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Mental Health and the Workplace: How the FMLA and the ADA Should Work Harmoniously to Ensure Job Security and a Healthy Workplace for Employees with Mental Illness

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COMMENT

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I. INTRODUCTION

The Family and Medical Leave Act ("FMLA") and the Americans with Disabilities Act ("ADA") provide protections for workers and individuals seeking employment.[1] The FMLA enables employees to take up to twelve weeks of unpaid leave for serious health conditions.[2] The ADA protects employees from discrimination based on a physical or mental disability.[3] Because the two Acts protect a similar subset of individuals, "[t]he ADA can often interact with the [FMLA]."[4] However, there is currently a circuit split on whether the FMLA and the ADA are mutually exclusive or whether FMLA leave can be a reasonable accommodation under the ADA.[5] For example, in *Acker v. GM, LLC*,[6] the Fifth Circuit stated that by seeking FMLA leave, an employee "by nature argu[es] that he *canno*t perform the functions of the job, while an employee requesting a reasonable accommodation communicates that he *can* perform the essential functions of the job."[7] Thus, the court concluded that taking FMLA leave categorically precludes any claim under the ADA.[8] However, in *Capps v. Mondelez Global, LLC*,[9] the Third Circuit stated that a "request for FMLA leave may qualify, under certain circumstances, as a request for a reasonable

1. *See generally* Family and Medical Leave Act (FMLA) of 1993, 29 U.S.C. §§ 2601–2654 (entitling eligible employees to family and medical leave); Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12111–12117 (providing equal opportunity for employment for individuals with disabilities).

2. 29 U.S.C. § 2612(a)(1)(D).

3. 42 U.S.C. § 12112(a).

4. Tory L. Lucas, *Disabling Complexity: The Americans with Disabilities Act of 1990 and Its Interaction with Other Federal Laws*, 38 CREIGHTON L. REV. 871, 876 (2005); *see* Gregory G. Pinski & Angela L. Rud, *The Employer's "Bermuda Triangle": An Analysis of the Intersection Between Workers' Compensation, ADA, and FMLA*, 76 N.D. L. REV. 69, 70 (2000) ("Employers today face their own Bermuda Triangle: the area of law bounded by the [ADA], the [FMLA], and state workers' compensation statutes." (first citing Myron B. Charfoos, *Workers' Compensation and the ADA/FMLA: Issues and Solutions*, ABA INST. ON THE ADA, Feb. 1998, at 1; then citing 42 U.S.C. § 12101; and then citing 29 U.S.C. § 2601)).

5. Cullotta v. United Surgical Partners Int'l, Inc., No. 19-cv-06490, 2021 WL 3367193, at *3 (N.D. Ill. Aug. 3, 2021) (first citing Acker v. Gen. Motors, L.L.C., 853 F.3d 784, 791–92 (5th Cir. 2017); and then citing Capps v. Mondelez Glob., LLC, 847 F.3d 144, 156–57 (3d Cir. 2017)).

6. Acker v. Gen. Motors, LLC, 853 F.3d 784 (5th Cir. 2017).

7. *Id.* at 791–92.

8. *See id.* (holding the appellant cannot assert both that he cannot prove his entitlement to FMLA benefits and ADA benefits at the same time).

9. Capps v. Mondelez Glob., LLC, 847 F.3d 144 (3d Cir. 2017).

accommodation under the ADA."[10] This circuit split creates uncertainty about the extent of protections provided for individuals with disabilities. More specifically, given the unique challenges that mental disabilities present, individuals with mental disabilities currently have little guidance on how to navigate their protections under the FMLA and the ADA. Moreover, employers are generally less willing to accommodate employees with mental disabilities as opposed to physical disabilities.[11]

In a recent decision, the United States District Court for the Northern District of Illinois affirmed the dismissal of an employee's claim that his employer violated the ADA by not providing a reasonable accommodation for his mental illnesses.[12] Donald J. Cullotta began working for United Surgical Partners in 1999.[13] Mr. Cullotta had suffered from post-traumatic stress disorder, depression, anxiety, and disassociation since 2007.[14] In 2018, Mr. Cullotta was demoted and subsequently fired after requesting intermittent days off to attend outpatient treatment for his mental illnesses.[15] While the court declined to "make a categorical holding that the FMLA and ADA are mutually exclusive," the court held that Mr. Cullotta's request for FMLA leave demonstrated that he could not "perform the essential functions of his job;" thus, his request for FMLA leave precluded any
ADA claim.[16]

This Article's central argument is that, rather than being mutually exclusive, the FMLA and ADA should work harmoniously to ensure protections for individuals with mental disabilities. A request for FMLA leave should not automatically preclude protection under the ADA. Rather, intermittent FMLA leave for mental health treatment should be considered a reasonable accommodation under the ADA.

