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Absenteeism and the ADA: The Limits and the Loopholes

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ABSENTEEISM AND THE ADA: THE LIMITS AND THE LOOPHOLES

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A survey of absences from June 1997 to May 1998 conducted by Commerce Clearing House, a publisher of employment law information, reports that employee absenteeism in 1998 increased 25 percent from the previous year. The statistics suggest that personal demands and family-related absences, rather than illness, account for a large portion of workplace absenteeism. How do employers cope with these figures? One way is by knowing your legal responsibilities and obligations to employees before leave issues arise.[1]

Congress enacted the Americans with Disabilities Act ("ADA" or "the Act")[2] to broaden the scope of protections available to persons with disabilities.[3] Title I of the ADA provides that no employer governed by the Act may discriminate in the terms and conditions of employment against a qualified person with a disability.[4] A qualified person with a

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1. Christine M. Cieplinski, *Ins and Outs of Workplace Absenteeism*, 7 CONN. EMPL. L. LETTER 2 (1999).

2. Americans With Disabilities Act of 1990, 42 U.S.C. §§ 12101-02, 12111-17 (2000).

3. 42 U.S.C. § 12101(a)(9), (b)(1) (2000) (establishing that "the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis" and that a purpose of the Act is "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities"). The purpose of the ADA was to "eliminat[e] discrimination against people with disabilities; fully integrat[e] disabled Americans into the society in general and economic life in particular; and transfer[] the costs of supporting individuals with disabilities from the public to the private sector." JONATHAN R. MOOK, AMERICANS WITH DISABILITIES ACT: EMPLOYEE RIGHTS & EMPLOYER OBLIGATIONS 2-33 (1999) (citing Elizabeth Clark Morin, Note, *Americans With Disabilities Act of 1990: Social Integration Through Employment*, 40 CATH. U.L. REV. 189 (1990)).

4. 42 U.S.C. § 12112 (2000) (noting that an employer violates the ADA when it discriminates "against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment").

disability must be able to perform the essential functions of the job with or without a reasonable accommodation.[5] In providing these protections, Congress encouraged an interactive process between the employer and the employee whereby the parties themselves could agree on a reasonable accommodation.[6] Occasionally, however, this process of mutual agreement fails and litigation ensues.

While Congress enacted the ADA to provide protection to persons with disabilities and, in particular, to provide them job security, courts' interpretations of the statute effectively halted the protection to a certain class of persons with disabilities.[7] While some employees require accommodations that can be provided at the workplace, other employees require accommodations that permit absences from the workplace. In particular, employees who suffer from chronic or unpredictable disabilities often need time off or flexible leave as a reasonable accommodation.[8] When this is the requested accommodation, employers and courts are much less willing to provide the accommodation because there is undue hardship on the employer.[9] In a controversial development, many courts have determined that "presence is an essential function" of most jobs.[10] This rule is considered a matter of law rather than a question of fact and has thus taken the protection of the ADA away from persons with chronic or unpredictable illnesses or disabilities by using their frequent or unplanned absences against them, regardless of the circumstances.[11] While the EEOC intended that ADA cases be

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5. *See* 42 U.S.C. § 12111(8) (2000) (defining "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").

6. *See* Mook, *supra* note 3, at 6-17 (stating that a "reasonable accommodation at base is a 'problem solving approach'") (citing S. REP. NO. 116, at 34 (1989) (Senate Committee on Labor and Human Resources)).

7. *See, e.g.*, Tyndall v. Nat'l Educ. Ctr., Inc., 31 F.3d 209 (4th Cir. 1994); Jackson v. Veterans Admin., 22 F.3d 277 (11th Cir. 1994).

8. *See* Audrey E. Smith, Comment, *The "Presence Is An Essential Function" Myth: The ADA's Trapdoor for the Chronically Ill*, 19 SEATTLE U. L. REV. 163, 163-64 (1995) (stating that "[i]n nearly all cases, long-term chronic illnesses satisfy the ADA's broad definition of disability").

9. *Id.* at 170-72.

10. *See id.* at 163. *But see* EEOC, Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, n.61, *at* http://www.eeoc.gov/docs/accommodation.html (last visited Apr. 6, 2001) (stating that while some courts "have characterized attendance as an 'essential function' . . . [it] is not an essential function as defined by the ADA because it is not one of 'the fundamental job duties of the employment position'").

11. *See* Smith, *supra* note 8, at 163.

subjected to a fact-intensive, case-by-case analysis,[12] the courts have chosen not to use this type of analysis when considering the issue of presence in the workplace.[13] Although presence may be an essential function in many jobs, a disabled person should nonetheless have the opportunity to present evidence to the contrary for his or her individual circumstances.

This article analyzes the ADA regulations, focusing on the regulations' effect on attendance requirements. Next, the article provides an overview of how the courts currently address attendance requirements. This analysis illustrates the difference in the levels of proof required by courts for attendance policies. The article then examines the different accommodations requested by employees that address the inflexible attendance policies. Finally, the article demonstrates that employers are given a free "out" when they deal with an employee who has an imperfect attendance record.

