

WILL THE INTERACTION OF THE FAMILY AND MEDICAL LEAVE ACT AND THE AMERICANS WITH DISABILITIES ACT LEAVE EMPLOYEES WITH AN "UNDUE HARDSHIP?"

I. INTRODUCTION

Imagine that you had severely broken both of your legs in a car accident and took twelve weeks of combined paid and unpaid leave, as permitted under The Family and Medical Leave Act of 1993 ("FMLA"),¹ to recover from your injuries. After a trying recovery, you return to the job you have held for the past ten years as a paralegal. However, you still need continuous physical therapy and often miss entire work days because the pain is so severe. You request, and believe you are entitled to, modifications in your work schedule and additional leave as a "reasonable accommodation"² under the Americans With Disabilities Act of 1990 ("ADA").³ However, your employer is a relatively small firm with only sixty employees. Your employer fires you, claiming that the firm has already incurred substantial losses by granting you twelve weeks of FMLA leave, and that your requested schedule changes and additional leave are an "undue hardship"⁴ on the business. What do you do?⁵

1. 29 U.S.C. §§ 2601-2654 (Supp. V 1993).

2. The Americans with Disabilities Act defines "reasonable accommodation" to include (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.

42 U.S.C. § 12111(9) (Supp. V 1993). The Equal Employment Opportunity Commission ("EEOC") defines "reasonable accommodation" as "[m]odifications or adjustments to a job application process . . . or . . . the work environment . . . that enable a qualified individual with a disability to perform the essential functions of that position." 29 C.F.R. § 1630.2(o) (1995). The EEOC indicates that the purpose behind the "reasonable accommodation" requirement is to provide "[m]odifications or adjustments that enable an employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by other similarly situated employees without disabilities." *Id.* § 1630.2(o)(iii). See also H.R. REP. NO. 485, 101st Cong., 2d Sess., pt. 3, at 39-40 (1990), reprinted in 1990 U.S.C.C.A.N. 445, 462-63; BUREAU OF NAT'L AFFAIRS, SPECIAL SUPPLEMENT—EEOC: A TECHNICAL ASSISTANCE MANUAL ON THE EMPLOYMENT PROVISIONS (TITLE I) OF THE AMERICANS WITH DISABILITIES ACT S-15 (1992) [hereinafter EEOC TECHNICAL ASSISTANCE MANUAL].

3. 42 U.S.C. §§ 12101-12213 (Supp. V 1993).

4. The ADA defines an undue hardship as:
an action requiring significant difficulty or expense, when considered in light of the

When an employee suffers a prolonged illness, she may be eligible for leave under both the Family and Medical Leave Act and the Americans with Disabilities Act. The FMLA mandates that employers grant qualified employees up to twelve workweeks of paid or unpaid leave⁶ per year for an employee's illness.⁷ The ADA requires employers to grant qualified disabled employees⁸ a reasonable accommodation unless it would cause the employer undue hardship to do so.⁹ When an employee falls under the protection of both provisions, the obligations of the employer are unclear.

[following] factors:

(i) the nature and cost of the accommodation needed under this [Act];

(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;

(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

(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.

42 U.S.C. §§ 12111(10)(A), 1(B) (Supp. V 1993).

5. This hypothetical is a variation on one offered in Brian F. Jackson & Howard R. Flaxman, *Intermittent Leave and Reduced Leave Schedule: Traps for the Unwary under the Family and Medical Leave Act*, 20 EMPLOYEE REL. L.J. 29, 39-40 (1994).

This problem may also arise when cancer patients are hospitalized for extended periods and then need additional leave for continuing treatment. Ms. Frances Wright testified before a congressional committee that she took twelve weeks of leave for surgery for colon cancer and was later fired when she requested additional leave for chemotherapy treatments. S. REP. NO. 3, 103d Cong., 1st Sess. 12 (1993), reprinted in 1993 U.S.C.A.N. 3, 14. She had already made every effort to schedule the appointments on non-work time, and in the ten years she had been working for her employer, she had only been absent from work two times (three weeks total). *Id.* According to the testimony before the Senate, approximately 25% of cancer patients are discriminated against in employment. *Id.* Ms. Barbara Hoffman, vice president of the National Coalition for Cancer Survivorship, asserted in the hearings that "such discrimination against qualified employees costs society millions of dollars in lost wages, lost productivity and needless disability payments." *Id.*

6. The FMLA leave can be taken as paid or unpaid leave. 29 C.F.R. § 825.207 (1995). See also Gerald L. Uslander, *From Companies That Have Family Leave: How Costly and Disruptive Is It Really?*, EMPLOYMENT REL. TODAY, Spring 1993, at 1. The employee can, and the employer is permitted, to require that the employee first use his or her paid accrued leave and then take the remainder of the time as unpaid leave. 29 C.F.R. § 825.207(a) (1995). However, the regulations specifically state that "[a]n employee has a right to substitute paid medical/sick leave to care for a seriously ill family member only if the employer's leave plan allows paid leave to be used for that purpose." *Id.*

7. 29 U.S.C. § 2612(a)(1) (Supp. V 1993).

8. "Qualified individual with a disability" is defined in 42 U.S.C. § 12111(8) (Supp. V 1993), and is further discussed *infra*, notes 21-23 and accompanying text.

9. 42 U.S.C. §§ 12111(a), 12111(b)(5) (Supp. V 1993).

Once an employer grants twelve weeks of FMLA leave, can the employer consider the economic and practical effects of having granted that leave in determining whether an accommodation under the ADA will be an undue hardship on the employer?

This Note begins by defining and comparing the key terms and provisions of the FMLA and the ADA. The Note then explains the reasonable accommodation/undue hardship standard under the ADA and uses case law to interpret its application. Next, the Note presents arguments of both employers and employees on whether past FMLA leave should be considered in the undue hardship test. Finally, the Note concludes that an employer should not be able to consider past FMLA leave in an ADA undue hardship test, because doing so would discriminate against employees for exercising their FMLA rights. Nonetheless, this Note proposes amendments to the ADA to codify judicial limitations on the employee's right to a reasonable accommodation after exercising her FMLA rights.

II. A COMPARISON OF THE KEY TERMS AND PROVISIONS OF THE FMLA AND THE ADA

A. *Background on the FMLA and Definition of Terms*

The Family and Medical Leave Act of 1993 was enacted to respond to the changing needs of the American worker who has been forced to choose between work responsibilities and family health needs.¹⁰ The FMLA creates minimum labor standards by mandating that private employers of at least fifty employees grant twelve workweeks¹¹ of family or medical

10. Statement by President William J. Clinton on Signing the Family and Medical Leave Act, 29 WEEKLY COMP. PRES. DOC. 144-45 (Feb. 8, 1993) [hereinafter Clinton Statement]. Family health needs include the serious illness of the worker or an immediate family member, and the birth or adoption of a child or a foster child. 29 U.S.C. § 2612(a)(1) (Supp. V. 1993); see *infra* note 15. In his statement upon signing the FMLA, President Clinton stressed that the obligations and needs of the American worker are dramatically different than in years past. Clinton Statement, *supra*, at 145. For example, the number of mothers in the labor force with children under 18 has increased from 35% in 1965 to 67% in 1992. *Id.* President Clinton noted that forcing parents to choose between work and family will have a negative impact on the American working environment. *Id.* By giving workers more options with regard to family leave, the FMLA will "promote heightened productivity, lessen[] job turnover, and reduce[] absenteeism." *Id.*

11. The twelve workweeks of leave can be taken at one time or as "intermittent" or reduced schedule leave. 29 C.F.R. § 825.203 (1995). If an employee chooses to take such leave, an employer is permitted to temporarily transfer the employee to an equivalent position with the same salary and benefits in order to better accommodate the employer's needs. *Id.* § 825.204. Only the intermittent or

leave to employees¹² who have worked for at least twelve months and 1,250 hours.¹³ The FMLA gives employees the right to family and medical leave for the “serious health condition”¹⁴ of an employee, spouse, child,

reduced leave that is taken is measured into the twelve workweeks calculation. *Id.* § 825.205(a). See also Jana H. Carey, *Overview and Summary of the Family and Medical Leave Act of 1993*, in *ADVANCED EMPLOYMENT LAW AND LITIGATION 1993*, 231, 254 (ALI-ABA Course of Study Materials No. C874, 1993).

12. The FMLA does not require employers to restore “highly compensated employees” to their jobs, or even to equivalent positions, if doing so would cause “substantial and grievous” economic injury to the company and the employer promptly notifies the employee that he or she will not be reinstated after the leave. 29 U.S.C. § 2614(a), 2614(b) (Supp. V 1993); Carey, *supra* note 11, at 247-48. “Highly compensated employees” generally constitute the highest paid 10% of the employees. 29 U.S.C. § 2614(b)(2) (Supp. V 1993); Carey, *supra* note 11, at 247-48. The FMLA’s “substantial and grievous economic injury” test is stricter and harder to meet than the ADA’s “undue hardship” test. 29 C.F.R. § 825.218(d) (1995).

13. 29 U.S.C. §§ 2611(2)(A), 2611(4)(A), 2612(a)(1) (Supp. V 1993). See generally 29 C.F.R. § 825.100 (1995); Gerald L. Maatman, Jr. & Andrew J. Boling, *What You Should Know About the Family and Medical Leave Act*, PRAC. LAW., July 1993, at 21, 22-23; Peggy R. Mastroianni & David K. Fram, *The Family Medical Leave Act and the Americans with Disabilities Act: Areas of Contrast and Overlap*, 9 LAB. LAW 553 (1993); Peter M. Panken & Christine L. Wilson, *The Family and Medical Leave Act of 1993*, in *EMPLOYMENT DISCRIMINATION AND CIVIL RIGHTS ACTIONS IN FEDERAL AND STATE COURTS 1994*, at 923, 925 (ALI-ABA Course of Study Materials No. C902, 1994); John T. Shannon, *The Family and Medical Leave Act of 1993*, ARK. LAW., Summer 1993, at 9; G. John Tysee & Kimberly L. Japinga, *The Federal Family and Medical Leave Act: Easily Conceived, Difficult Birth, Enigmatic Child*, 27 CREIGHTON L. REV. 361, 363 (1994).

14. “Serious health condition” is defined by the FMLA as an illness, injury, impairment, or physical or mental condition that involves—(A) inpatient care in a hospital, hospice, or residential medical care facility; or (B) continuing treatment by a health care provider. 29 U.S.C. § 2611(11) (Supp. V 1993); see also 29 C.F.R. § 825.800 (1995) (providing a similar definition but expanding the definition to include subsequent treatment in connection with inpatient care).

A serious health condition involving continuing treatment by a health care provider includes (A) a period of incapacity . . . of more than three consecutive calendar days, including any subsequent treatment or period of incapacity relating to the same condition, that also involves:

- (1) Treatment two or more times by a health care provider, . . . or
- (2) Treatment by a health care provider on at least one occasion which results in a regimen of continuing treatment under the supervision of the health care provider.
- (B) Any period of incapacity due to pregnancy, or for prenatal care.
- (C) Any period of incapacity or treatment for such incapacity due to a chronic serious health condition
- (D) A period of incapacity which is permanent or long-term due to a condition for which treatment may not be effective. The employee or family member must be under the continuing supervision of, but need not be receiving active treatment by, a health care provider
- (E) Any period of absence to receive multiple treatments . . . by a health care provider . . . , either for restorative surgery after an accident or other injury, or for a condition that would likely result in a period of incapacity of more than three consecutive calendar days in the absence of medical intervention or treatment.

