 (6th Cir. 1998) ("medical leave of absence can constitute a reasonable accommodation under appropriate circumstances"); *Rascon v. US W. Commc'ns, Inc.*, 143 F.3d 1324, 1333-34 (10th Cir. 1998) ("An allowance of time for medical care or treatment may constitute a reasonable accommodation."), overruled on other grounds by *New Hampshire v. Maine*, 532 U.S. 742, 750-51 (2001).

In addition, EEOC guidance—both the Appendix to the title I regulation as well as the EEOC's enforcement guidance on reasonable accommodations—and the ADA's legislative history identify leave as a reasonable accommodation. *See* 29 C.F.R. pt. 1630, App. § 1630.2(o) ("other accommodations could include . . . providing additional unpaid leave for necessary treatment"); *EEOC Enforcement Guidance*, 2002 WL 31994335, at *14-17 ("Permitting the use of accrued paid leave, or unpaid leave, is a form of reasonable accommodation when necessitated by an employee's disability."); H.R. Rep. No. 101-485, pt. 2, at 63 (May 15, 1990) ("Reasonable accommodation may also include providing additional unpaid leave days, if such provision does not result in an undue hardship for the employer.").

An employee need not provide an exact date of return from disability-related leave in order for the requested accommodation to be found reasonable. In *Haschmann*, the Seventh

Circuit found that although the employee was uncertain at the time she made the request for additional leave if she would need two or four weeks, a jury could find her request was sufficiently specific to constitute a "reasonable accommodation." 151 F.3d at 601-02; *see also Garcia-Ayala*, 212 F.3d at 648 ("Some employees, by the nature of their disability, are unable to provide an absolutely assured time for their return to employment, but that does not necessarily make a request for leave to a particular date indefinite."). An employer, however, has no obligation to provide leave of indefinite duration. *See Nowak v. St. Rita High Sch.*, 142 F.3d 999, 1004 (7th Cir. 1998) (holding that the ADA does not require accommodation of "an indefinite leave of absence" where teacher took leave for more than one year); *EEOC Enforcement Guidance, Americans with Disabilities Act: Applying Performance and Conduct Standards to Employees with Disabilities*, 2008 WL 4786697, at *22 (Sept. 25, 2008) ("Although employers may have to grant extended medical leave as a reasonable accommodation, they have no obligation to provide leave of indefinite duration.").

Thus, a request for additional, unpaid leave will ordinarily be reasonable when it is not indefinite in nature and will be reasonably likely to enable the employee to return to work. *See, e.g.*, *Haschmann*, 151 F.3d at 601 (finding a leave of absence reasonable in reliance on a doctor's stated optimism about its benefits); *Humphrey v. Mem'l Hosps. Ass'n*, 239 F.3d 1128, 1136 (9th Cir. 2001) (identifying a "could have plausibly enabled [job performance]" standard for the reasonableness of a requested leave of absence); *Walsh v. United Parcel Serv.*, 201 F.3d 718, 726-27 (6th Cir. 2000) (distinguishing the case of short and definite leave with a "reasonable prospect of recovery" from the case of indefinite leave with a vague medical opinion about recovery prospects); *Criado v. IBM Corp.*, 145 F.3d 437, 440, 444 (1st Cir.1998) (holding that a jury could find that the employee's request for leave beyond her disability-leave allowance was

reasonable where the employee's doctor was optimistic that the leave would "ameliorate her disability"). Thus, in considering the parties' cross-motions for summary judgment, this Court should consider that additional medical leave may be a reasonable accommodation and evaluate whether Ms. Golden's request for leave under IHA's six-month unpaid leave policy was reasonable in the run of cases.

Undue Hardship. Finally, once an employee has shown that the request for additional, unpaid leave is reasonable in the run of cases, the burden shifts to the employer to "show special (typically case-specific) circumstances that demonstrate undue hardship in the particular circumstances." *E.E.O.C. v. United Airlines, Inc.*, 693 F.3d 760, 762-63 (7th Cir. 2012) (citing *Barnett*, 535 U.S. at 402). In considering whether IHA has presented evidence that Ms. Golden's request for additional unpaid leave would have been an undue hardship, the Court should take into account the existence of IHA's general leave policy allowing up to six-months of unpaid leave. *See, e.g.*, *Nunes*, 164 F.3d at 1249 (finding that employer's benefit policy affording unpaid leave for up to one year belies undue hardship claim with respect to leave request for a shorter period of time); *Rascon*, 143 F.3d at 1334-35 (finding that employer's policy providing for six months leave with reinstatement rights supported employee's request for four month leave of absence).