I. SETTING FORTH THE FRAMEWORK

Congress enacted the ADA to employ millions of disabled Americans who were out of work, to stop the discrimination and exclusion of disabled persons, and to equalize the treatment for Americans who, through circumstances out of their control, are forced to live life as disabled persons.[14] While the ADA broadens the scope of coverage for disabled individuals, the statutory framework of the ADA sets a high standard for individuals seeking its protection. Initially, the individual seeking protection under the ADA must establish that the Act covers her disability.[15] The Act defines an individual with a disability as one

12. *See* 29 C.F.R. § 1630.2(n) (2000) (listing factors that should be considered in determining whether a job function is essential). The interpretative guidelines issued by the EEOC state that "[w]hether a particular function is essential is a factual determination that must be made on a case by case basis." Appendix to 29 C.F.R. pt. 1630 (2000).

13. *See, e.g.*, Jackson v. Veterans Admin., 22 F.3d 277, 279 (11th Cir. 1994) (finding that regular attendance is an essential function of the job); Carr v. Reno, 23 F.3d 525, 529 (D.C. Cir. 1994) (stating that "coming to work regularly" is an essential function of the job).

14. *See* 42 U.S.C. § 12101 (2000). *But see* Ruth Colker, *Hypercapitalism: Affirmative Protections for People with Disabilities, Illness and Parenting Responsibilities Under United States Law*, 9 YALE J.L. & FEMINISM 213, 215 (1997) (presenting the argument that the ADA conflicts with free market principles that reason that "the state should not require that the private sector use affirmative programs to improve the employability of members of the disadvantaged groups because there is no objective way to determine who is historically disadvantaged and because state intervention into private markets is an inefficient remedy for any social problem").

15. 42 U.S.C. § 12112 (2000) (stating that discrimination against a qualified individual

who (1) has a "physical or mental impairment that substantially limits one or more of the [individual's] major life activities"; (2) has a record of such impairment; or (3) is regarded as having such an impairment.[16] If the plaintiff satisfies one of these requirements, then the individual must show that she was discriminated against by a "covered entity."[17] In addition, the individual must establish that she is a "qualified individual with a disability,"[18] which is met when the individual satisfies the prerequisites of the job and accomplishes the essential functions of the position with or without a reasonable accommodation.[19] In order to examine employee absences, it is important to analyze what may be deemed a prerequisite, what qualifies as an essential function, and what individuals with disabilities can expect as a reasonable accommodation.

Job prerequisites are those requirements that the applicant must meet before she will be considered for the position. The Equal Employment Opportunity Commission ("EEOC" or "the Commission") developed regulations to implement the ADA.[20] The regulations define "qualification standards" to include education, experience, and skill as permissible job prerequisites, however, this definition does not provide an exhaustive list.[21] The courts have added items, such as presence at the workplace, to the list of job prerequisites detailed in the EEOC regulations.[22] Generally, employers freely establish the prerequisites for a position; however, when these prerequisites are challenged, an employer must prove that the prerequisites are "job related and consistent with business necessity."[23]

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with a disability is prohibited); *see also* Heyman v. Queens Village Comm. for Mental Health, 198 F.3d 68, 71 (2d. Cir. 1999) (laying out the elements required to state a claim for discrimination under the ADA).

16. 42 U.S.C. § 12102 (2000).

17. 42 U.S.C. § 12112 (2000) (prohibiting discrimination by a "covered entity"); 42 U.S.C. § 12111(2) (2000) (defining "covered entity" as an "employer, employment agency, labor organization, or joint labor-management committee").

18. 42 U.S.C. § 12112 (2000) (prohibiting discrimination against a "qualified individual with a disability"); *see also supra* note 6 and accompanying text (discussing the definition of "qualified individual with a disability").

19. 42 U.S.C. § 12111(8) (2000).

20. *See* 29 C.F.R. pt. 1630 (2000). The Appendix to this part provides the EEOC's interpretations as guidance for applying the regulations. *See* Appendix to 29 C.F.R. pt. 1630 (2000).

21. 29 C.F.R. § 1630.2(q) (2000).

22. *See, e.g.*, Dutton v. Johnson County Bd. of County Comm'rs, 859 F. Supp. 498, 508 (D. Kan. 1994) (stating that attendance is an essential part of most jobs); Jackson v. Veterans Admin., 22 F.3d 277, 278 (11th Cir. 1994) (finding that regular attendance is an essential element of the job).

23. Mook, *supra* note 3, at 4-9 n.3. (noting that the EEOC does not require that job

The next step in examining an employee's absences is to determine what job functions are essential. The ADA does not define "essential functions," therefore, the essential functions of each position are determined on a case-by-case basis. The EEOC regulations define "essential functions" of a job as "the fundamental job duties of the employment position the individual with a disability holds or desires."[24] The EEOC regulations also articulate considerations for determining whether a particular function should be deemed essential.[25] The non-exhaustive list of reasons that may lead to a determination that a function is essential includes: (1) "the reason the position exists is to perform that function"; (2) there are a limited number of employees among whom the performance of that function can be distributed; or (3) the function is so highly specialized that an individual is hired for her expertise or ability to perform the particular function.[26] While the employer's business judgment factors into this analysis, it is not dispositive of the issue.[27]

If an individual is a qualified person with a disability then the employe r may be required to provide that individual with a reasonable accommodation enabling that individual to perform the essential functions of the job.[28] The ADA provides that a reasonable accommodation may include "job restructuring, part-time [employment] or modified work schedules."[29] The EEOC regulations expand upon the potential accommodations listed in the ADA, but the regulations also emphasize that the list is not exhaustive.[30] Discussing other possible accommodations, the appendix to the regulations suggests "permitting the use of accrued paid leave or providing additional unpaid leave for

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prerequisites be job related or consistent with business necessity unless "an individual meets all the job prerequisites except those that he or she cannot satisfy because of a disability, then the employer must show that the prerequisites that screened out the person are job related and consistent with business necessity").