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10. *Id.* at 156–57 (citing 29 C.F.R. § 825.702(c)(2)).

11. Stacy A. Hickox & Angela Hall, *Atypical Accommodations for Employees With Psychiatric Disabilities*, 55 AM. BUS. L.J. 537, 538 (2018).

12. Cullotta v. United Surgical Partners Int'l, Inc., No. 19-cv-06490, 2021 WL 3367193, at *4 (N.D. Ill. Aug. 3, 2021) (citing Byrne v. Avon Prods., Inc., 328 F.3d 379, 381 (7th Cir. 2003)).

13. *Id.* at *1.

14. *Id.*

15. *Id.*

16. *Id.* at *3–4.

II. STATUTORY BACKGROUND

A. *The FMLA*

In drafting the FMLA, Congress found that "there is inadequate job security for employees who have serious health conditions that prevent them from working for temporary periods."[17] Congress also found that "[p]rivate sector practices and government policies have failed to adequately respond to recent economic and social changes that have intensified the tensions between work and family."[18] Congress further stated: "This failure continues to impose a heavy burden on families, employees, employers and the broader society."[19] In an effort to remedy this problem, Congress sought "to entitle employees to take reasonable leave for medical reasons."[20] The FMLA entitles eligible employees "to a total of 12 workweeks of leave during any 12-month period . . . [b]ecause of a *serious health condition* that makes the employee unable to perform the functions of the position of such employee."[21] Importantly, the FMLA allows employees who have a serious health condition to take this leave intermittently.[22] The FMLA defines a "serious health condition" as "an illness, injury, impairment, or physical *or mental* condition that involves . . . continuing treatment by a health care provider."[23]

B. *The ADA*

"The ADA represents a major effort to provide comprehensive antidiscrimination protections for persons with disabilities."[24] In drafting the ADA, Congress stated that "physical *or mental* disabilities in no way

17. Family and Medical Leave Act (FMLA) of 1993, 29 U.S.C. § 2601(a)(4).
18. S. Rep. No. 103-3, at 4 (1993), *as reprinted in* 1993 U.S.C.C.A.N. 3, 6.
19. *Id.*
20. 29 U.S.C. § 2601(b)(2).
21. *Id.* at § 2612(a)(1) (emphasis added).
22. *Id.* at § 2612(b)(1).
23. *Id.* at § 2611(11) (emphasis added).
24. *Americans With Disabilities Act of 1989: Hearing on H.R. 2273 Before the Subcomm. On Civ. & Const. Rights of the H. Comm. on the Judiciary*, 101st Cong. (1989) (opening statement of Hon. Don Edwards, Chairman, Subcommittee on Civil and Constitutional Rights), *reprinted in* 3 COMM. ON EDUC. & LAB., U.S. H.R., 101ST CONG., SER. NO. 102-C, LEGISLATIVE HISTORY OF THE AMERICANS WITH DISABILITIES ACT, at 1825 (1990).

diminish a person's right to fully participate in all aspects of society."[25] However, "individuals with disabilities continually encounter various forms of discrimination, including . . . failure to make modifications to existing facilities and practices."[26] As a remedy, Congress sought to "assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals."[27] Moreover, "Congress's original intent was for the ADA's definition of a disability to be broadly construed and to include all individuals who suffered from either 'a physical or mental impairment that substantially limits one or more [of their] major life activities.'"[28]

By enacting the ADA, Congress attempted "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."[29] The ADA provides: "No covered entity shall discriminate against a *qualified individual* on the basis of disability 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."[30] The ADA defines a "qualified individual" as "an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires."[31] The ADA further provides:

> [T]he term "discriminate against a qualified individual on the basis of disability" includes . . . not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability . . . unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity . . . .[32]

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25. Americans with Disabilities Act (ADA), 42 U.S.C. § 12101(a)(1) (emphasis added).
26. *Id.* at § 12101(a)(5).
27. *Id.* at § 12101(a)(7).
28. Scott C. Thompson, *Open for Business: The ADA Beyond an Employer's Front Door*, 18 TEX. WESLEYAN L. REV. 383, 386 (2011) (quoting ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2, 122 Stat. 3553, 3553 (2008) (codified as amended at 42 U.S.C. § 12101 (2006 & Supp. III 2009))).
29. 42 U.S.C. § 12101(b)(1).
30. 42 U.S.C. § 12112(a) (emphasis added).
31. *Id.* at § 12111(8).
32. *Id.* at § 12112(b).

The ADA also supplies examples of "reasonable accommodations," including:

> (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.[33]

Particularly relevant to the issue in this article is the ADA definition's example of part-time or modified work schedules.

III. THE ADA AMENDMENTS ACT OF 2008

Although Congress clearly intended for the ADA to protect every individual with a disability, those "who would be covered under the Act was still up for debate."[34] As it was initially enacted, "the ADA provide[d] little guidance as to when a condition [rose] to the level of a covered disability."[35] Prior to the ADA Amendments Act of 2008 (ADAAA), the Supreme Court stringently interpreted the ADA's requirement that plaintiffs must "show that they had 'a physical or mental impairment that substantially limits one or more of [their] major life activities,' 'a record of such an impairment,' or that they were 'regarded as having such an impairment.'"[36] The ADA did

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33. *Id.* at § 12111(9).

34. Anastasia Latsos, *ADA Reform and Stork Parking: A Glimmer of Hope for the Pregnant*, 32 WOMEN'S RTS. L. REP. 193, 195 (2011).

35. Stephen F. Befort & Holly Lindquist Thomas, *The ADA in Turmoil: Judicial Dissonance, the Supreme Court's Response, and the Future of Disability Discrimination Law*, 78 OR. L. REV. 27, 34 (1999).

36. Jeannette Cox, *Crossroads and Signposts: The ADA Amendments Act of 2008*, 85 IND. L.J. 187, 199 (2010) (quoting 42 U.S.C. § 12102(2) (2006) (amended 2008)); *see* Toyota Motor Mfg., Ky., Inc. v. Williams, U.S. 184, 197 (2002) ("[T]hese terms need to be interpreted strictly to create a demanding standard for qualifying as disabled is confined by the first section of the ADA . . . . If Congress intended everyone with a physical impairment that precluded the performance of some isolated, unimportant, or particularly difficult manual task to qualify as disabled, the number of disabled Americans would surely have been much higher."); *see also* Sutton v. United Air Lines, Inc., 527 U.S. 471, 487 (1999) (noting Congress did not intend to include every minor or corrected "disability" because the ADA states that 43 million individuals have a disability while "the 1986 National Council

not define "what constitute[d] an 'impairment' or a 'major life activity.'"[37] The strict interpretation by the Supreme Court "narrowed the class of individuals who could be regarded as disabled" and caused federal appellate courts to hold that individuals with severe disabilities were not protected by the ADA.[38] The Supreme Court's interpretation had "serious consequences for the cognitively disabled, who are at once able to perform employment tasks but sufficiently disabled to be at a performance disadvantage in their employment."[39] Congress sought to remedy the Supreme Court's stringent and hyper-textual interpretation by enacting the ADAAA.[40] The findings and purposes of the ADAAA provide: "the holdings of the Supreme Court in [*Sutton v. United Air Lines, Inc.*], and its companion cases have narrowed the broad scope of protection intended to be afforded by the ADA, thus eliminating protection for many individuals whom Congress intended to protect;" "the holding of the Supreme Court in [*Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*], further narrowed the broad scope of protection intended to be afforded by the ADA . . . ."[41] Congress made its intention

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on Disability report estimated that there were over 160 million disabled under the 'health conditions approach.'").