The mere existence of a leave policy capping the amount of leave available for medical purposes is not sufficient to demonstrate undue hardship. An employer may need to modify a leave policy that gives employees only a set amount of leave, in response to a reasonable accommodation request from an employee with a disability: "[An] employer must modify its 'no-fault' leave policy to provide the employee with the additional leave, unless it can show that: (1) there is another effective accommodation that would enable the person to perform the

essential functions of his/her position, or (2) granting additional leave would cause an undue hardship." *EEOC Enforcement Guidance*, at *14-15; *see also EEOC, Employer-Provided Leave and the Americans with Disabilities Act*, available at https://www.eeoc.gov/eeoc/publications/ada-leave.cfm (May 9, 2016).

In a case very similar to this one, the First Circuit reversed a district court's grant of summary judgment where an employer refused to extend an employee's medical leave another four-and-a-half months to allow the employee to finish recuperating from cancer treatment after she had been on medical leave for over five months. *Garcia-Ayala v. Lederle Parenterals, Inc.*, 212 F.3d 638, 641-42 (1st Cir. 2000). The First Circuit rejected the district court's conclusion that plaintiff's request for additional leave was not reasonable because her doctors' inability to guarantee she would return on the designated day made her leave extension an "unreasonable" request for "indefinite leave." *Id.* at 646-47. Chastising the lower court for apparently applying a per se rule concerning leave instead of the individualized assessment the ADA requires, the First Circuit held that plaintiff met her prima facie burden by producing evidence that she could return to work in the near future. *Id.* at 647-49. The First Circuit then held that, while the burden of showing the reasonableness of an accommodation is on the plaintiff, "this is a case in which the employer did not contest the reasonableness of the accommodation except to embrace a per se rule that any leave beyond its one-year reservation period was too long." *Id.* at 648-49. The First Circuit entered judgment for plaintiff when her employer offered no evidence of undue hardship. *Id.*

The goal of a reasonable accommodation request for leave is to enable the employee to return to work and perform the essential functions of her job, with or without reasonable accommodations. The United States files this brief to help clarify the appropriate standards, as

set out in the EEOC's regulations and guidance, case law, and legislative history.[3]

III. WHEN LEAVE IS THE REASONABLE ACCOMMODATION AT ISSUE, AN EMPLOYEE'S ABILITY TO PERFORM THE ESSENTIAL JOB FUNCTIONS MUST NOT BE ASSESSED AT THE TIME THE EMPLOYEE IS ON DISABILITY-RELATED LEAVE

Title I protects qualified individuals with disabilities. A "qualified individual" is an individual who "with or without a reasonable accommodation, can perform the essential functions" of the job she holds or desires. 42 U.S.C. § 12111(8). However, under the ADA, it is inappropriate to consider whether the employee could perform the essential functions of her job during the time period she requested disability-related leave as a reasonable accommodation. Instead, the correct assessment of whether an employee is a qualified individual should be made as of the date the employee anticipates returning to work—*i.e.*, at the end of the leave of absence the employee is requesting.

The Seventh Circuit applies a two-step test for determining whether a plaintiff has established that he or she is a qualified individual under the ADA. *Stern v. St. Anthony's Health Ctr.*, 788 F.3d 276, 285 (7th Cir. 2015). The court first "consider[s] whether the individual satisfies the prerequisites for the position, such as possessing the appropriate educational background, employment experience, skills, licenses, etc." *Id.* (citation omitted). If she does, the court then considers whether "the individual can perform the essential functions of the position held or desired, with or without reasonable accommodation." *Id.*; *see also* 29 C.F.R. § 1630.2(m). IHA concedes that at the time Ms. Golden was terminated, she possessed the requisite skills, education, certification, or experience necessary to do her job. (Def.'s Br. at 16). IHA contends, however, that Ms. Golden could not perform the essential functions of her job

[3] The United States takes no position on what period of leave would comprise an undue hardship under these or other circumstances. That is a case-specific inquiry.

because she was still on leave for cancer treatment and not physically able to perform the duties of a public safety officer. (Def.'s Br. at 16-19).

Whether someone is qualified under the ADA is generally assessed as of the time of the relevant employment decision. *See Basden v. Prof'l Transp., Inc.*, 714 F.3d 1034, 1037 (7th Cir. 2013); *see also* 29 C.F.R. pt. 1630, App. § 1630.2(m). When the requested accommodation takes time to implement, however, the individual should be assessed after the accommodation is implemented. For example, the statute lists as examples of reasonable accommodations "making existing facilities used by employees readily accessible" and "acquisition or modification of equipment or devices." 42 U.S.C. § 12111(9)(A), (B). If it would take an employer time to modify existing facilities or to acquire and install needed equipment, it would be at odds with the statutory text to deem an individual not qualified at the time she made the request because the proposed accommodation would take time to implement.