24. 29 C.F.R. § 1630.2(n) (2000).

25. *See supra* note 12.

26. *See* 29 C.F.R. § 1630.2(n)(2)(i)-(iii) (2000).

27. *See* 29 C.F.R. § 1630.2(n)(3)(i) (2000) (listing the employer's judgment as one of seven factors to be considered in determining whether a particular function is essential).

28. *See generally* 42 U.S.C. § 12112(b)(5)(A) (2000) (defining "discrimination" to include an employer's failure to make a reasonable accommodation for a qualified individual with a disability).

29. 42 U.S.C. § 12111(9)(B) (2000).

30. *See* 29 C.F.R. § 1630.2(o)(2) (2000); *see also* Appendix to 29 C.F.R. pt. 1630 (2000) (stating that the listing "of the most common types of accommodations that an employer may be required to provide...is not intended to be exhaustive of accommodation possibilities").

necessary treatment."[31]

In determining what constitutes a reasonable accommodation, an employer is not required to provide any accommodation that imposes an undue hardship on its business.[32] The ADA defines an "undue hardship" as "an action requiring significant difficulty or expense" when considering the factors for determining whether an accommodation causes an undue hardship.[33] The EEOC regulations concerning undue hardship follow closely the statutory language of the ADA.[34] The factors for determining whether an undue hardship exists illustrate Congress' intent to balance the interests of the disabled person against the interests of the employer.[35] While the imposition of an undue burden is available as an affirmative defense for the employer, to establish a prima facie case of discrimination an employee has the burden to prove that an accommodation is reasonable and not an undue burden on the employer.[36]

Courts have held that an employer who offers an accommodation in the past is not required to continue offering it in the future and that such an offering does not deem the accommodation reasonable.[37] The courts, however, should reconsider this proposition's application. If an employer provided an accommodation to an employee in the past, that employee should not be precluded from using that evidence to prove that the requested accommodation is reasonable. Thus, the employee could use the past accommodation to establish her prima facie case of discrimination. Then the employer would be given the opportunity to present evidence that the accommodation would constitute an undue

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31. Appendix to 29 C.F.R. pt. 1630 (2000).

32. *See* 42 U.S.C. § 12111(10)(B) (2000) (listing the factors to be considered in determining whether an accommodation would cause an undue hardship on an employer).

33. 42 U.S.C. § 12111(10)(A) (2000).

34. *See* 29 C.F.R. § 1630.2(p) (2000). *But see* Kristen M. Ludgate, Note, *Telecommuting and the Americans with Disabilities Act: Is Working at Home a Reasonable Accommodation?*, 81 MINN. L. REV. 1309, 1318 (1997) (arguing that the "requirements for establishing an undue hardship defense are ambiguous, because neither Congress nor the EEOC have promulgated specific guidelines that distinguish a reasonable accommodation from an undue hardship").

35. *See* Smith, *supra* note 8, at 171.

36. *See id.*

37. *See, e.g.*, Corder v. Lucent Techs., 162 F.3d 924, 928 (1998) (stating that the employer "went the extra mile and then some" by agreeing to accommodate the employee's need for unpredictable time off by placing her in a different office and that "such an accommodation easily qualifies as a reasonable one for ADA purposes"); *see also* Vande Zande v. Wisc. Dep't of Admin., 44 F.3d 538, 545 (7th Cir. 1995) (stating that an employer "must not be punished for its generosity by being deemed to have conceded the reasonableness of [a] far-reaching accommodation").

burden. If the parties used this approach, then the employee would receive the benefit of the doubt that an accommodation is reasonable while the employer would be able to demonstrate why the accommodation is not reasonable.

II. REGULAR ATTENDANCE REQUIREMENTS

Most employers establish attendance policies that provide vacation, medical, and sick leave. Employers' policies typically include the maximum days available for leave as well as procedures for requesting leave. Attendance policies generally apply the same standards to all similarly situated employees and maintain equality among employees.

The ADA, a civil rights statute, does more than promote equal treatment.[38] Rather, the ADA goes further when it mandates that an employer provide reasonable accommodations to disabled individuals.[39] Thus, while an employer's attendance policy applies equally to all employees, that policy may actually discriminate against disabled individuals if it does not consider whether some disabled employees will need different accommodations.

III. THE COURTS' CURRENT POSITION

Although it may be necessary for many employers to modify their attendance policies to accommodate disabled employees, the courts have often extended a "blanket rule" stating that an employee's presence is an essential function of most jobs.[40] Some courts rely on this rule to imply that presence is a minimum requirement of almost all jobs and that any modification to the attendance requirement is unreasonable because it would require modification of an essential job function.[41] Under this analysis, any employee who is not present is *not* qualified to perform the job.[42] In fact, a change to an employer's attendance policy might impose

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38. *See* Mook, *supra* note 3, at 6-4.

39. *See id.* (stating that "the ADA requires an employer to do more than merely disregard a person's disability; in appropriate circumstances, an employer is obligated to take affirmative steps to provide 'reasonable accommodation' for the individual with disabilities").