29 C.F.R. § 825.800 (1995). Legislative history indicates that “serious health condition” does not include short-term illnesses with recoveries of only a few days. However, it does include, but is not limited to,

or parent, or the birth, adoption, or placement of a child.¹⁵ In addition, the FMLA guarantees an employee continued health benefits during leave and full job restoration, including salary and benefits, subsequent to leave.¹⁶

The FMLA protects employees who exercise their statutory rights by prohibiting an employer from interfering with those rights or discriminating against an employee who contests¹⁷ a practice as a violation of the FMLA.¹⁸ "Interference" includes an employer's refusal to grant FMLA

heart attacks, heart conditions requiring heart bypass or valve operations, most cancers, back conditions requiring extensive therapy or surgical procedures, strokes, severe respiratory conditions, spinal injuries, appendicitis, pneumonia, emphysema, severe arthritis, severe nervous disorders, injuries caused by serious accidents on or off the job, ongoing pregnancy, miscarriages, complications or illnesses related to pregnancy, such as severe morning sickness, the need for prenatal care, childbirth and recovery from childbirth.

H.R. REP. NO. 8, 103d Cong., 1st Sess., pt. 1, at 40 (1993).

15. The FMLA text states that an employee is eligible for 12 workweeks of leave during any 12-month period for one or more of the following:

- (A) Because of the birth of a son or daughter of the employee and in order to care for such son or daughter.
- (B) Because of the placement of a son or daughter with the employee for adoption or foster care.
- (C) In order to care for the spouse, or a son, daughter, or parent, of the employee, if such spouse, son, daughter, or parent has a serious health condition.
- (D) Because of a serious health condition that makes the employee unable to perform the functions of the position of such employee.

29 U.S.C. § 2612(a)(1) (Supp. V 1993).

16. 29 U.S.C. § 2614 (Supp. V 1993); 29 C.F.R. §§ 825.209, 825.214 (1995); *see generally* Jackson & Flaxman, *supra* note 5, at 30-31. In comparison, under the ADA the employer need only make a reasonable accommodation to the employee's disability. *See supra* note 2 and accompanying text. If the employer grants the employee leave as a reasonable accommodation to the employee's health problem, the employer need not restore the employee to the same or equivalent job, nor must the employer continue to provide health benefits during the employee's absence. Jana H. Carey & Sandra S. Fink, *How the ADA and FMLA Interact with an Employer's Policies Concerning Absenteeism and Leave Due to Medical Conditions*, in *ADVANCED EMPLOYMENT LAW AND LITIGATION*, *supra* note 11, at 269, 288-89.

17. Examples of such contests or "opposition" include "complaining to anyone . . . about allegedly unlawful practices, participating in a group that opposes discrimination; [or] refusing to obey an order because the worker thinks it is unlawful under the act." H.R. REP. NO. 8, *supra* note 14, at 46. The legislative history indicates that the drafters modeled this provision after the "opposition" clause of Title VII of the Civil Rights Act of 1964. *Id.* The Senate Report explains that "the Family and Medical Leave Act is intended to provide the same sorts of protection [as Title VII] to workers who oppose, protest, or attempt to correct alleged violations of the FMLA." S. REP. NO. 3, *supra* note 5, at 34, *reprinted in* 1993 U.S.C.C.A.N. at 36.

18. 29 U.S.C. § 2615 (Supp. V 1993); 29 C.F.R. § 825.220 (1995). The FMLA provides that "[i]t shall be unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under this subchapter." 29 U.S.C. § 2615(a)(1) (Supp. V 1993). The FMLA also prohibits discrimination against employees for exercising their FMLA rights by making it "unlawful for any employer to discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by this subchapter." *Id.* § 2615(a)(2).

leave and any actions that discourage the taking of such leave.¹⁹ These provisions ensure that employees will feel free to exercise their FMLA rights without fear of retaliation.

B. Background of the ADA and Definitions of Terms

The purpose of the ADA is to prevent discrimination against disabled employees in hiring and employment.²⁰ In order to merit protection under the ADA, an employee must be a "qualified individual with a disability,"²¹ an individual "who, with or without reasonable accommodation, can

19. 29 C.F.R. § 825.220(b) (1995). Other examples of interference include employers who try to avoid FMLA obligations by transferring employees from one worksite to another in order to prevent any one worksite from employing more than fifty employees. *Id.* Interference would also include "changing the essential functions of the job in order to preclude the taking of leave," or reducing employee hours to prevent FMLA eligibility. *Id.*

20. The ADA states that "[n]o [employer] shall discriminate 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." 42 U.S.C. § 12112(a) (Supp. V 1993). Discrimination includes "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, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity . . ." *Id.* § 12112(b)(5)(A).

The ADA applies to employers with fifteen or more employees. *Id.* § 12102(5)(A). Furthermore, it covers employees irrespective of the length of their employment. *Id.* § 12112. *See also* Mastroianni & Fram, *supra* note 13, at 554.

21. 42 U.S.C. § 12111(a) (Supp. V 1993). *See also* EEOC TECHNICAL ASSISTANCE MANUAL, *supra* note 2, at S-7. A disability includes "any physical or mental impairment that substantially limits a major life activity." Carla R. Walworth & Margaret J. Strange, *Serving Two Masters: The Interaction between the Family and Medical Leave Act and the ADA*, 18 EMPLOYEE REL. L.J. 461, 467 (1992-93). Major life activities include "caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 29 C.F.R. § 1630.2(i) (1995).

The Code of Federal Regulations notes that under the ADA, physical impairments include "[a]ny physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, gastro-urinary, hemic and lymphatic, skin, and endocrine." *Id.* § 1630.2(h)(1). Mental impairments include "[a]ny mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities." *Id.* § 1630.2(h)(2). These lists are not exhaustive but are intended as guidelines. EEOC TECHNICAL ASSISTANCE MANUAL, *supra* note 2, at S-5. A person's condition is a disability without regard to any medicine the individual may take to control it. *Id.* Thus, an individual who has epilepsy but controls the condition with medicine would still have a disability under the ADA. *Id.* The Manual specifically notes that "simple physical characteristics . . . are not impairments." *Id.* It is interesting to note that the ADA protects individuals who are considered to have a disability, even if the individual does not actually have such an impairment. 42 U.S.C. § 12102(2)(C) (Supp. V 1993). The Act defines "disability" to include an individual "being regarded as having such an impairment." *Id.*

perform the essential functions²² of the employment position that such individual holds or desires."²³

If the employee is a qualified individual with a disability who requests²⁴ a reasonable accommodation²⁵ under the ADA, the employer is required to provide an accommodation to enable the employee to perform the job. In most cases, a reasonable accommodation includes an adjustment in the facilities or existing job requirements.²⁶ However, under the ADA an employer is not obliged to provide the accommodation if it would impose

22. "Essential functions" are defined as the fundamental, nonmarginal requirements of the job. *See* 29 C.F.R. § 1630.2(n) (1995). An employer is only required to accommodate individuals who can perform the essential functions of the job, with or without reasonable accommodation. *See* 42 U.S.C. §§ 12111(8), 12112(a) (Supp. V 1993). Although employers must "reallocate" marginal job requirements if necessary to reasonably accommodate employees, the ADA does not require them to reallocate essential or fundamental job requirements. EEOC TECHNICAL ASSISTANCE MANUAL, *supra* note 2, at S-14. For example, if a security guard must inspect identification cards in order to adequately protect a building, good vision is an essential function of his job. *Id.* If his vision is impaired so that he cannot inspect the cards with or without a reasonable accommodation, then the ADA would not require the employer to hire the individual. *Id.* However, if an individual can perform all of the essential job functions, the employer must reallocate the nonessential functions through job restructuring or job modification. *Id.* An employer can restructure a job by "exchanging marginal functions of a job that cannot be performed by a person with a disability for marginal job functions performed by one or more other employees." *Id.* For example, a secretary may be able to perform all the essential functions of her job but may not be able to perform one nonessential function, such as walking around to deliver papers to other offices on the floor. The employer could restructure the job by giving the delivery responsibilities to another secretary while the disabled secretary performed additional typing work in exchange. *See id.*

23. 42 U.S.C. § 12111(8) (Supp. V 1993).

24. Employers are required to accommodate only the physical or mental limitations of an otherwise qualified individual with a disability that are *known* to the employer. 29 C.F.R. § 1630.9 (1995). The employer must have knowledge of the employee's disability before it must make a reasonable accommodation. *Carlson v. Inacom Corp.*, 885 F. Supp. 1314, 1322 (D. Neb. 1995). If the employee informs the employer about the disability or the employer can reasonably infer the disability from his knowledge of certain factors, *Brink v. Veterans Admin.*, 4 M.S.P.B. 419, 423, 4 M.S.P.R. 358, 363 (1980), the employer has sufficient knowledge. *See id.*

25. The requirement that the employer make a "reasonable accommodation" does not mean that the employer must provide the "best" accommodation or the one the employee prefers; it simply means that it must be "reasonable." Elliot H. Shaller & Dean A. Rosen, *A Guide to the EEOC's Final Regulations on the Americans with Disabilities Act*, 17 EMPLOYEE REL. L.J. 405, 415 (1991-92).

26. Specifically, "reasonable accommodation" includes, but is not limited to:

- (i) [m]aking existing facilities used by employees readily accessible to and usable by individuals with disabilities; and
- (ii) [j]ob restructuring; part-time or modified work schedules; reassignment to a vacant position; acquisition or modifications 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.

29 C.F.R. § 1630.2(o)(2) (1995).

an undue hardship on the employer to do so.²⁷ An undue hardship is defined as a burdensome expense in light of "the nature and cost of the accommodation needed under [the ADA and] the overall financial resources of the facility."²⁸

If an employer refuses to provide a reasonable accommodation to enable a qualified individual to perform the essential functions of her job and the employer does not have a valid undue hardship defense, the employer engages in "discrimination"²⁹ and violates the ADA.³⁰ The ADA prohibits such workplace discrimination and provides a private right of action for

27. 42 U.S.C. § 12111(b)(5)(A) (Supp. V 1993). The undue hardship analysis must be determined on a case-by-case basis, and the burden rests with the employer to show that the accommodation would present an undue hardship. H.R. REP. NO. 485, *supra* note 2, at 42, *reprinted in* 1990 U.S.C.C.A.N. at 465. For a discussion of the burden of proof in ADA cases, see *infra* notes 58-59 and accompanying text.

Note that an undue hardship defense cannot be justified solely by a negative impact on employee morale. Shaller & Rosen, *supra* note 25, at 418; Carey & Fink, *supra* note 16, at 269, 277. *But see* Barth v. Gelb, 2 F.3d 1180, 1189-90 (D.C. Cir. 1993) (declaring that an adverse effect on employee morale caused by accommodation to handicapped employee can be considered in determining whether the accommodation causes undue hardship to the employer).

Another instance in which an employer is not bound by the strictures of the ADA is if the employee poses a "direct threat" to other employees or customers. 29 C.F.R. § 1630.2(r) (1995). The EEOC defines a "direct threat" as a "significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by the reasonable accommodation." *Id.* A disabled employee who poses a "direct threat" to other employees or customers is not a "qualified individual with a disability" protected by the ADA. *See* 29 C.F.R. §§ 1630.15(b)(2), 1630.2(a), 1630.2(r) (1995). There should be a personalized assessment of the individual's ability to safely perform the job. *Id.* § 1630.2(r). An evaluation should be based on the most current medical judgment and should include such factors as:

- (1) the duration of the risk;
- (2) the nature and severity of the potential harm;
- (3) the likelihood that the potential harm will occur; and
- (4) the imminence of the potential harm.

Id.

28. For the ADA definition of "undue hardship," see *supra* note 4.

29. "Discrimination," as used in the ADA, includes, but is not limited to, the following actions: limiting, segregating and classifying individuals on the basis of disability; contractual arrangements that have the effect of discriminating against a disabled individual; standards, criteria, or methods of administration that discriminate against a disabled employee; unequal treatment because of an individual's relationship or association with an individual with a disability; not making a reasonable accommodation; qualification standards, tests and other selection criteria which screen out individuals with disabilities and do not have a business necessity; administration of tests in a manner that disadvantages disabled individuals; retaliation or coercion against a disabled individual who has opposed any act or practice made unlawful by the ADA; and medical examinations and inquiries that have no business necessity and are not job related. 29 C.F.R. § 1630.4-1630.14 (1995).