This same concept applies with a leave request. When an employee requests leave as a reasonable accommodation, the relevant inquiry is whether the employee would be able to perform the essential job functions of her job at the end of the leave. In *Nunes v. Wal-Mart Stores, Inc.*, 164 F.3d 1243, 1247 (9th Cir. 1999), the Ninth Circuit explained that the employer may not assess whether the employee was qualified while on leave as a reasonable accommodation. The district court granted summary judgment for Wal-Mart on the ground that plaintiff was not a qualified individual because she could not perform the essential functions of her job while on leave for several months recovering from a medical condition that caused her to faint. *Id.* The Ninth Circuit reversed, explaining that "[b]y focusing on [plaintiff's] disability during the period of her medical leave," "the district court misapplied the ADA's 'qualified individual' requirement." *Id.* at 1246-1247. Likewise, as one district court explained, "if an

employee's ability to perform essential job functions were evaluated solely with regard to the period of time during which [he or she was] on medical leave, no employee [who] was forced by disability to take medical leave could ever be a 'qualified individual' under the ADA." *Donelson v. Providence Health & Servs.-Washington*, 823 F. Supp. 2d 1179, 1189-90 (E.D. Wash. 2011).

While some language in the Seventh Circuit, in *Byrne v. Avon Products, Inc.*, 328 F.3d 379 (7th Cir. 2003), appears to cast doubt on this position, *Byrne* does not stand for the proposition that any employee who needs leave as a reasonable accommodation cannot be qualified. The facts in *Byrne* are very different from this case, and since *Byrne*, several lower courts have declined to apply such a categorical rule. In *Byrne*, the plaintiff, unbeknownst to himself or the employer, suffered from major depression that caused him to sleep for hours while on the job, miss a few days of work, and skip a meeting to discuss his work problems. *Id.* at 380. Only after the employer fired him and the plaintiff got several months of treatment did he argue that his employer should have allowed him simply not to work during that time. *Id.* at 380-81. The Seventh Circuit rejected that post-hoc, indefinite "no work" accommodation, explaining that "[i]nability to work for a multi-month period removes a person from the class protected by the ADA." *Id.* at 381.

Recognizing the context of this language, one lower court in *EEOC v. Midwest Independent Transmission Systems Operator, Inc.*, No. 11-1703, 2013 WL 2389856, at *4 (S.D. Ind. May 30, 2013), declined to find *Byrne* dispositive of whether an employee who needed leave was a qualified individual. The court explained that determining if there is an accommodation that can enable an employee to perform the essential functions of his or her job is a "highly fact-specific inquiry" and "a leave of absence can sometimes be a reasonable accommodation." *Id.* (citing *Haschmann*, 151 F.3d 591, as support for leave as a reasonable

accommodation, and noting that *Haschmann* was cited without disapproval in *Byrne*.); s*ee also Sluga v. Metamora Tel. Co.*, No. 12-1553, 2015 WL 1811823, at *4 (C.D. Ill. Apr. 17, 2015) (holding that plaintiff was qualified because his doctor had cleared him to return to work at the end of his six months of leave for rotator cuff surgery, and stating that "[s]ubsequent cases [to *Byrne*] have walked back any categorical rule—if one existed—and concluded that context matters."); *E.E.O.C. v. United Parcel Serv., Inc.*, No. 09-CV-5291, 2010 WL 3700704, at *5-6 (N.D. Ill. Sept. 10, 2010) (denying motion to dismiss, holding that employee who requested more than one year of medical leave stated a claim for relief because she plausibly alleged she was qualified to return to work after her leave, and employer failed to engage in the interactive process and summarily terminated her).

Thus, an employee is qualified if she is able to perform the essential functions of her job as of the end of the leave that has been requested, assuming that the leave requested is reasonable. To apply any other standard would leave individuals with disabilities who need to take leave as a reasonable accommodation without any protection under the ADA.

The United States files this brief to help clarify the appropriate standard to determine whether Ms. Golden is a qualified individual with a disability entitled to a reasonable accommodation under the law. The appropriate standard is to assess whether Ms. Golden is able to perform the essential functions of the job as of the end of the requested leave period that is found to be a reasonable accommodation—not during the time period she was on disability-related leave.

CONCLUSION

For the foregoing reasons, the United States respectfully requests that the Court consider this Statement of Interest in this litigation.

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CERTIFICATE OF SERVICE

I hereby certify that on May 19, 2016, a copy of the foregoing was filed electronically. Notice of this filing will be sent to the following parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

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