40. *See* Smith, *supra* note 8, at 163.

41. *See, e.g.*, Dutton v. Johnson County Bd. of County Comm'rs, 859 F. Supp. 498, 507-08 (D. Kan. 1994) (citing cases holding that an employee is unqualified if the attendance requirements of the job are not met); Jackson v. Veterans Admin., 22 F.3d 277, 279 (11th Cir. 1994) (finding that regular attendance is an essential function of the job).

42. *See Jackson*, 22 F.3d at 279 (stating that the employer had no obligation to accommodate an employee's absenteeism) (citing Guice-Mills v. Derwinski, 772 F. Supp. 188 (S.D.N.Y. 1991)).

an undue hardship on the employer and thus not require the employer to provide the accommodation.[43] Although many employees cannot seek protection under the ADA, those individuals with chronic illnesses that require sporadic or extended periods of time off may be covered by the ADA.[44]

IV. PROOF ISSUES

In absenteeism cases, the employer rarely defends its assertions describing the essential functions of a job. To determine which job functions are essential, an employee filing a discrimination suit under the ADA must first establish a prima facie case of discrimination.[45] Once the employee establishes his or her case, the burden shifts to the employer, who may assert undue burden as an affirmative defense.[46] In presenting its defense, an employer must demonstrate which job functions are essential.[47] While the law gives deference to the employer's judgment as to which functions are essential, the EEOC does not grant the employers a rebuttable presumption based on their judgment that all functions identified as essential are essential.[48] The EEOC encourages a fact-sensitive analysis to determine an essential job function.[49]

If presence is the issue, then employers do not need to defend their position because courts consider presence an essential job function.[50] As a result, an employer that demonstrates presence as the issue will be able to circumvent the fact-intensive analysis because courts categorize the issue as a question of law rather than one of fact.[51] Most courts accept the proposition that presence is an essential function as a common-sense

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43. *See* Smith, *supra* note 8, at 178.

44. *See id.* at 184 (arguing that chronically ill employees are covered by the ADA and must take sporadic absences as part of their illness).

45. Heyman v. Queens Village Comm. for Mental Health, 198 F.3d 68, 71 (2d. Cir. 1999) (stating the elements of a prima facie case).

46. *See* 42 U.S.C. § 12111(10) (2000) (defining the term "undue hardship"); *see also* Smith, *supra* note 8, at 168 (noting that the burden shifts to the employer to prove that that the accommodation poses an undue hardship).

47. *See* 29 C.F.R. § 1630.2(n)(3) (2000) (defining "essential functions" as "the fundamental job duties of the employment position the individual with a disability holds or desires").

48. *See* Appendix to 29 C.F.R. pt. 1630 (2000) (stating that the inquiry regarding essential functions "is not intended to second guess an employer's business judgment").

49. Appendix to 29 C.F.R. pt. 1630 (2000) (stating that "[w]hether a particular function is essential is a factual determination that must be made on a case by case basis").

50. *See supra* note 12.

51. *See* Smith, *supra* note 8, at 163.

rule.[52] This acceptance by the courts forecloses the employee from casting doubt on the employer's showing that presence is an essential function.

The reasonable accommodation issue also illustrates the problem with categorizing employer assertions as matters of law rather than factual findings. The employee's request for a reasonable accommodation usually triggers the employer's affirmative responsibility to provide a reasonable accommodation.[53] Once the employer is aware of the employee's situation, the interested parties are encouraged to engage in a "problem solving approach" to determine what would constitute a reasonable accommodation.[54] This process should include the employer, employee, and possibly outside technical assistance in an interactive determination of potential accommodations.[55] This interactive process reinforces the need for a fact-sensitive analysis. When presence is automatically deemed an essential function, however, the need for this case-by-case analysis disappears because any modification to an essential function would be unreasonable. Without the blanket rule identifying presence as an essential function, an employee and her employer could litigate whether presence is a job prerequisite or an essential function, whether absence is an unreasonable accommodation, and whether the accommodation is an undue burden.

V. EXCESSIVE ABSENTEEISM

Disability-related absenteeism cases often disregard the need for any accommodation despite the language in the ADA, which implies that employers have an affirmative duty to reasonably accommodate individuals with disabilities.[56] Employers may rely on the "presence is an

52. *See, e.g.*, Corr v. MTA Long Island Bus, No. 98-9417, 1999 U.S. App. LEXIS 25058, at *4 (2d Cir. Oct. 7, 1999) (stating that "an essential aspect of many jobs is the ability to appear at work regularly and on time") (citation omitted); Carr v. Reno, 23 F.3d 525, 529 (D.C. Cir. 1994) (stating that "coming to work regularly" is an essential function of the job).

53. *See* Appendix to 29 C.F.R. pt. 1630 (2000) ("Once a qualified individual with a disability has requested provision of a reasonable accommodation, the employer must make a reasonable effort to determine the appropriate accommodation.").

54. *See* MOOK, *supra* note 3, at 6-17.

55. *See* 29 C.F.R. § 1630(o)(3) (2000) (stating that "[t]o determine the appropriate reasonable accommodation it may be necessary for the covered entity to initiate an informal, interactive process with the qualified individual with a disability in need of the accommodation").