30. 42 U.S.C. § 12112(a) (Supp. V 1993).

such discrimination.³¹

C. Comparison of the FMLA and the ADA

In many ways, the FMLA provides more inclusive leave than an ADA reasonable accommodation.³² When an employee requires FMLA leave due to a medical condition, the employee need not be capable of performing the essential functions of the job to qualify for such leave. However, such ability is necessary before an employer can provide an ADA reasonable accommodation.³³ Additionally, because employers do not have the equivalent of an ADA undue hardship defense, the employer must grant

31. *Id.* §§ 12112(a), 12112(b), 12117(a). The ADA remedies are the same as Title VII remedies. *Id.* § 12117(a). The ADA provides that

[t]he powers, remedies, and procedures set forth in sections 2000e-4, 2000e-5, 2000e-6, 2000e-8, and 2000e-9 of this title shall be the powers, remedies, and procedures this subchapter provides to the Commission, to the Attorney General, or to any person alleging discrimination on the basis of disability in violation of any provision of this chapter, or regulations promulgated under section 12116 of this title, concerning employment.

Id. § 12117(a). Title VII provides for injunctive and affirmative relief if the employer has "intentionally" discriminated against an employee. *Id.* § 2000e-5(g). Such affirmative relief "may include, but is not limited to, reinstatement or hiring of employees, with or without back pay, . . . or any other equitable relief as the court deems appropriate." *Id.* Other equitable relief can include removing barriers to employment, promotion, or ordering an employer to advertise or train. Professor Karen Tokarz, Lecture at Washington University School of Law, Employment Discrimination Class (Apr. 18, 1995).

Furthermore, plaintiffs can obtain monetary relief, including: (a) backpay, as mentioned above; (b) limited compensatory damages, which include "future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses," 42 U.S.C. § 1981a(b) (Supp. V 1993); (c) limited punitive damages if the employer "engaged in a discriminatory practice . . . with malice or with reckless indifference to the federally protected rights of an aggrieved individual," *id.*; and (d) attorneys fees and costs. *Id.* § 2000e-5(k). However, damages will not be awarded against employers who engaged in discriminatory practices under the ADA or the Rehabilitation Act

where the [employer] demonstrates good faith efforts, in consultation with the person with the disability who has informed the [employer] that accommodation is needed, to identify and make a reasonable accommodation that would provide such individual with an equally effective opportunity and would not cause an undue hardship on the operation of the business.

Id. § 1981a(a)(3).

32. However, in some ways FMLA leave is more limiting than ADA leave. First, although the FMLA provides job and benefits security during the employee's absence, the employee can only take a maximum of twelve workweeks of leave per year. 29 U.S.C. § 2602(a)(1) (Supp. V 1993). Under the ADA, there is no similar time limitation. The employer's duty to provide a disabled employee or applicant with a reasonable accommodation is indefinite, as long as it does not become an undue hardship. Carey & Fink, *supra* note 16, at 287. Second, under the FMLA, an employer can demand medical certification of the employee's or family member's illness. 29 U.S.C. § 2603. However, under the ADA, the employer cannot request medical certification of the employee's disability, unless the inquiries are "job-related and consistent with business necessity." Carey & Fink, *supra* note 16, at 292 (construing 42 U.S.C. § 12112(d)).

33. 42 U.S.C. §§ 12111(8), 12112(a) (Supp. V 1993).

leave to any employee who qualifies for it.³⁴ Lastly, an employer must grant FMLA leave even if the employee will not be healthy enough to return after the twelve workweeks of leave.³⁵ As in the hypothetical, both acts become relevant when an employee takes twelve weeks of FMLA leave due to the employee's own medical condition, and upon returning to work, attempts to secure additional leave or a modified work schedule as a reasonable accommodation under the ADA.³⁶

III. THE ADA REASONABLE ACCOMMODATION STANDARD

A. *The Standard and the Undue Hardship Exception*

The employer's obligation to make a reasonable accommodation is limited by the undue hardship exception. Upon gaining knowledge³⁷ of the employee's disability, the employer has several options.³⁸ For purposes of this Note, assume that the employer chooses to show that all possible accommodations pose an undue hardship.³⁹ The phrases "reasonable accommodation" and "undue hardship" are discussed in conjunction because undue hardship is the "flip side" of reasonable accommodation; if an accommodation is not reasonable, it presents an undue hardship.

In establishing the reasonable accommodation requirement, the ADA

34. Mastroianni & Fram, *supra* note 13, at 555. However, an employer can require the employee to provide medical certification before granting FMLA leave. 29 C.F.R. § 825.305(a) (1995). This gives the employer a legitimate way to verify the medical condition without questioning the employee's integrity. An employer must give an employee notice of the medical certification requirement. *Id.* Under certain circumstances, the employer can request recertification at the employee's expense. *Id.* § 825.308.

35. Carey & Fink, *supra* note 16, at 286.

36. 42 U.S.C. § 1211(9) (Supp. V 1993). Two other interesting questions are: (1) what should an employer do if she restructures an employee's job as a reasonable accommodation to a disability under the ADA, and then the employee requests FMLA leave?, *Treatment of Serious Illnesses Is Key Employer Concern*, 7 Lab. Rel. Wk. (BNA) 1239, 1240 (Dec. 22, 1993); and (2) whether an employer can consider the fact that some employees are on FMLA leave while making an undue hardship evaluation for another employee. Carey & Fink, *supra* note 16, at 292.

37. See *supra* note 24.

38. The employer could also argue that the employee is not a "qualified individual with a disability" because the employee does not have a "disability" within the meaning of the ADA, or that the employee cannot perform the "essential functions" of the job with or without a reasonable accommodation, or that no reasonable accommodation exists. See 29 U.S.C. §§ 1211(8); 1211(9) (Supp. 1988).

39. See *id.* § 1211(9)(A); see also *id.* §§ 1211(9), 1211(10) (defining reasonable accommodation and undue hardship).

drafters intended to create a “process”⁴⁰ which would remove obstacles from an individual’s opportunity for equal employment.⁴¹ In order to determine if an accommodation is an undue hardship, the ADA requires employers to consider a variety of factors⁴² on a case-by-case basis. The legislative history indicates that by including a number of factors in the consideration, the drafters “intend[ed] to establish a flexible approach.”⁴³ In fact, they specifically rejected a strict “ceiling” test⁴⁴ as inappropriate for determining reasonable accommodation.⁴⁵ Rather, the employer must consider the circumstances in light of all the factors and deny only those accommodations which place “*significant* difficulty or expense” on the employer.⁴⁶

Legislative history specifically indicates that the ADA reasonable accommodation standard places a strong obligation on an employer to accommodate an employee.⁴⁷ This is a much higher standard than those imposed on the employer by previously enacted anti-discrimination acts,

40. H.R. REP. NO. 485, 101st Cong., 2d Sess., pt. 2, at 65 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 347-48. The House report states:

The accommodation process focuses on the needs of a particular individual in relation to problems in performance of a particular job because of a physical or mental impairment. A problem-solving approach should be used to identify the particular tasks or aspects of the work environment that limit performance and to identify possible accommodations that will result in a meaningful equal opportunity for the individual with a disability.

Id., *reprinted in* 1990 U.S.C.C.A.N. at 348. This “problem solving approach” includes consulting the disabled employee, State Vocational Rehabilitation Services agencies, the Job Accommodation Network, or other employers. *Id.* at 65-66, *reprinted in* 1990 U.S.C.C.A.N. at 348.

41. *Id.* at 65, *reprinted in* 1990 U.S.C.C.A.N. at 347.

42. *See supra* note 4.

43. H.R. REP. NO. 485, *supra* note 2, at 41, *reprinted in* 1990 U.S.C.C.A.N. at 464. The factors approach is “flexible” because the drafters “did not intend to give any single factor particular weight. Rather, all of the listed factors should be included in an analysis of whether providing an accommodation would impose an undue hardship on [an employer].” *Id.* For a list of factors, *see supra* note 4. The drafters wanted to model the ADA analysis after the flexible approach of § 504 of the Rehabilitation Act, 29 U.S.C. § 794 (1988), the disability statute that prohibits the federal government from discriminating in employment and government programs. H.R. REP. NO. 485, *supra* note 2, at 41, *reprinted in* 1990 U.S.C.C.A.N. at 464.

44. A ceiling test would find an undue hardship per se if the employer had to make an accommodation that was more than a set percentage of the employee’s salary. *Id.*

45. *Id.*

46. *Id.* (emphasis added). The House Report indicates that the reasonable accommodation/undue hardship test presents the employer with a stronger obligation to accommodate than Title III’s “readily achievable” standard, which regulates the alteration of existing public accommodations. *Id.* at 42, *reprinted in* 1990 U.S.C.C.A.N. at 463. The Report also indicates that the ADA standard places a stronger burden on the employer than the “*de minimis*” standard of Title VII. *Id.*

47. *See id.* at 39-42, *reprinted in* 1990 U.S.C.C.A.N. at 462-65.

such as Title VII's "de minimis" test,⁴⁸ where the employer can refute a disparate treatment discrimination claim by demonstrating that the statistics offered by the plaintiff are "inaccurate or insignificant."⁴⁹ Thus, the drafters consciously placed a greater burden on the employer to accommodate disabled employees in the ADA than in previous anti-discrimination legislation.

The drafters realized the importance of an employer's accommodation obligation and thus placed additional limits on the undue hardship defense.⁵⁰ For example, the legislative history notes that the fact that an accommodation benefits only one individual (such as medical leave) rather than many (such as a wheelchair ramp) should not have a negative impact on the reasonable accommodation analysis.⁵¹ Additionally, the federal regulations indicate that a reasonable accommodation with a negative impact on employee morale, standing alone, is insufficient to merit an undue hardship defense.⁵²

Congress also placed limits upon the employer's undue hardship defense when outside funds are available⁵³ to cover the entire cost of the accom-

48. H.R. REP. NO. 485, *supra* note 2, at 40, *reprinted in* 1990 U.S.C.C.A.N. at 463.

49. EEOC v. O & G Spring & Wire Forms Specialty Co., 38 F.3d 872, 878 (7th Cir. 1994), *cert. denied*, 115 S. Ct. 1220 (1995).

50. *See, e.g.*, H.R. REP. NO. 485, *supra* note 40, at 69, *reprinted in* 1990 U.S.C.C.A.N. at 351.

51. *Id.* The legislative history states that "[b]y its very nature, an accommodation should respond to a particular individual's needs in relation to performance of a specific job at a specific location." *Id.*

52. 29 C.F.R. pt. 1630 app., § 1630.15(d) (1995). *See also* Carey & Fink, *supra* note 16, at 277.

53. For example, subsidies are available through "[s]tate vocational rehabilitation agenc[ies] . . . [f]ederal, [s]tate or local tax deductions[,] tax credits," or the employee himself. H.R. REP. NO. 485, *supra* note 40, at 69, *reprinted in* 1990 U.S.C.C.A.N. at 351-52. An employer must pay for a reasonable accommodation up to the amount deemed "reasonable," as long as the employee is willing to pay for the remainder. *Id.* at 69, *reprinted in* 1990 U.S.C.C.A.N. at 352. Under this program, which is known as the "Targeted Job Tax Credit Program," an employer can receive a 40% credit on the first \$6,000 per year earned by workers with disabilities. 26 U.S.C. §§ 51(a), 51(b)(3) (Supp. V 1993). For a discussion of these sections, see John J. Franco, The 'Undue Hardship' Exception to Reasonable Accommodations Under the Americans with Disabilities Act 9 (May 26, 1994) (unpublished manuscript, on file with author). However, the Targeted Job Tax Credit has limited use because it does not apply to workers who begin work for the employer after December 31, 1994. *Id.* (citing 26 U.S.C. § 51(c)(4) (Supp. V 1993)).