37. Befort & Lindquist Thomas, *supra* note 35, at 34 (1999).

38. John E. Murray, *The ADA Amendments Act of 2008: Redefining Who Is Disabled*, 81-DEC WIS. LAWYER, 12, 15 (Dec. 2008); *see* Holt v. Grand Lake Mental Health Center, Inc., 443 F.3d 762, 767 (10th Cir. 2006) (holding plaintiff, a woman with cerebral palsy, "introduced no evidence . . . that would permit a factfinder to conclude she is severely restricted in dressing herself. . . . [A] rational jury could not find Holt is substantially limited in her ability to perform tasks."); *see also* Littleton v. Wal-Mart Stores, Inc., 231 F. App'x. 874, 876 (11th Cir. 2007) ("We do not doubt that Littleton has certain limitations because of his mental retardation. In order to qualify as 'disabled' under the ADA, however, Littleton has the burden of proving that he actually is, is perceived to be, or has a record of being substantially limited as to 'major life activities' under the ADA.").

39. Nathan Catchpole & Aaron Miller, *The Disabled ADA: How a Narrowing ADA Threatens To Exclude the Cognitively Disabled*, 2006 BYU L. REV. 1333, 1335 (2006).

40. *See* ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2(a)(3), 122 Stat. 3553, 3553 (2008) ("[W]hile Congress expected that the definition of disability under the ADA would be interpreted consistently with how courts had applied the definition of a handicapped individual under the Rehabilitation Act of 1973, that expectation has not been fulfilled . . . ."); *see also id.* § 2(b)(3) (stating "[t]he purposes of this Act are . . . to reject the Supreme Court's reasoning in Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999) with regard to coverage under the third prong of the definition of disability and to reinstate the reasoning of the Supreme Court in School Board of Nassau County v. Arline, 480 U.S. 273 (1987) which set forth a broad view of the third prong of the definition of handicap under the Rehabilitation Act of 1973 . . . .").

41. *Id.* § 2(a)(4)–(5) (citing Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999); Toyota Motor Manufacturing, Kentucky, Inc. v. Williams, 534 U.S. 184 (2002)).

abundantly clear by amending the ADA to say: "[t]he definition of disability in this chapter shall be construed in favor of broad coverage of individuals under this chapter, to the maximum extent permitted by the terms of this chapter" and "[t]he term 'substantially limits' shall be interpreted consistently with the findings and purposes of the [ADAAA]."[42] Congress's intention in enacting the ADAAA was clear: more individuals should be afforded the protections of the ADA. Indeed, Congress accomplished its goal, as "the ADA's protected class [previously] encompassed an estimated 13.5 million individuals, or approximately 4% of the U.S. population. Today, by contrast, the ADA's protected class includes at least 43 million persons, or 14% of the U.S. population, though the actual number is likely much higher."[43]

IV. CULLOTTA V. UNITED SURGICAL PARTNERS INTERNATIONAL, INC.

In 1999, Donald J. Cullotta began working for an entity that United Surgical Partners eventually acquired in 2004.[44] Mr. Cullotta started suffering from post-traumatic stress disorder, anxiety, depression, and disassociation in 2007.[45] Mr. Cullotta was initially the director for information technology but was promoted to director of facilities management in early 2008.[46] However, on March 9, 2018, United Surgical Partners demoted him back to director for information technology.[47]

On March 26, 2018, in order to attend outpatient treatment, Cullotta requested FMLA leave for three days out of the week, eight hours per day, for six months.[48] Although United Surgical Partners initially approved the request, they eventually revoked the leave and fired him on March 29, 2018.[49] Cullotta sued United Surgical Partners, claiming that it violated the ADA by denying his request for leave and firing him.[50]

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42. Americans With Disabilities Act (ADA), 42 U.S.C.A. § 12102(4)(A)–(B).

43. Jeannette Cox, *Disability Stigma and Intraclass Discrimination*, 62 FLA. L. REV. 429, 430 (2010).

44. Cullotta v. United Surgical Partners Int'l, Inc., No. 19-CV-06490, 2021 WL 3367193, at *1 (N.D. Ill. Aug. 3, 2021).

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.* at *2.