56. *See* 42 U.S.C. § 12111(9) (2000) (stating that a "'reasonable accommodation' may include . . . job restructuring, part-time or modified work schedules . . . and other similar accommodations for individuals with disabilities").

essential function" theory that grants them the right to be inflexible when they assert that excessive absences or time off is unreasonable.

One serious flaw in the courts' current analysis enables some disabled employees to receive accommodations over others. In particular, employees who require extended, unpaid leave are more likely to be accommodated than employees who miss work unpredictably.[57] Ironically, it is possible that the unpredictable absences may add up to much less time off than the scheduled leave and even less than the employee's allotted time off.

Heyman v. Queens Village Committee for Mental Health,[58] provides an example of an employer that attempted to avoid accommodating an employee with unpredictable absences. In *Heyman*, the Second Circuit considered the district court's decision to enter summary judgment in favor of an employer that fired an employee soon after learning that he was diagnosed with lymphoma.[59] Prior to the employee's firing, a co-worker had suffered and died from the same disease.[60] The employee claimed that his termination was pretextual and that the employer fired him because of its concern that the employee may not be able to meet the "level of time commitment required" solely based on its experience with a previous employee.[61] In an attempt to rely on the "presence is an essential function" theory, the employer, relying on its past experience, asserted that the employee could not perform the essential functions of his management position if he did not adhere to the standard attendance policy.[62] The Second Circuit vacated the district court's judgment entering summary judgment for the employer and remanded the case.[63]

Conversely, in *Waggoner v. Olin Corp.*,[64] the Seventh Circuit affirmed the district court's grant of the employer's motion for summary judgment and dismissal of the employee's action under the ADA.[65] The employee

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57. *See* Nunes v. Wal-Mart Stores, Inc., 164 F.3d. 1243, 1247 (9th Cir. 1999) (stating that extended unpaid leave is potentially a reasonable accommodation); *but see* Waggoner v. Olin Corp., 169 F.3d 481, 484 (7th Cir. 1999) (stating that persons with "erratic, unexplained absences, even when those absences are a result of a disability" are not protected by the ADA).

58. 198 F.3d 68 (2d Cir. 1999).

59. *Id.* at 70-71.

60. *Id.* at 70.

61. *Id.* at 71.

62. *Id.* at 73 (discussing that a jury could find that based on its experience the employer could have believed that the employee's attendance would falter).

63. *Id.* at 74.

64. 169 F.3d 481 (7th Cir. 1999).

65. *Id.* at 485.

in *Waggoner* suffered from "visual disturbances" which qualified as a disability.[66] During the twenty-month period of her employment, Waggoner missed or was late for work on forty separate occasions and took a five-month medical leave because of her disability.[67] In upholding the motion for summary judgment, the court explained that the ADA does not require employers to accommodate erratic, unexplained absences because attendance is a requirement of most jobs.[68] This explanation exemplifies the error in the courts' current analysis of absenteeism under the ADA because it demonstrates how courts assume that presence at the job site is required and therefore, any request to forgo attendance is *per se* unreasonable. In *Waggoner*, the Seventh Circuit accepted as a matter of law that attendance is a prerequisite or an essential function of employment.[69] Consequently, the court took an issue of fact, which should be decided by the trier of fact, and announced a rule of law.[70] Specifically, this rule allows employers to circumvent the case-by-case analysis encouraged by the statute.

As a result of the rule created by courts, employees seeking an accommodation permitting erratic or unpredictable absences are likely to face a tougher burden than those that request a specific amount of absences.[71] Some courts have determined that a request for an *indefinite* amount of leave disqualifies the employee from the protection of the ADA,[72] which illustrates the bias incorporated into the ADA that certain disabilities should be treated differently.

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66. *Id.* at 482.

67. *Id.*

68. *See id.* at 484 (stating that it is "fair to conclude that in most instances the ADA does not protect persons who have erratic, unexplained absences, even when those absences are a result of a disability. . . . in most cases, attendance at the job site is a basic requirement of most jobs").

69. *Id.*

70. *But see id.* at 485 (stating that the court is "not establishing a hard-and-fast rule that no absences from work need be tolerated" but that "as a matter of law" the employee's request for indefinite leave was not reasonable).

71. *See id.* (referring to Waggoner's request for time off, the court found that "[s]he simply wanted to miss work whenever she felt she needed to and apparently for so long as she felt she needed to"). The court also indicated that the employee would have been in a better position if she requested a lump amount of time off rather than the erratic, unpredictable days that she was occasionally requesting. *Id.* The court stated that the employee would have had a better argument if she "request[ed] a leave so that she would have time to refine the dosage of her medication so that she could return to work on a regular basis." *Id.*

72. *See, e.g.*, Walton v. Mental Health Assoc., 168 F.3d 661, 671 (3d Cir. 1999) (holding that employee's request for continued leave would have created an undue burden on the employer).

VI. MODIFIED WORK SCHEDULES/PART-TIME EMPLOYMENT

Many people with disabilities may require modified work schedules that allow them the flexibility to leave work during the day or to schedule medical appointments that may interfere with the standard work schedule. In adopting the ADA, Congress stressed that modified work schedules or part-time employment may be reasonable accommodations to disabled individuals.[73] The courts and the EEOC have reinforced this position.[74] The EEOC guidelines state that an employer must provide a modified or part-time work schedule when it is a reasonable accommodation, and does not cause an undue burden on the employer.[75] While such an accommodation is not automatically reasonable, the EEOC indicates its desire to have employers "carefully assess" such a possibility before discharging an employee.[76]

VII. UNPAID LEAVE

The ADA does not require employers to compensate disabled individuals who are incapable of performing the work.[77] While Congress intended to shift some of the burden of supporting disabled individuals from the public to the private sector, it did not intend to cripple the private sector.[78] Thus, unpaid leave is more accepted than paid leave as a reasonable accommodation.