In the hypothetical situation, the Targeted Job Tax Credit is the only tax credit the employer could use to offset the cost of a reasonable accommodation. Disabled Access Credit, established in § 44 of the Internal Revenue Code to help small employers meet the costs of ADA compliance, is only available to employers of less than thirty workers and thereby disqualifies the employer in the hypothetical, who has 60 employees. 26 U.S.C. § 44(b) (Supp. V 1993). *See also* Franco, *supra*, at 8. Likewise, § 190 of the Internal Revenue Code only gives tax credits for making facilities accessible to handicapped and the elderly. 26 U.S.C. § 190(b)(1) (Supp. V 1993). For further discussion of the § 190 credit, see Franco, *supra*, at 9.

modation or cover the cost beyond what is deemed "reasonable."⁵⁴ When such funding can supplement part of the cost of the accommodation, the employer can make an undue hardship defense only as to that portion of the cost not covered by the external source.⁵⁵ Moreover, an employer may not use lack of external funding as an excuse for not providing a reasonable accommodation.⁵⁶

B. *Case Law Interpreting the Reasonable Accommodation and Undue Hardship Standards*

In order to resolve the conflict between the leave provisions of the FMLA and the ADA, it is helpful to examine case law interpreting the reasonable accommodation and undue hardship standards under both the ADA and its predecessor for government entities, the Rehabilitation Act.⁵⁷ Because there is little case law on FMLA leave, it is appropriate to draw an analogy between the effect of previously granted FMLA leave on the undue hardship defense and the effect of previously granted ADA leave on the undue hardship defense. Therefore, this Note examines cases in which employers provided several reasonable accommodations and then refused to provide more accommodations, relying on their previous unsuccessful attempts to accommodate the employee.

Under the reasonable accommodation analysis, the plaintiff has the initial burden of requesting an accommodation and establishing a *prima facie* showing that the reasonable accommodation is possible.⁵⁸ If the employer

54. H.R. REP. NO. 485, *supra* note 40, at 69, *reprinted in* 1990 U.S.C.C.A.N. at 110-11 (1990).

55. *Id.*

56. *Id.*, *reprinted in* 1990 U.S.C.C.A.N. at 352.

57. Both the text and the legislative history of the ADA indicate that the reasonable accommodation and undue hardship standards should be interpreted consistently with §§ 501, 503 & 504 of the Rehabilitation Act of 1973. 42 U.S.C. § 12117(b) (Supp. V 1993); H.R. REP. NO. 485, pt. 2, *supra* note 40, at 62, *reprinted in* 1990 U.S.C.C.A.N. at 344; H.R. REP. NO. 485, *supra* note 2, at 40, *reprinted in* 1990 U.S.C.C.A.N. at 462-63. *Id.* at 106; 42 U.S.C. § 12107(b). The Rehabilitation Act prohibits discrimination against qualified government employees with a disability and requires the government to make a reasonable accommodation. *See* 29 U.S.C. §§ 791, 794 (1988 & Supp. V 1993). Cases decided under the Rehabilitation Act have precedential value to ADA determinations. *See, e.g.*, *Chandler v. City of Dallas*, 2 F.3d 1385, 1391 (5th Cir. 1993), *cert. denied*, 114 S. Ct. 1386 (1994); *Stradley v. LaFourche Communications, Inc.*, 869 F. Supp. 442, 443 n.1 (E.D. La. 1994).

58. *See, e.g.*, *Arneson v. Heckler*, 879 F.2d 393, 396 (8th Cir. 1989) (interpreting the Rehabilitation Act). *See also* *Shaller & Rosen*, *supra* note 25, at 415 (noting that the burden is on the employee to request a reasonable accommodation). A plaintiff (or the Equal Employment Opportunity Commission suing on behalf of the disabled employee) must also initially establish that:

- (1) the respondent fits the definition of a "covered entity,"
- (2) the charging party is:

is not willing to provide the accommodation, the burden then shifts to the employer to show either that the employee cannot perform the “essential functions” of the job with or without reasonable accommodation, or that such accommodation would be an “undue hardship.”⁵⁹

Although no court has considered the effect of FMLA leave on the ADA undue hardship analysis, at least one court refused to allow an employee to continuously demand ADA accommodations from an employer when he

- (a) “disabled,” within the meaning of the ADA;
- (b) is [sic] “qualified,” i.e., meets the skill, education and other requirements of the job, and is able to perform the essential functions of the job, with or without accommodation; and
- (c) there is a nexus between the [charging party’s] disability and the adverse employment action.

ORGANIZATION RESOURCES COUNSELORS, INC., ADA TRAINING MANUAL 57 (1992) [hereinafter ADA TRAINING MANUAL]. See also, 29 U.S.C. §§ 12112(a), 12111(8) (Supp. V 1993).

59. See, e.g., *Arneson*, 879 F.2d at 396. The traditional disparate treatment framework provides a rebuttable presumption in favor of plaintiffs who have only circumstantial evidence of discrimination. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) (applying disparate treatment framework to prove racial discrimination and explaining that disparate treatment claims presume an underlying discriminatory intent). See, e.g. *Carson v. Scott Paper Co.*, 834 F. Supp. 33, 36 (D. Me. 1993).

First, the plaintiff must make a prima facie showing of discrimination by demonstrating:

- (i) that he belongs to a racial minority;
- (ii) that he applied and was qualified for a job for which the employer was seeking applicants;
- (iii) that, despite his qualifications, he was rejected; and
- (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant’s qualifications.

Green, 411 U.S. at 802. Upon such a showing, the burden shifts to the defendant to articulate a nondiscriminatory reason for the employment action. *Id.* Lastly, the burden shifts back to the plaintiff to prove that the defendant’s stated reasons were merely pretextual. *Id.* at 804.

The *Green* framework is adaptable to ADA analysis. Indeed, the Court noted that the listed specification of prima facie proof may vary in differing factual situations. *Id.* at 802 n.13. First, the plaintiff must meet his initial prima facie burden. See *supra* note 58 and accompanying text. Next, the defendant may state a legitimate nondiscriminatory reason for the failure to accommodate. ADA TRAINING MANUAL, *supra* note 58, at 60. For example, in an individual disparate treatment case, a defendant can state that the plaintiff was not promoted because he was not as qualified as the selected employee. *Id.* The burden then returns to the plaintiff to prove that the stated reason was pretextual. *Id.* In other words, the plaintiff can prove that the promoted employee was not more qualified than the plaintiff, that the discriminatory policy is not job related, or that the plaintiff can be reasonably accommodated. See *id.*

Employers can also defend against charges of discriminatory “disparate impact” practices. Disparate impact practices or policies are those that, although not adopted for discriminatory reasons, have a disparate, and negative, impact upon the protected class—here, disabled employees. See *Griggs v. Duke Power Co.*, 401 U.S. 424, 430-32 (1971); see also, e.g., *Carson*, 834 F. Supp. at 36. Employers can defend against such claims by proving that “the policy [or] practice in question is job related and consistent with business necessity[,] and reasonable accommodation is impossible.” ADA TRAINING MANUAL, *supra* note 58, at 65.

could not perform the job with the accommodations.⁶⁰ In *Gallagher v. Catto*,⁶¹ the Federal District Court for the District of Columbia suggested that if an employee-plaintiff abuses his right to a reasonable accommodation, the court will consider previous leave grants as a factor in the reasonable accommodation analysis.⁶²

In *Gallagher*, the employer provided a series of reasonable accommodations to an alcoholic employee over a ten-year period of employment.⁶³ The leave included at least nine long-term detoxification programs and a "firm choice" agreement in which the employee agreed to be in daily contact with an Alcoholics Anonymous mentor.⁶⁴ After the employer provided the employee with many reasonable accommodations and the employee repeatedly failed to remain sober and productive at work, the employer discharged the employee.⁶⁵ The employee then sued the employer under the Rehabilitation Act, claiming the employer failed to make a reasonable accommodation for the employee's disability.⁶⁶ The district court considered the previous leave grants by the employer in deciding that, under these circumstances, additional leave would be an undue hardship under the Rehabilitation Act.⁶⁷

60. See *Gallagher v. Catto*, 778 F. Supp. 570 (D.D.C. 1991), *aff'd*, 988 F.2d 1280 (D.C. Cir. 1993). Because FMLA is a recent law, there is little case law on the interaction of FMLA and ADA leave. *Gallagher* is an excellent example of some of the issues courts will face in determining whether to consider prior FMLA leave in an ADA undue hardship analysis, an issue no court has yet addressed. *Gallagher* is analogous in that it is the only case wherein the court considered whether to include prior disability leave (albeit ADA rather than FMLA) in undue hardship analysis. See *id.*

61. *Id.*

62. See *id.*

63. *Id.* at 573.

64. *Id.* at 572-76.

65. *Id.* at 576.

66. *Id.* at 572.

67. *Id.* at 579 n.13, 581-82. *Robinson v. Hamline Univ.*, No. C4-93-2074, 1994 WL 175019 (Minn. Ct. App. May 10, 1994), is also persuasive. In *Robinson*, a dismissed law student claimed Hamline University violated the Minnesota anti-discrimination statute, MINN. STAT. § 363.03(5)(1) (1988), by failing to reasonably accommodate his disability. 1994 WL 175019, at *1. The court, looking to the federal Rehabilitation Act for guidance, held that because the disabled student was unable to perform the requirements of the law school curriculum (the "essential functions" of his job in the terminology of the ADA), even after the accommodations made by the school, he was not "otherwise qualified" for Hamline's law school, and that the university had met its obligation of reasonable accommodation. *Id.* at *2-5.

Although the *Robinson* case occurs in the admissions context, and deals with a public accommodation, it is analogous to the employment context because, using similar language, the ADA and the Rehabilitation Act require reasonable accommodations in employment and public services. Compare 42 U.S.C. § 12112(a) with 42 U.S.C. § 12212 (Supp. V 1993). In addition, many state human rights laws are similar to the Rehabilitation Act. See, e.g., Minn. Stat. § 363.03 (1988). Mr. Robinson brought

The result in *Gallagher* is factually distinguishable from our hypothetical scenario. In *Gallagher*, the employer did have an initial duty to accommodate the employee.⁶⁸ However, once the employee abused that right, the court found that the employer no longer had a duty to accommodate.⁶⁹ The employer's obligation to make a reasonable accommodation continues only until the employee begins to abuse that right.⁷⁰ In the introductory hypothetical, the employee took one twelve week period of FMLA leave; this should not be considered an abuse of the employee's FMLA rights.⁷¹

Gallagher underscores the need to place some limits on the employee's rights in order to avoid abuse of the anti-discrimination laws. *Gallagher* also demonstrates that courts should not require an employer to continue to make reasonable accommodations when those efforts are fruitless and the employee starts to take undue advantage of the employer's compliance with the ADA.

In interpreting the Rehabilitation Act and the ADA, courts have found many instances in which forcing an employer to provide an accommodation would constitute an undue hardship.⁷² One set of cases found that regular attendance is an "essential function" of many jobs and an inability to report

his claim under the Minnesota Human Rights Act ("MHRA"), which contains language prohibiting educational institutions from discriminating against persons with disabilities, almost identical to the language of the Rehabilitation Act. Compare 29 U.S.C. § 794(a) (1988) with Minn. Stat. § 363.03, subd. 5(1) (1988). In fact, in interpreting provisions of the MHRA, the *Robinson* court correctly relied on federal case law interpreting the Rehabilitation Act because no MHRA case law existed. 1994 WL 175019, at *2. Thus, the MHRA and the Rehabilitation Act can be interpreted analogously.

The hypothetical posited in the introduction is distinguishable from cases such as *Gallagher* and *Robinson*, because with a reasonable accommodation, the employee could perform the essential functions of the job. In *Robinson*, the court established that a reasonable accommodation will be sufficient as a matter of law if the employer considered "alternative means, their feasibility, cost and effect . . . and came to a rational decision." *Id.* at *4 (citing *Wynne v. Tufts Univ. Sch. of Medicine*, 932 F.2d 19, 26 (1st Cir. 1991)). Under this type of test, our employee would have a harder case, because a court could find that the employer's decision to consider past FMLA leave is a rational decision under the circumstances.

68. *Gallagher*, 778 F. Supp. at 577.

69. *Id.* at 581-82.

70. *See id.*

71. However, if our hypothetical employee had demanded and taken twelve weeks of FMLA leave each and every year for the previous three years (supposing the FMLA had been in effect for three years), and upon returning from each leave, requested an ADA reasonable accommodation, the result might be similar to the *Gallagher* court's conclusion. This, of course, depends on the severity of the employee's abuse of the leave provisions. The employee may have legitimate reasons for taking leave each year, and it may have been coincidental that these personal health problems occurred consecutively.

72. *See infra* notes 73-75 and accompanying text.

to work at regular hours may place an undue hardship on an employer.⁷³ Other courts have found an undue hardship when the accommodation would require the employer to change the way the organization functions.⁷⁴ Lastly, courts do not require an employer to accommodate an employee when such accommodation would pose a health or safety threat to the employee or others.⁷⁵ These cases demonstrate that the courts will find an undue hardship when accommodation is unduly costly, disruptive or unsafe. Thus, the courts provide necessary checks on the reasonable accommodation standard to insure that employees do not take undue advantage of their rights.

There are significantly fewer cases in which the courts have found that an accommodation was not an undue hardship on the employer or that the employer failed to provide a reasonable accommodation.⁷⁶ In *Arneson v. Heckler*,⁷⁷ the Eighth Circuit found that the Social Security Administration did not fully examine all the reasonable accommodations it could provide

73. See *Carr v. Reno*, 23 F.3d 525, 529-30 (D.C. Cir. 1994) (finding that specific hours were an essential function of clerk's job in U.S. Attorney's Office because the office had to meet a 4 p.m. deadline each day); *Jackson v. Veteran's Admin.*, 22 F.3d 277, 278-79 (11th Cir. 1994) (finding that housekeeper in hotel who could not keep regular hours could not perform the essential functions of the job and it would be an undue hardship on employer to keep him employed); *Walders v. Garrett*, 765 F. Supp. 303, 312-14 (E.D. Va. 1991) (finding that frequent and unpredictable absence presented an undue hardship when the job entailed time deadlines and budget constraints).

74. See *Southeastern Community College v. Davis*, 442 U.S. 397 (1979) (finding that it is an undue hardship on an employer to provide an accommodation that substantially changes the nature of the job or lowers the standards of the school or workplace); *Wood v. School Dist. of Omaha*, 25 F.3d 667 (8th Cir. 1994) (upholding the district court's finding that it would be an undue hardship on the employer of a school van driver suffering from diabetes mellitus to provide the disabled driver sufficient accommodations to avert the risk posed to the driver or passengers by sudden hypoglycemic reaction); *Barth v. Gelb*, 2 F.3d 1180, 1187-88 (D.C. Cir. 1993) (finding that the Rehabilitation Act did not require an overseas radio station operated by the U.S. Information Agency to accommodate an insulin-dependent diabetic applicant because the individual could only be accommodated at three of the twelve posts worldwide and it would place an undue strain on the limited number of employees in the same job).

75. See *Wood*, 25 F.3d 667; see also *Huber v. Howard County, Md.*, 849 F. Supp. 407, 414 (D. Md. 1994) (accommodating firefighter with asthma was a health threat and thus an undue hardship because he depended on an inhaler which became ineffective and possibly explosive under high temperatures); *Serrapica v. New York*, 708 F. Supp. 64, 73 (S.D.N.Y.) (accommodating a garbage truck operator with diabetes was an undue hardship because the employee was irresponsible in caring for his disease and thus posed a safety risk to himself and those around him), *aff'd*, 888 F.2d 126 (2d Cir. 1989).

76. See, e.g., *Arneson v. Heckler*, 946 F.2d 90 (8th Cir. 1991).

77. *Id.* For a lengthier examination of the facts and issues of this case, see *Arneson v. Heckler*, 879 F.2d 393 (8th Cir. 1989), wherein the Eighth Circuit had previously reversed and remanded the first district court decision in favor of the defendant employer.

for a claims representative who had apraxia, a disorder that made him easily distracted and unable to concentrate because of activity around him.⁷⁸ The employer had previously accommodated the employee under the Rehabilitation Act by relocating the employee's desk to a quieter area, giving him a telephone headset to allow him to have his hands free, and providing him with assistance in organizing his work.⁷⁹ However, when the employee was transferred to a new office and received comparable accommodations, his work performance became unsatisfactory.⁸⁰ The Social Security Administration refused to provide further accommodation, presumably because it thought that additional accommodations would be unduly costly and disruptive.⁸¹ The Eighth Circuit disagreed, ordering the federal government to provide the necessary reasonable accommodations.⁸² The court found that regardless of the expense and hassle incurred in providing the previous accommodations, the employer had a continuing duty to provide the employee with additional accommodations.⁸³

The cases in which the courts have found an undue hardship show that the judiciary places checks on the employee's ability to obtain opportunistic leave under the ADA; the courts will not permit employees to take advantage of employers. Also, the courts will not require employers to continue to accommodate employees who can no longer perform the "essential functions" of the job.

IV. EMPLOYERS VS. EMPLOYEES: SHOULD FMLA LEAVE BE CONSIDERED IN THE UNDUE HARDSHIP TEST?

A. *Employer's Argument*

Employers have two effective arguments that prior FMLA leave should be considered in an undue hardship evaluation under the ADA. First, providing the employee with twelve weeks of FMLA leave *was* a reasonable accommodation, and therefore the employer's obligation under the ADA has been completely satisfied.⁸⁴ In other words, there is no need to continue an ADA analysis. Second, an undue hardship evaluation must

78. 946 F.2d at 92.

79. *Id.* at 91.

80. *Id.*

81. *Id.* at 92.

82. *Id.* at 92-93.

83. *Id.*

84. See *infra* notes 86-87 and accompanying text.

include the overall financial status of the employer, including the fact that the employee has just taken twelve weeks of FMLA leave, and it is unrealistic to ignore this fact when evaluating an employee's request for further leave as a reasonable accommodation.⁸⁵ Thus, the employer acknowledges that the ADA applies but argues that providing additional leave as an accommodation would be an undue hardship.

1. *FMLA Leave Per Se Satisfies the ADA Reasonable Accommodation Standard*

An employer's ideal and simplest argument is that granting FMLA leave per se satisfies the employer's obligations under the ADA. In other words, when an employee takes twelve weeks of federally mandated FMLA leave, the employer has satisfied the ADA requirement that it make a reasonable accommodation, and thus the granting of any further accommodation would be an undue hardship as a matter of law.⁸⁶ This argument allows the employer to avoid the entire undue hardship analysis. By arguing that FMLA leave per se satisfies the reasonable accommodation obligation, the employer could easily win its case on summary judgment.⁸⁷

85. See *infra* notes 88-94 and accompanying text.

86. This is the argument proposed by the U.S. Chamber of Commerce. *Treatment of Serious Illnesses Is Key FMLA Employer Concern*, *supra* note 36, at 1240. The group argued to the Department of Labor that "providing leave should discharge an employer's obligations under both laws." *Id.* But see Maatman & Boling, *supra* note 13, at 30 (stating that "[c]ompliance with the ADA is independent of compliance with the [FMLA]").

The Society for Human Resource Management, along with other employer representatives, expressed indignation at the multitude of obligations with which they must comply under the FMLA and the ADA. See *Treatment of Serious Illnesses Is Key FMLA Employer Concern*, *supra* note 36, at 1240. These employer representatives argue that if, by granting FMLA leave, an employer satisfies its reasonable accommodation requirement, employers could better handle the voluminous obligations of these two rules. See *id.*

87. But see 29 C.F.R. § 825.702 (1995) (answering the question: "How does FMLA affect Federal and State anti-discrimination laws?"). Apparently, this view has not been adopted by the Department of Labor or the EEOC, whose guidelines state that "the leave provisions of the [FMLA] are wholly distinct from the reasonable accommodation obligations of employers covered under the [ADA]." *Id.* § 825.702(a) (citing S. REP. NO. 3, 103d Cong., 1st Sess. 38 (1993), reprinted in 1993 U.S.C.A.N. at 40). However, the regulations next state that "[a]n employer must therefore provide leave under whichever statutory provision provides the greater rights to employees," thus possibly implying that employees only reap the benefits of one of the anti-discrimination statutes, not both. *Id.*

Accordingly, the EEOC's opinion on how to read the FMLA and the ADA together is unclear. See also *id.* § 825.702(c) (providing examples and seemingly approving the grant of leave as an ADA reasonable accommodation to be simultaneously considered FMLA leave). In the Interim Final Regulations, the Department of Labor states situations where the two acts must be satisfied independently. BUREAU OF NAT'L AFFAIRS, SPECIAL SUPPLEMENT: THE FAMILY AND MEDICAL LEAVE ACT OF 1993: INTERIM FINAL REGULATIONS S-5 (1993) [hereinafter INTERIM FINAL REGULATIONS].

2. *Previous FMLA Leave Is Crucial to an Undue Hardship Analysis.*

An employer's next best argument is that it can take the economic burden of previous FMLA leave into consideration in deciding whether to grant additional leave as a reasonable accommodation under the ADA.⁸⁸ Under the ADA, an employer can consider its "overall financial resources" in determining whether an accommodation would impose an undue hardship on it.⁸⁹ If FMLA leave has been taken, the employer cannot help but calculate the financial impact of that leave into future requests for accommodations.⁹⁰ Because FMLA leave will undoubtedly affect the overall financial resources of a smaller employer, this argument is particularly persuasive for smaller employers.⁹¹

The reasoning behind this argument is that, realistically, it would be nearly impossible to independently evaluate an employee's request for leave as a reasonable accommodation after the employee has just taken twelve weeks of continuous or sporadic FMLA leave at great expense to the employer.⁹² It will be difficult for the employer to "ignore" the substantial financial and organizational impact of the employee's twelve week absence on the employer.⁹³

For example, it warns against firing an employee who is a substance abuser without first ensuring that the employer is not retaliating against the employee for taking FMLA leave and that the employer is complying with the ADA. *Id.*

88. Carey & Fink, *supra* note 16, at 291-92. Carey and Fink suggest that previous grants of FMLA leave to the employee or other employees should be considered in an undue hardship analysis because the ADA permits the employer to factor in "the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility." *Id.* at 292 (citing 42 U.S.C. § 12102(10) (Supp. V 1993)); see also Mastroianni & Fram, *supra* note 13, at 556-57 (indicating that employers have a strong argument that previous FMLA leave has an impact on an employer's resources, which must be considered in an ADA undue hardship evaluation).

89. 42 U.S.C. § 12102(10)(B)(iii) (Supp. V 1993).

90. Mastroianni & Fram, *supra* note 13, at 557.

91. In fact, one attorney with expertise in ADA cases argues that there are few reasonable accommodations that would constitute an undue hardship for employers. David Newberger, Speech to Washington University Employment Discrimination Class (April 6, 1995). Most reasonable accommodations of a physical nature such as a braille typewriter or a wheelchair ramp cost under \$16,000. *Id.* Leave accommodations may be more costly.