A recent Ninth Circuit decision instructs courts on how they should proceed when the employee requests unpaid leave as the reasonable accommodation.[79] In *Nunes v. Wal-Mart Stores, Inc.*, the employee suffered from a fainting disorder that occasionally caused periods of unconsciousness.[80] The employer's attendance policy granted employees short-term medical leave absences for up to one year.[81] The employer

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73. H.R. REP. NO. 101-485, at 62 (1990) (referring to a "reasonable accommodation" as providing a person with epilepsy with a constant rather than a varying shift).

74. *See, e.g.*, Ralph v. Lucent Techs., Inc., 135 F.3d. 166, 172 (1st Cir. 1998) (stating that a modified work schedule is a potential reasonable accommodation); *see also* Enforcement Guidance, *supra* note 10, at 2.

75. Enforcement Guidance, *supra* note 10, at 2.

76. *See id.*

77. *See* Anderson v. United Airlines, No. 95-1458 Section "L", 1996 U.S. Dist. LEXIS 3555 (E.D. La. Mar. 18, 1996).

78. *See supra* note 3 and accompanying text (discussing the purposes of the Act and omitting any desire to bankrupt the private sector).

79. *See* Nunes v. Wal-Mart Stores, Inc., 164 F.3d. 1243 (9th Cir. 1999).

80. *Id.* at 1245.

81. *Id.*

terminated the employee's job after she took seven months of leave.[82] The Ninth Circuit reversed the district court's decision to grant summary judgment and remanded the case because the court found that there was a genuine issue of material fact as to whether the employee's medical leave was a reasonable accommodation.[83] In finding for the employee, the Ninth Circuit stated that extended leave could be reasonable if it did not unduly burden the employer.[84] If such leave is reasonable, the absence during that period does not render an employee unqualified.[85] In *Nunes*, the court evaluated the specific facts of the case and did not just assume that the employee was unqualified because of her absences.[86] The *Nunes* decision alerted employers that extended medical leave may be viewed as a reasonable accommodation protected by the ADA even when an employee "is completely unable to work for an extended period of time."[87]

Giardina v. HealthNow New York, Inc.[88] illustrates why courts need to conduct a case-by-case analysis for situations involving unpaid leave. In *Giardina*, the court granted the employer's motion for summary judgment where an employee alleged that she was a wrongfully terminated qualified person with a disability under the ADA.[89] The employee began working for the employer in 1988 and took disability leave beginning in March 1993.[90] On May 8, 1999, the employer terminated the employee after a six-year leave of absence.[91] The court ruled in favor of the employer, effectively holding that such a substantial leave of absence was not a reasonable accommodation and that because the employee was "incapable of any work at that time" the termination did not violate the ADA.[92] Although the court found for the employer, it did so based on a specific analysis of the facts and did not rely on the

82. *Id.* at 1245-46.

83. *Id.* at 1249.

84. *See id.* at 1247.

85. *Id.* at 1247 (citation omitted) (stating that "[e]ven an extended medical leave, or an extension of an existing leave period, may be a reasonable accommodation if it does not pose an undue hardship on the employer. If [the employee's] medical leave was a reasonable accommodation, then her inability to work during the leave period would not automatically render her unqualified").

86. *See id.*

87. Perkins Coie, *Extended Medical Leave Can Be A "Reasonable Accommodation,"* 4 ALA. EMPL. L. LETTER 6 (1999).

88. No. 97-CV-0078E(M), 2000 U.S. Dist. LEXIS 840 (W.D.N.Y. Jan. 25, 2000).

89. *Id.* at *10.

90. *Id.*

91. *Id.*

92. *Id.*

rule that presence is an essential function as a matter of law.

VIII. TELECOMMUTING AS AN ALTERNATIVE

Some courts have "declined to deem attendance an essential element of the job in situations where the employee was capable of performing all necessary functions of his/her work away from the worksite."[93] In *Langon v. Department of Health & Human Services*,[94] the Court of Appeals for the District of Columbia reversed the district court's grant of summary judgment for the employer.[95] The court found that there was a genuine issue of material fact relating to the disagreement between the employee and employer over whether the employee could work from home.[96] The employee was a computer programmer with a satisfactory record of employment when she began suffering increased symptoms of multiple sclerosis.[97] The disability forced the employee to make numerous changes in her work habits, including working late to compensate for time missed in the morning, taking leave without pay, and eventually working on a part-time schedule.[98] The employer worked with the employee to accommodate her needs;[99] however, when the employee requested to work from home as a reasonable accommodation, the employer refused to accommodate the request.[100] The employer used the fact that other computer programmers in the same position had to do their work in the workplace to justify the denial of her request.[101] The Court of Appeals for the District of Columbia reversed the district court's decision to grant summary judgment on behalf of the employer.[102]

In *Langon*, the Court of Appeals for the District of Columbia found that there was a genuine issue of material fact as to the feasibility of

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93. Robert B. Gordon & Christopher L. Ekman, *Attendance Control Issues Under the ADA and FMLA*, 13 LAB. L. 393, 396 (1997).