92. See Mastroianni & Fram, *supra* note 13, at 556-57.

93. *Id.* For example, congressional opponents of the FMLA bill noted that the workplace can become "chaotic" and unproductive when a secretary is out on leave. H.R. REP. NO. 8, *supra* note 14, at 66 (reporting minority views). Carey & Fink, *supra* note 16, at 291. With regard to the fact that employees on FMLA leave have more rights than employees on ADA leave, Carey and Fink argue that job benefits while on FMLA leave are mandated by federal statute. *Id.* The authors stress the need for independent evaluation of employees' ADA and FMLA rights by stating that "the fact that an employer

Lastly, employers will urge that evaluating a reasonable accommodation request separate from previous FMLA leave invites abuse by opportunistic employees at the expense of the employer.⁹⁴ In theory, an employee could take twelve weeks of FMLA leave every twelve months and then return each time to demand more leave as a reasonable accommodation under the ADA. Employers fear that each year, an employee could demand that the employer ignore previously granted FMLA leave when determining whether a given accommodation is an undue hardship.

B. *Employee's Argument*

An employee who genuinely finds herself in the position of needing both FMLA leave and a reasonable accommodation under the ADA will argue that her employer cannot consider her recent exercise of FMLA rights in an undue hardship analysis.⁹⁵ The employee has five major sources of support. First, the policy objectives and purposes of both the FMLA and the ADA lend support to the employee's argument.⁹⁶ Second, the employee has statutory support for this argument in both the FMLA and the ADA.⁹⁷ Third, the employee's arguments are strengthened by the FMLA's confidentiality requirement with regard to medical information.⁹⁸ Fourth, a comparison of the FMLA to state medical leave laws bolsters the employee's argument.⁹⁹ Fifth, the employee's argument is enhanced by the exposure of employers' FMLA fears as baseless.¹⁰⁰

1. *Policy Objectives of the ADA and the FMLA*

An employee can look to the policy objectives behind the ADA and the

provides greater rights to employees on FMLA leave should be of no relevance to the issue of whether it would be an undue hardship to provide those benefits to individuals on ADA leave as well." *Id.*

94. INTERIM FINAL REGULATIONS, *supra* note 87, at S-9 to S-10. Willie Washington, of the California Manufacturers Association, "predicted that the FMLA will make employees view the leave 'as an entitlement.' Employees may feel that they should take leave whether they need it or not." *Id.*

95. See Mastroianni & Fram, *supra* note 13, at 556; see also Carey & Fink, *supra* note 16, at 287 (stating that after exhausting the twelve weeks of FMLA leave, an employee may still be entitled to additional leave under the ADA). The ADA may govern an employer's obligations when an employee returns from FMLA leave. See Jean C. Gaskill & John A. Ricca, *Americans with Disabilities Act: An Analysis of Developments and Potential Statutory Conflicts*, in EMPLOYMENT LAW 1993, 495, 607 (PLI Litig. & Admin. Practice Course Handbook Series No. 476, 1993).

96. See *infra* notes 101-21 and accompanying text.

97. See *infra* notes 122-42 and accompanying text.

98. See *infra* notes 143-50 and accompanying text.

99. See *infra* notes 151-56 and accompanying text.

100. See *infra* notes 157-63 and accompanying text.

FMLA to support her argument. The policy objectives are: (1) the independence¹⁰¹ of the FMLA and the ADA rights, and the preservation of the employees' rights as separate protections;¹⁰² and (2) the differing philosophies of the FMLA (minimum labor standards for family and medical leave)¹⁰³ and the ADA (prohibition of discrimination against disabled employees).¹⁰⁴

The FMLA and the ADA grant distinct and separate rights to protected individuals.¹⁰⁵ There is evidence that Congress intended the acts to be interpreted independently.¹⁰⁶ The FMLA states that "nothing in this Act . . . shall be construed to modify or affect any Federal . . . law prohibiting discrimination on the basis of race, religion, color, national origin, sex, age, or disability."¹⁰⁷ Legislative interpretation of this clause indicates that the FMLA leave requirements are "wholly distinct from the reasonable accommodation obligations of employers covered under the Americans With Disabilities Act."¹⁰⁸ The House Report further indicates that the purpose of the FMLA is "not to limit already existing rights and protections."¹⁰⁹ Employment attorneys warn that "[e]mployers should not assume that they have fulfilled their ADA obligations by offering a disabled employee 12 weeks of [FMLA] leave."¹¹⁰ In fact, federal

101. Independence, as used in this Note, means that if an employee exercises his or her rights under one act, it should not affect the employee's ability to exercise his or her rights under the other act.

102. See H.R. REP. NO. 8, *supra* note 14, at 49.

103. See 29 U.S.C. § 2601(b) (Supp. V 1993).

104. See 42 U.S.C. § 12101(b) (Supp. V 1993).

105. See H.R. REP. NO. 8, *supra* note 14, at 49.

106. *Id.* See also *infra* notes 109-10, 113.

107. 29 U.S.C. § 2651(a) (Supp. V 1993). However, the EEOC regulations accompanying the FMLA detract from the independence argument. See 29 C.F.R. § 825.310(b) (1995). After FMLA leave is taken, an employee's "return-to-work" physical must be "job-related and consistent with business necessity" so that the medical examination is consistent with the ADA. *Id.* In addition, an employer may require "fitness-for-duty" medical certification "only with regard to the particular health condition that caused the employee's need for FMLA leave." *Id.* § 825.310(c). This provision hurts the independence argument because the FMLA ensures that its medical certification requirement complements the ADA.

108. S. REP. NO. 3, *supra* note 5, at 38, *reprinted in* 1993 U.S.C.C.A.N. at 40.

109. H.R. REP. NO. 8, *supra* note 14, at 49. In addition, the FMLA does not affect any rights under Title VII of the Civil Rights Act of 1964 or the Rehabilitation Act. *Id.* See also HELEN D. IRVIN & RALPH M. SILBERMAN, FAMILY AND MEDICAL LEAVES: THE NEW FEDERAL STATUTE AND STATE LAWS 29 (1993). In a similar vein, the FMLA does not alter an employer's obligations with regard to a collective bargaining agreement or an employment benefit program that provides more thorough leave provisions than the FMLA. *Id.* at 30.

110. Maatman & Boling, *supra* note 13, at 30. Federal regulations also state that employers may be subject to additional ADA requirements independent of a previous grant of FMLA leave. 29 C.F.R. § 825.702 (1995). Specifically, the regulations explain that after an employee exhausts FMLA leave and is unable to "perform an essential function of the position because of a physical or mental condition,

regulations note that if an employer is making a reasonable accommodation for an employee, the employee may nonetheless take FMLA leave.¹¹¹ The regulations also emphasize that "disability" under the ADA and "serious health condition" under the FMLA are "different concepts, and must be analyzed separately."¹¹²

The FMLA and the ADA are also independent with regard to compliance obligations.¹¹³ Compliance with one act is independent of compliance with the other act, and different agencies bear the enforcement responsibilities.¹¹⁴ The EEOC is responsible for enforcing the ADA, and it is empowered to investigate claims and bring suits in its own name against an employer.¹¹⁵ On the other hand, the Secretary of Labor investigates FMLA complaints in a "compliance review" and commences court proceedings against an employer if it finds a violation of the FMLA.¹¹⁶

In addition, the FMLA and the ADA rest upon different philosophical foundations.¹¹⁷ An employee can accordingly assert that the FMLA and the ADA have distinct purposes and underlying goals. Whereas the ADA prevents discrimination in the workplace on the basis of disability,¹¹⁸ the FMLA provides minimum labor standards for family and medical leave without forcing employees to choose between the "demands of the workplace"¹¹⁹ and the "needs of families."¹²⁰ Thus, employee rights

... the employer's obligations may be governed by the Americans with Disabilities Act." *Id.* § 825.214(b); see also Carey & Fink, *supra* note 16, at 287.

111. See 29 C.F.R. § 825.702(b) (1995).

112. *Id.*

113. Maatman & Boling, *supra* note 13, at 30. For example, when both the FMLA and the ADA are applicable, maintenance of medical records must meet the separate confidentiality requirements of both acts. 29 C.F.R. § 825.500(g) (1995). Medical records are important to this discussion because in order for an employee to prove that she has a "serious health condition" within the meaning of the FMLA or a "disability" within the meaning of the ADA, the employee must provide medical records to substantiate her condition. *Id.* §§ 825.305(a), 1630.14 (1995).

114. Carey and Fink, *supra* note 16, at 279, 291 (noting that the Secretary of Labor enforces the FMLA and the Equal Employment Opportunity Commission enforces the ADA).

115. 29 C.F.R. § 1640.6.

116. See, WAGE & HOUR DIV., DEPARTMENT OF LAB. FAMILY AND MEDICAL LEAVE ACT OF 1993: SUMMARY OF OUTREACH/COMPLIANCE ACTIVITY (June 30, 1995) [hereinafter SUMMARY OF ACTIVITY]; 42 U.S.C. § 12107(b).

117. See *supra* notes 103-04 and accompanying text; Mastroianni & Fram, *supra* note 13, at 553-54.

118. 42 U.S.C. § 12101(b)(2) (Supp. V 1993). The ADA text states that the purpose of the act is to "provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities." *Id.* See also Mastroianni & Fram, *supra* note 13, at 553-54.

119. 29 U.S.C. § 2601(b)(1) (Supp. V 1993).

120. *Id.* See also Mastroianni & Fram, *supra* note 13, at 553-54. In his statement upon signing the FMLA, President Clinton stated that it was unfair for Americans to have to choose between "continuing

under these two acts must remain distinct in order to preserve the maximum protection that Congress intended for employees. If employers blur the distinction between these two rights, they deprive employees of the full benefit of Congress' intended protections. By treating FMLA leave as a factor in granting ADA leave, employers could unfairly avoid their responsibilities to provide for their employees and evade their legal responsibilities under the acts. The differing philosophies of the two acts underscore the need for independent evaluation of ADA accommodations from previously granted FMLA leave.¹²¹

2. FMLA and ADA Statutory Support

Four FMLA provisions lend statutory support to employee arguments that the exercise of FMLA rights should not be a factor in an undue hardship analysis. First, the FMLA contains an "anti-retaliation" clause¹²² that prohibits employer "interfere[nce] with" an individual's FMLA rights and prohibits "discrimination" against an individual "for opposing any practice made unlawful by [the FMLA]."¹²³ The presence of this clause emphasizes the importance of ensuring that employees are able to exercise their FMLA rights without fear of retaliation. Counting FMLA leave in an undue hardship evaluation discourages the use of such leave and is likely

their employment" and "tending to their own health." Clinton Statement, *supra* note 10, at 144-45. The purpose of the FMLA is to encourage a "reciprocal commitment between employer and employee" in order to deal with family and medical crises. *Id.* In the end, this will provide support for workers and help employers by fostering increased productivity, lower turnover rates, and reduced absenteeism. *Id.*

121. This philosophical difference accounts for the different leave accommodations for an impaired or ill employee under the two acts. See Mastroianni & Fram, *supra* note 13, at 553-54; Carey & Fink, *supra* note 16, at 287. Also note how the same circumstances result in different types of leave or accommodation under the two acts. For examples of such variances, see Carey & Fink, *supra* note 16.

122. For a discussion of the anti-retaliation provision, see Carey, *supra* note 11, at 259. Carey states that the FMLA's "anti-retaliation" clause means that

[i]t is unlawful for an employer to interfere, restrain, or deny the exercise of rights given under the FMLA. It is also unlawful for an employer to discriminate or to retaliate against employees for taking advantage of their rights to family and medical leave or opposing the employer's denial of those rights.

Id.

123. 29 U.S.C. § 2615 (Supp. V 1993). The FMLA reads:

Prohibited Acts

(a) Interference with rights

(1) Exercise of rights - It shall be unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under this subchapter.

(2) Discrimination - It shall be unlawful for any employer to discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by this subchapter.

Id. See also Carey & Fink, *supra* note 16, at 281.

to constitute an interference with FMLA rights.¹²⁴

Second, the FMLA protects an employee who has taken leave by mandating full restoration or maintenance of his job and employment benefits.¹²⁵ The FMLA job security includes restoration to an "equivalent" position,¹²⁶ the restoration of employment benefits accrued prior to leave,¹²⁷ the maintenance of health insurance coverage during leave,¹²⁸ and a prohibition against using FMLA leave to an employee's disadvantage in a "no-fault" absenteeism policy.¹²⁹ Legislative history indicates that

124. Carey & Fink, *supra* note 16, at 291-92.

125. 29 U.S.C. § 2614 (Supp. V 1993). The FMLA's "Employment and Benefits Protection" section provides:

(a) Restoration to Position

(1) In general - Except as provided in subsection (b) of this section, any eligible employee who takes leave under section 2612 of this title for the intended purpose of the leave shall be entitled, on return from such leave -

(A) to be restored by the employer to the position of employment held by the employee when the leave commenced; or

(B) to be restored to an equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment.

(2) Loss of benefits - The taking of leave under section 2612 of this title shall not result in the loss of any employment benefit accrued prior to the date on which the leave commenced.

Id. § 2614(a). Section (b) exempts the highest paid 10% of the employer's workforce from the scope of the mandatory restoration requirement. *Id.* § 2614(b).

126. "Equivalent" position means that the new job must have the "same duties, terms, conditions and status." Shannon, *supra* note 13, at 11. Shannon explains that "[r]estoration to a less than equivalent position would deter employees from exercising their FMLA rights." *Id.* Congress noted that "equivalence" does not mean "similarity" or "comparability," but is a stricter standard requiring "correspondence to the duties and other terms, conditions and privileges of an employee's previous position." S. REP. NO. 3, *supra* note 5, at 30, *reprinted in* 1993 U.S.C.C.A.N. at 32. The employer must return the employee to an "equivalent position" with "equivalent benefits" even if "the employee has been replaced or his or her position has been restructured to accommodate the employee's absence." 29 C.F.R. § 825.214(a) (1995).

127. Shannon, *supra* note 13, at 11. However, an employer is not required to grant an employee seniority or employment benefits that would have accrued during FMLA leave. *Id.* Also, the employee is not entitled to unemployment compensation. *Id.*

128. An employer is required to continue to provide equivalent health coverage during an employee's FMLA leave. 29 C.F.R. § 825.209 (1995); Carey, *supra* note 11, at 245. If the employer makes the coverage payments, then the employer is required to continue such payments. *Id.* If the employee contributes to or pays the entire coverage payments, the employer is entitled to require that the employee continue to pay the premiums. *Id.* If the employee defaults on these payments, the employer must continue coverage for 30 days, and only after that time can the employer cease coverage. *Id.* However, this does not relieve the employer of its obligation to fully restore health coverage when the employee returns to work. *Id.*

129. Jackson & Flaxman, *supra* note 5, at 36. In "no-fault" absenteeism policies, all absences are treated alike. *Id.* In other words, a "legitimate" sickness absence counts the same as an illegitimate absence. *Id.* Employers usually institute such a policy in order to combat chronic absenteeism and the resultant morale problems. *Id.* In this way, employers "eliminate claims of discriminatory or subjective enforcement." *Id.* The FMLA actually forces employers to except FMLA leave from such no-fault

Congress considered the job and benefits security as "central to the entitlement provided in [the FMLA]."¹³⁰ The drafters intended to prevent employers from punishing employees who exercised their federally mandated FMLA rights.¹³¹ If an employer could penalize an employee for taking FMLA leave, it would frustrate the Act's effectiveness and violate the intent and spirit of the FMLA.¹³²

Third, the drafters placed a high priority on FMLA rights by providing generous remedies for an employee who has been discriminated against for exercising FMLA rights. Specifically, it provides the plaintiff with double damages plus interest for lost wages, salary, or employment benefits denied by an employer acting without "good faith."¹³³ In addition, if the employee proves discrimination, the employee recovers attorney's fees, expert witness fees, and costs.¹³⁴

Fourth, the FMLA's special rules for employees of local educational agencies suggest that FMLA obligations are supplementary to employer obligations under other disability acts.¹³⁵ The FMLA states that public schools do not automatically "violate" the Individuals with Disabilities Education Act or Section 504 of the Rehabilitation Act of 1973 by granting FMLA leave.¹³⁶ Congress has interpreted this provision to mean that by merely granting FMLA leave, educational institutions do not violate the disability acts.¹³⁷ The drafters warned schools that granting employees

policies. *Id.* The FMLA places such high importance on preventing employer retaliation that it does not permit employers to count FMLA leave under no-fault policies. *Id.* Jackson and Flaxman argue that this "statutory entitlement to short-term absences" weakens the ability of employers to "promote good attendance and efficiency." *Id.*

130. H.R. REP. NO. 8, *supra* note 14, at 41. The drafters noted that "employees would be greatly deterred from taking leave without the assurance that upon return from leave, they will be reinstated to a genuinely equivalent position." *Id.* See generally 29 C.F.R. § 825.214-825.220 (1995).

131. Shannon, *supra* note 13, at 10.

132. In his article on the FMLA, John Shannon remarks that "[t]he general entitlement to family and medical leave is of little value if the employer may impose a cost on the employee's exercise of the FMLA right. [The] FMLA provisions are designed to protect employees who exercise leave rights." Shannon, *supra* note 13, at 10.

133. See 29 U.S.C. § 2614(a)(1) (Supp. V 1993); Shannon, *supra* note 13, at 11 (construing 29 U.S.C. § 2617(a)(1)(A) (Supp. V 1993)). See also *Mann v. Haigh*, 891 F. Supp. 256, 264 (E.D.N.C. 1995) (finding that the "whole point of the FMLA, gleaned from even a cursory examination, is to protect such benefits [as reinstatement, restoration of back pay, continuation of health insurance benefits and restoration and appropriate enhancements of accrued leave] for eligible employees").

134. 29 U.S.C. § 2617(a)(3) (Supp. V 1993); Shannon, *supra* note 13, at 11 (construing 29 U.S.C. § 2617(a)(3)).

135. See 29 U.S.C. § 2618(b) (Supp. V 1993); H.R. REP. NO. 8, *supra* note 14, at 48.

136. 29 U.S.C. § 2618(b) (Supp. V 1993).

137. H.R. REP. NO. 8, *supra* note 14, at 49.

FMLA leave does not satisfy their obligations under the other acts.¹³⁸ This implies that the drafters intended an employer's FMLA obligations to be in addition to its obligations under the disability acts. Congress likely drafted the FMLA provisions for private employers with these ideas in mind. This information can be helpful in understanding the purpose behind the FMLA and how it relates to other acts.

The ADA can also be interpreted to provide statutory support for the employee's argument. The plain meaning of the statute instructs that in an undue hardship analysis, the employer can only consider certain listed factors.¹³⁹ The listed factors pertain only to the specific accommodation requested, and there is no mention of past accommodations or past considerations in the analytical framework.¹⁴⁰ For example, one of the relevant factors is the "nature and cost of the accommodation needed *under this Act [i.e. the ADA]*."¹⁴¹ Because the employer is permitted to consider only the nature and cost of granting the specific requested ADA accommodation, and the statute does not mention past accommodations, the ADA suggests that the employer may not consider the nature and cost of previous leave or previous accommodations.¹⁴²

3. *The FMLA Medical Information Must Remain Confidential*

The distinct requirements for medical certification under the ADA and the FMLA¹⁴³ support an evaluation of the undue hardship test which is

138. *Id.*

139. 42 U.S.C. § 12111(10)(B) (Supp. V 1993). For the text of § 12111(A)(B), see *supra* note 4.

140. See 42 U.S.C. § 12111(10)(B) (Supp. V 1993).

141. *Id.* (emphasis added).

142. See Jackson & Flaxman, *supra* note 5, at 36 (warning that the "employer must take care to administer its [FMLA] policy to avoid punishing employees for exercising their statutory rights").

143. According to the FMLA, requirements for certification provide:

(a) In general - An employer may require that a request for leave . . . be supported by a certification issued by the health care provider of the eligible employee or of the son, daughter, spouse, or parent of the employee, as appropriate. The employee shall provide, in a timely manner, a copy of such certification to the employer.

(b) Sufficient certification - Certification . . . shall be sufficient if it states -

(1) the date on which the serious health condition commenced;

(2) the probable duration of the condition;

(3) the appropriate medical facts within the knowledge of the health care provider regarding the condition;

(4) [if the leave is to care for an ill relative] a statement that the eligible employee is needed to care for the [relative] and an estimate of the amount of time that such employee is needed to care for the [relative]; and [if the employee herself is ill], a statement that the employee is unable to perform the functions of the position of the employee;

(5)(6)(7) [special certification for intermittent leave]

29 U.S.C. § 2613 (Supp. V 1993).

independent of previous FMLA leave. Medical information received by the employer because the employee exercised her FMLA rights should not be used to later discriminate against the employee in an ADA analysis. For example, the FMLA permits the employer to obtain detailed medical certification of the employee's illness,¹⁴⁴ whereas the ADA only permits medical inquiries that are "job-related" and "consistent with business necessity."¹⁴⁵ Thus, the employer must ensure that if he possesses medical information about the employee due to FMLA leave, he does not use the more intrusive information in an ADA reasonable accommodation analysis.¹⁴⁶

In addition, the FMLA imposes a confidentiality requirement on medical information obtained under the FMLA.¹⁴⁷ Thus, an employer violates the FMLA if he uses confidential medical information obtained under the FMLA in an ADA reasonable accommodation analysis.¹⁴⁸ In order to avoid the risk of impropriety, employers are warned that "providing managers and supervisors with any further information runs the risk that it will appear that the information is used for purposes inconsistent with the job-related and business necessity exception."¹⁴⁹ These provisions offer support to the employee's argument that the FMLA and the ADA are independent acts with distinct purposes and thus, rights exercised under the FMLA should not be considered in an ADA evaluation.¹⁵⁰

Under the ADA, the employer cannot request medical certification of the employee's disability unless the inquiry is "job-related and consistent with business necessity." 42 U.S.C. § 12112(d) (Supp. V 1993); *see also* Carey & Fink, *supra* note 16, at 292-93 (explaining the ADA restrictions on medical certification).

144. *See* 29 U.S.C. § 2613 (Supp. V 1993).

145. 42 U.S.C. § 12112(d) (Supp. V 1993); *see also* Walworth & Strange, *supra* note 21, at 470.

146. *See generally* Walworth & Strange, *supra* note 21, at 471-75 (discussing possible conflicts between ADA informational rights and those of state family and medical leave acts). Walworth and Strange assert that "[e]mployers should not use [state mandated family or medical leave] certification to seek information concerning the nature and extent of the disability when such information will not shed any light on the need for the requested leave If the employer seeks more information than is necessary to confirm that the leave request is valid and reasonable in length, it may violate the ADA." *Id.* at 473.

147. 42 U.S.C. § 12112(d) (Supp. V 1993) (stating that medical information is to be maintained "in separate medical files and treated as a confidential medical record").

148. *See id.*

149. Walworth & Strange, *supra* note 21, at 475.

150. The independence argument has another side as well. The employer can argue that if the acts are truly independent, then the FMLA should not infringe on the employer's right to consider the overall financial resources of the entity in an ADA undue hardship analysis. Thus, if the ADA is independent, all factors should be considered, including the economic effect of prior leave. However, this author does not suggest that the independence of these two acts is absolute. For example, the text

4. State Law Comparisons

A comparison of state family leave laws and the ADA provides a compelling analogy for the appropriate interaction between the FMLA and the ADA.¹⁵¹ Before the FMLA, over thirty states, the District of Columbia, and Puerto Rico, had established mandatory family or medical leave.¹⁵² The FMLA does not override any state family or medical leave laws that provide greater leave rights than the federal law.¹⁵³ If an employer grants family or medical leave in accordance with state law or the company's own policies, it will be difficult for the employer to later assert that additional leave is an undue hardship under the ADA.¹⁵⁴ If the employer is able to find a temporary replacement for the employee while the employee is on state family medical leave, the employer has demonstrated its ability to provide such leave.¹⁵⁵ In our hypothetical situation, the law firm has shown that it was feasible to accommodate its employee during twelve weeks of FMLA leave. If there have been no major changes in the firm's economic health, it is difficult for the firm to now argue that additional leave will be an undue hardship.¹⁵⁶

of the FMLA itself limits FMLA leave to the extent it infringes on any other anti-discrimination laws (such as the ADA). See 29 U.S.C. § 2651(a) (Supp. V 1993).