94. 959 F.2d 1053 (D.C. Cir. 1992).

95. *Id.* at 1061 ("In sum, because there are genuine factual disputes . . . summary judgment should not have been granted.").

96. *Id.* at 1060.

97. *See id.* at 1054 (describing the employee's work as satisfactory for the first twenty-one months of her employment).

98. *See id.* at 1054-55 (listing the employer's changes to employee's work environment).

99. *Id.* at 1054-55.

100. *Id.* (stating that the employer rejected employee's request because the job of "computer programmer 'does not lend itself to work at home'").

101. *Id.* at 1060.

102. *Id.* at 1058.

allowing the employee to work from home.[103] The employer supported its position by presenting a memorandum that it issued citing the infeasibility of this particular employee's accommodation.[104] The employee, however, provided her job description and convinced the court that her position "did not demand her being in the office,"[105] and therefore the accommodation would be both feasible and reasonable. By viewing the facts in a light most favorable to the plaintiff, the court of appeals found that summary judgement was inappropriate and therefore reversed and remanded the case so that a trier of fact could consider the question of whether the employee's request was feasible.[106]

While the *Langon* court recognized the potential of working from home, there are conflicting views regarding this alternative.[107] In *Vande Zande v. Wisconsin Department of Administration*,[108] the court held that it would follow the "majority rule," holding that an employer need not accommodate a disable employee by allowing him to work from home.[109] The court also stated that it would take an extraordinary case to permit the employee to litigate the issue in court.[110] While the court recognized that communications technology may advance to the point where working from home is a reasonable accommodation, the court did not require the employer to illustrate an undue burden caused by the accommodation because the court rejected working from home as a reasonable accommodation at the present time.[111] The court's determination rested on a narrow interpretation of the ADA and did not

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103. *Id.* at 1060.

104. *See id.* (stating that the employer pointed to its letter to the employee as evidence that the feasibility of working from home was an undisputed fact).

105. *Id.*

106. *Id.* (stating that "[a]t all events, [employee], through her deposition testimony, has disagreed with HHS about the length of the deadlines and the need for frequent face-to-face contacts. A genuine dispute about this material fact thus exists").

107. *See* Ludgate, *supra* note 34, at 1324 (recognizing that there are conflicting views relating to telecommuting. Some proponents argue that the arrangement "facilitate[s] improved employment opportunities for disabled individuals." However, other critics fear that telecommuting arrangements may segregate disabled individuals from the mainstream workforce.).

108. 44 F.3d 538 (7th Cir. 1995).

109. *Id.* at 544 ("[A]n employer is not required to accommodate a disability by allowing the disabled worker to work, by himself, without supervision, at home.").

110. *Id.* at 545 ("[I]t would take a very extraordinary case for the employee to be able to create a triable issue of the employer's failure to allow the employee to work at home.").

111. *Id.* at 544 ("This will no doubt change as communications technology advances, but [that] is not the situation today.").

require the employer to allow the employee to work from home.[112] However, the ADA does not require any *specific* accommodation, rather it requires an employer to provide a "reasonable accommodation."[113] In *Vande Zande*, the employee's inability to demonstrate that working from home was reasonable prevented her from establishing a prima facie case.

While the above cases involve a rejection of an employee's request for an accommodation allowing her to complete clerical or administrative duties from home, other cases reject the requested accommodation for other job-related reasons. In *Whillock v. Delta Air Lines, Inc.*,[114] an employee was a reservation sales agent and she requested the accommodation of working from home.[115] The employer rejected her request and cited security concerns and limited computer terminals as reasons why working from home was unreasonable.[116] While these are important, specific factors that should be considered in the analysis, the court dismissed the employee's request to work from home as "unreasonable as a matter of law."[117] Unfortunately, the court announced its holding as a matter of law and did not analyze the specific factors that the employer emphasized.

IX. UNSCHEDULED ABSENCES

Courts and employers are unlikely to consider unscheduled absences reasonable accommodations. In *Jackson v. Veteran's Administration*,[118] the Eleventh Circuit upheld the district court's grant of summary judgment for an employer that fired a disabled housekeeping aide due to his excessive absences.[119] The court reasoned that because the employee was absent on a "sporadic, unpredictable basis, he could not fulfill [an] essential function of his employment, that of being present on the job."[120] The court based its decision on the sporadic nature of the employee's absences and not on the excessiveness of his absences.[121]

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112. *Id.* at 545 (stating that the employer "was not required by the Americans with Disabilities Act to allow [the employee] to work at home").

113. 42 U.S.C. § 12112(b)(5)(A) (2000) (stating that an employer discriminates against an employee if it fails to make a reasonable accommodation).

114. 926 F. Supp. 1555 (N.D. Ga. 1995).

115. *See id.* at 1557-58.

116. *Id.* at 1564.

117. *Id.* at 1566.

118. 22 F.3d 277 (11th Cir. 1994).

119. *Id.* at 278.

120. *Id.* at 279.

121. *Id.* at 279 ("But the issue here is not whether absences in excess of allotted leave are subject to accommodation . . .[r]ather, . . .whether the number of sporadic,

The EEOC regulations provide that a reasonable accommodation "may involve changing when or how an essential function is performed."[122] The dissent in *Jackson* stated that the court erred in finding as a matter of law that the employer did not need to accommodate the sporadic absences because it should have based its decision on the specific facts presented to the court.[123] The fact that the employee had unused accrued leave raised the question of whether the court actually looked at the individualized facts of this case.[124] The dissent also noted that although there was no showing of excessive absenteeism in *Jackson*, the court avoided the question of reasonableness because it accepted that unpredictable absences are an unreasonable accommodation without further analysis.[125]

Like the court's failure to consider the employee's unused leave, the fact that the employee suggested numerous other accommodations is another factor that places doubt on the extent of the court's inquiry.[126] In order to accommodate his arthritis, the employee suggested that the hospital grant him leave for his bi-weekly treatments and when his arthritis flared up, he could switch hours with other employees, delay his start time, or just delay less time-sensitive duties.[127] The court thought that the employee's request was unreasonable because of its unpredictable nature.[128]

The court's analysis in *Jackson* creates a bias in favor of some disabilities over others. For instance, by allowing extended, unpaid leave, the court's analysis of the ADA favors individuals with disabilities that require this type of leave, while individuals with chronic or unpredictable disabilities cannot expect the same protection. The Sixth

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unscheduled absences . . .can be reasonably accommodated."). The employer conceded that the employee only took time off that was allotted to him. *Id.*

122. Appendix to 29 C.F.R. pt. 1630 (2000) (discussing 29 C.F.R. § 1630.2(o)).

123. *Jackson*, 22 F.3d at 281-82 (Birch, C.J., dissenting) (stating that "[w]hether there was an accommodation the [employer] could have made which would both be reasonable and allow [employee] to perform his job. . . . The error in the district court's reasoning is that it determined as *a matter of law* that the hospital was not required to accommodate irregular and unpredictable absences.").

124. *Id.* (Birch, C.J., dissenting) ("[The employee] had not used any leave other than his accrued time off . . . [and his] absenteeism may have been . . . irregular and unpredictable, but . . . *it was not excessive.*").

125. *See id.* at 282 (Birch, C.J., dissenting). The court's treatment of this issue may create a per se rule that irregular or unpredictable absences are unreasonable.

126. *Id.* at 279 (finding that "[s]uch accommodations do not address the heart of the problem: the unpredictable nature of [the employee's] absences").

127. *Id.*

128. *Id.*

Circuit attempted to explain this disparity in *Parker v. Metropolitan Life Insurance Co.*,[129] when it explained that the ADA prohibits discrimination between disabled and nondisabled, but does not mandate equality between individuals with different disabilities.[130] While this proposition may be the answer, it seems that Congress already attempted to exclude those disabilities that do not deserve protection by statutorily defining and then excluding in the ADA.[131]

Regardless of this potential bias against certain disabilities that have chronic and unpredictable effects, the courts are consistently against providing ADA protection to such claims. In *Cino v. Sikorsky Aircraft & United Technologies Corp.*,[132] the court found that the employee's termination was not motivated by discrimination.[133] Instead, the court held that the employee's poor attendance record rendered him unqualified to perform his job.[134] Thus, he was not afforded protection under the ADA.[135]

In *Dutton v. Johnson County Board of County Commissioners*,[136] however, the court denied the employer's motion for summary judgment based on sporadic absences because it found that there was a genuine issue of material fact as to the reasonableness of the proposed accommodation.[137] The employee suffered from migraine headaches that caused him to miss work sporadically.[138] Since the employee's absences were not excessive and the employer was not able to establish that his performance suffered, the court ruled in favor of the employee.[139] Thus, the court suggested that predictable attendance was not essential as long as the employee's performance did not suffer.[140]

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129. 121 F.3d 1006 (6th Cir. 1997).

130. *Id.* at 1015 ("The ADA does not mandate equality between individuals with different disabilities.").

131. *See* 42 U.S.C. § 12113(d) (2000) (stating that employers may refuse to accommodate individuals with infections and communicable diseases).

132. 42 F. Supp. 2d 147 (D. Conn. 1998).

133. *See id.* at 151.

134. *Id.* (citing the employee's poor attendance record as proof that he could not "fulfill [the] minimum expectations" of the job).

135. *Id.*

136. 859 F. Supp. 498 (D. Kan. 1994).

137. *Id.* at 509.

138. *See id.* at 501.

139. *Id.* at 507 ("The court determines that defendant has not established that plaintiff's proposed accommodation is unreasonable or that it would impose an undue hardship.").

140. Gordon & Ekman, *supra* note 92, at 396 (stating that the court's conclusion in *Dutton* suggested that "predictable attendance was not an essential function of [the

X. CONCLUSION

Although the ADA protects disabled employees, no employee covered by the ADA will be granted any more leave than a nondisabled employee. As a result, excessive, chronic absenteeism will not be accommodated. Courts, however, have almost always dismissed categorically claims where the employee's absences were unpredictable but not excessive. The case law indicates that employees' absences, excessive or not, will not be tolerated by employers or courts. While some absences obviously can be deemed excessive, the courts should follow a case-by-case analysis that looks at all of the particular facts involved and refrain from relying on the "presence is essential" rule. Without such an approach, the goals of the ADA will continue to be frustrated and there will also be an unnecessary loss of jobs in this country.

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employee's] job").