151. It is also helpful to examine foreign family medical leave policies. The United States is one of the few remaining industrialized countries that has not enacted some form of a national family leave policy. H.R. REP. NO. 8, *supra* note 14, at 31. One hundred thirty-five industrialized and Third World countries mandate maternity or parental leave, and 127 require compensation during the worker's absence. *Id.* Japan, Canada, France, Great Britain, and Italy all have some form of maternity or paid sick leave for workers. *Id.* Many countries, including Norway, Austria, the United Kingdom, France, and Luxembourg also provide leave to care for an elderly parent. *Id.* at 32. According to the legislative history, the FMLA "will begin to close the gap between the leave statutes and policies in these countries and the United States." *Id.*

152. Although a majority of states provide some sort of family or medical leave, only five states and the District of Columbia permit medical leave for the employee's own illness or medical condition. Irvin & Silberman, *supra* note 109, at 35-47. Connecticut and the District of Columbia provide 16 weeks in 24 months; Maine provides 10 weeks in 24 months; Rhode Island provides 13 weeks in 24 months; Vermont provides 12 weeks in 12 months; and Washington provides 2 weeks in 12 months. *Id.*

153. 29 U.S.C. § 2651(b) (Supp. V 1993). See also IRVIN & SILBERMAN, *supra* note 109, at 35.

154. Walworth & Strange, *supra* note 21, at 476.

155. *Id.*

156. But note that this may not hold true in all situations. What may not constitute a hardship in an economic boom may be a hardship in a subsequent recession. Also, there may be seasonal variations involving different considerations for some businesses, such as the Christmas season for retailers or tax season for accountants.

5. Employers' Fears of the FMLA Have Not Been Realized

Employees can also argue that the consequences of requiring employers to evaluate undue hardship independently of FMLA leave are not severe. Statistically, there have not been many FMLA charges brought against employers, and the FMLA has not been used as a means of bringing nuisance suits against employers.¹⁵⁷ Although employers worry about employees abusing FMLA leave, their fears have not been realized.¹⁵⁸ Therefore, contrary to employers' fears (especially small businesses), because few employees actually take advantage of unpaid FMLA leave,¹⁵⁹ it is not very costly to employers.¹⁶⁰ In fact, studies have shown that FMLA leave is "cost effective"¹⁶¹ and employee satisfaction is higher when employers permit family and medical leave.¹⁶² Lastly, without family leave protection, the societal cost of continuously firing, hiring and retraining new employees is high.¹⁶³

157. According to Department of Labor statistics, as of June 30, 1995, only 3,016 FMLA complaints have been filed with the Department of Labor since the Act's inception in August 1993. SUMMARY OF ACTIVITY, *supra* note 116, at 1. In 1,232 of those complaints, no violations were found. *Id.* See also Bennett Pine, *Briefly Noted*, EMPLOYMENT L. INSIDER (Anderson Kill Olick & Oshinsky, P.C.), Feb. 23, 1994, at 4 (noting rarity of FMLA complaints).

158. The Department of Labor notes that "[v]ery few people can afford to take unnecessary, unpaid leave." INTERIM FINAL REGULATIONS, *supra* note 87, at S-4.

159. Uslander, *supra* note 6, at 3.

160. *Id.* See also S. REP. NO. 3, *supra* note 5, at 12-14, reprinted in 1993 U.S.C.C.A.N. at 14-16 (noting family and medical leave to be "cost-effective" in terms of reduced hiring and training costs, turnover, and absenteeism). Despite the fact that many employees are reluctant to take long periods of unpaid leave due to their own financial situation, the importance of the FMLA is not diluted. The FMLA provides essential job and benefits security. It assures all protected employees that, in the case of an unforeseen emergency, their jobs will be safe.

161. S. REP. NO. 3, *supra* note 5, at 14, reprinted in 1993 U.S.C.C.A.N. at 16. A multistate study has shown that employer implementation of state mandated family and medical leave is "neither costly nor burdensome." *Id.* at 14, reprinted in 1993 U.S.C.C.A.N. at 16. (testimony of Dr. Ellen Galinsky, copresident of Families and Work Institute).

162. Uslander, *supra* note 6, at 3-5. See also testimony by Ms. Jeanne Kardos, the director of a corporation that has already implemented family and medical leave policies. S. REP. NO. 3, *supra* note 5, at 13-14, reprinted in 1993 U.S.C.C.A.N. at 15-16. Ms. Kardos has found such policies to be "cost-effective rather than costly . . . [because] it serves productivity. We get people back who are not only highly trained and skilled in what they do, but we get them in such a way that they are very grateful to the company that cares for them, and they stay with us." *Id.* Although family leave will not have an identical effect when leave is federally mandated, it will be much the same, and employers will benefit because their employees will view them as accommodating and reasonable.

163. See S. REP. NO. 3, *supra* note 5, at 12, reprinted in 1993 U.S.C.C.A.N. at 14. "[D]iscrimination against qualified employees costs society millions of dollars in lost wages, lost productivity and needless disability payments." *Id.* (testimony by Ms. Barbara Hoffman, Vice President of the National Coalition for Cancer Survivorship).

One may question the importance of FMLA leave when so few people are affected by it and many companies or states have their own forms of family leave. First, it is important to note that the FMLA is a relatively new law. It is thus understandable that there are not many reported cases. Second, one must also remember that although many employees cannot afford to needlessly take twelve weeks of unpaid leave, the FMLA is essential to employees who require shorter periods of leave and need job and benefits security. It is also crucial to the employee who finds herself or a family member in a long-term catastrophic medical emergency. At the very least, employees affected by such catastrophes have the assurance that their jobs and medical benefits are secure.

IV. PROPOSAL

The employers' most prevalent fear is that employees will utilize FMLA leave to abuse their ADA right to a reasonable accommodation and that the costs will be excessive. However, these concerns are checked by the courts' application of the undue hardship standard. As indicated by the cases interpreting the ADA and the analogous Rehabilitation Act, the courts do not permit employees to take advantage of an employer.¹⁶⁴ Because the courts only consider past leave as probative of undue hardship when it rises to the level of abuse, it is unnecessary for an employer to consider previous FMLA leave in an ADA undue hardship analysis.¹⁶⁵ This Note proposes codification of the judicial interpretation of the undue hardship analysis.¹⁶⁶

164. *See supra* notes 60-70 and accompanying text.

165. It may seem that because the courts already curb employee abuse of past leave in analyzing the employer's undue hardship defense, the courts and the employer will consider past FMLA leave in proving employee abuse. This may seem to resolve the original issue in favor of the employer. However, although the courts may look at the employee's past leave history, the courts will only consider past leave significant and probative in the undue hardship analysis when there has been a clear record of abuse by the employee. *See, e.g.,* *Gallagher v. Catto*, 778 F. Supp. 570 (D.D.C. 1991). In other words, past FMLA leave may be introduced as evidence of abuse at any point, but the courts will not acknowledge this evidence as probative of undue hardship unless it rises to a certain level of abuse. *See id.*

This proposal codifies this viewpoint, permitting employers to consider past FMLA leave only after an employee has abused the right to FMLA and ADA leave a specified number of times. The fact that the courts check employee abuse does not indicate that the employer can always consider past leave in an undue hardship analysis; these judicial checks merely set a threshold standard for employee abuse before the courts and employers can consider past leave.

166. *See supra* notes 60-70 and accompanying text.

A. *The Proposed ADA Amendments*

In order to give employers and employees clearer guidelines, this author suggests an amendment to the ADA to specifically clarify the status of previous FMLA leave. In the list of factors to consider in an undue hardship analysis, the employer should consider "the overall resources of the business,"¹⁶⁷ *disregarding the cost of previous FMLA leave granted during the previous twelve-month period.* This will ensure that the two acts are evaluated independently and will protect employees who wish to exercise both their FMLA and ADA rights without retaliation.

In order to prevent the employee from abusing this modification and taking both FMLA and ADA leave each and every year as is theoretically possible, another amendment to the ADA should limit the number of times an employee can take both FMLA and ADA leave without penalty. The limit should be two consecutive twelve-month periods.¹⁶⁸ This would provide employers with a statutory right to limit the amount of times an employee can take both FMLA and ADA leave without penalty. This would also provide both employers and employees with certainty about their rights and limitations under the two acts.

In our hypothetical, if this was the first time that our employee requested an ADA accommodation following twelve weeks of FMLA leave, the employer could not consider the twelve weeks of FMLA leave as a factor in the undue hardship analysis. However, the result would be different if this was the third consecutive year that our employee took twelve weeks of FMLA leave followed by a request for an ADA reasonable accommodation. Under these facts, the employer could consider past FMLA leave in examining the cost of the accommodation.

B. *The Financial Resources Test*

An alternative amendment would always allow the employer to consider past leave granted as an element of its overall financial resources; however, the employer would not be allowed to consider the amount of money spent on FMLA leave for the individual employee if it had no effect on the organization's overall financial status. This view takes the employer's fiscal realities into consideration. A smaller organization may be severely harmed by granting an employee twelve weeks of FMLA leave, so it is unrealistic

167. See 42 U.S.C. § 12111(10)(B)(i) (Supp. V 1993).

168. The two consecutive twelve-month periods should not follow the employee if she switches jobs because we are only concerned with an employee abusing her leave rights to the detriment of the same employer. A leave of absence should stay the time calculation.

to prevent the employer from considering this in an undue hardship analysis.¹⁶⁹ However, this view also protects employees from discrimination by prohibiting an employer from denying an accommodation that does not affect its overall financial resources.¹⁷⁰ In this way, an employer could not penalize an individual employee solely in retaliation for the exercise of FMLA rights.

V. CONCLUSION

This Note has demonstrated that an employee's FMLA rights may be compromised if an employer considers past FMLA leave in an ADA undue hardship evaluation. The employer has a valid economic argument that past leave always affects an employer's resources and must be considered in an undue hardship evaluation. However, the FMLA was designed to ensure that employees are not penalized for taking the federally mandated leave.¹⁷¹ Additionally, it would be unjust and contrary to the intent of the drafters to discriminate against employees for exercising their FMLA rights. Therefore, it is in the best interest of both employers and employees to clarify the interaction of these two statutes. In order to provide such clarification, Congress should amend the ADA to specifically protect employees' FMLA rights. Congress should also limit the exercise of these rights in order to prevent employee abuse. The employers' conflicting obligations to the FMLA and the ADA have puzzled employers and lawyers alike. However, the suggested measures will eliminate the confusion that has surrounded the interaction of the FMLA and the ADA in the workplace.

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169. To some extent, it seems unfair to give employees different rights depending solely on the size of their employer. However, the coverage of all employment discrimination acts is dependent on the number of individuals employed by a business. See 42 U.S.C. § 2000e(a) (1988) (employer must employ more than 15 employees to be governed by Title VII); 42 U.S.C. § 12102(5) (Supp. V 1993) (employer must employ more than 15 employees to be governed by the ADA); 29 U.S.C. § 630(b) (1988) (employer must employ more than 20 employees to be governed by the ADEA). Note that the employers who could be most severely harmed, the smallest employers, are specifically exempt.

170. For example, suppose employer E spent \$10,000 in granting FMLA leave to employee A in 1992. When A returns and requests additional leave as a reasonable accommodation under the ADA, E cannot consider the fact that he has already spent \$10,000 on A and does not want to spend more. E can only consider the prior \$10,000 cost if it affects the overall financial resources of the company. If granting additional leave would severely harm the company's fiscal status, then the leave can be denied as an undue hardship.

171. See Shannon, *supra* note 13, at 10.