49. *Id.*

50. *Id.*

The central issue in Cullotta's ADA claim was whether United Surgical Partners violated the ADA by failing to make a reasonable accommodation for Cullotta.[51] Cullotta argued that United Surgical Partners failed to make a reasonable accommodation for him by "refusing to allow him to take a leave of absence to seek treatment for his mental health issues."[52] United Surgical Partners filed a motion to dismiss Cullotta's ADA claim, claiming that "the FMLA protects employees temporarily unable to perform a job's essential functions, while the ADA protects employees who can perform those essential functions with or without a reasonable accommodation."[53] United Surgical Partners further argued that "a request for FMLA leave cannot be a request for a reasonable accommodation under the ADA."[54] In response, Cullotta argued that the Seventh Circuit "carved out room for intermittent leave to be considered an ADA accommodation."[55]

The ADA prohibits discrimination against a "*qualified individual* on the basis of disability."[56] The ADA further provides that "discriminat[ing] against a qualified individual on the basis of disability 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."[57] Thus, in order to state a failure to accommodate claim under the ADA, Cullotta had to prove (1) that he was a "qualified individual" and (2) that United Surgical Partners discriminated against him by not making a "reasonable accommodation" for his disability.[58]

The ADA defines a "qualified individual" as "an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires."[59] Thus, one must be able to "perform the essential functions" of the job as protected by the ADA.[60] However, United Surgical Partners claimed that

51. *Id.*
52. *Id.*
53. *Id.* at *3.
54. *Id.* (internal quotation marks omitted).
55. *Id.*
56. Americans With Disabilities Act (ADA), 42 U.S.C.A. § 12112(a) (emphasis added).
57. *Id.* § 12112(b)(5)(A) (emphasis added) (internal quotations omitted).
58. *Cullotta*, 2021 WL 3367193, at *3.
59. ADA § 12111(8).
60. *See id.* § 12112(a) ("[n]o covered entity shall discriminate against a *qualified individual* on the basis of a disability.") (emphasis added); *id.* § 12111(8) (defining a qualified individual as "an individual

"a request for FMLA can never be a request for a reasonable accommodation under the ADA because an FMLA request must, by definition, contain an admission that the requestor is incapable of performing essential functions of the position."[61] In effect, United Surgical Partners argued that by requesting FMLA leave, Cullotta was not a "qualified individual."[62] The court stated that the Seventh Circuit "has never held that the FMLA and ADA are mutually exclusive" and noted that there is currently a circuit split on this issue.[63] In *Acker v. General Motors, LLC*, the Fifth Circuit stated: "[A]n employee seeking FMLA leave is by nature arguing that he *cannot* perform the functions of the job, while an employee requesting a reasonable accommodation communicates that he *can* perform the essential functions of the job."[64] However, in *Capps v. Mondelez Global, LLC*, the Third Circuit stated: "FMLA leave may qualify, under certain circumstances, as a request for a reasonable accommodation under the ADA."[65]

Despite declining to make a "categorical holding that the FMLA and ADA are mutually exclusive," the *Cullotta* court later stated that the plaintiff's form for requesting leave "unambiguously states that he could not perform the essential functions of his job."[66] The form asked Cullotta to "[i]dentify the job functions the employee is unable to perform."[67] To which Cullotta responded: "Any and all."[68] The form further asked: "Will the condition cause episodic flare-ups periodically preventing the employee from performing his/her job functions? Is it medically necessary for the

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who . . . can perform the essential functions of the employment position that such individual holds or desires.").

61. *Cullotta*, 2021 WL 3367193, at *3.

62. *See id.* (stating that an FMLA request is "an admission that the requestor is incapable of performing essential functions of the position," which is a requirement by the ADA's definition of a "qualified individual" or stressing the importance of the "essential function" requirement); ADA § 12111(8) (defining a qualified individual as "an individual who . . . can perform the essential functions of the employment position that such individual holds or desires." Or defining qualified individual in terms of the functionality requirement).

63. Cullotta, 2021 WL 3367193, at *3.

64. Acker v. Gen. Motors, LLC, 853 F.3d 784, 791–92 (5th Cir. 2017).

65. Capps v. Mondelez Glob., LLC, 847 F.3d 144, 156–57 (3d Cir. 2017).

66. *Cullotta*, 2021 WL 3367193, at *3–4.

67. *Id.* at *4.

68. *Id.*

employee to be absent from work during the flare-ups? If so, explain."[69] To which Cullotta responded in the affirmative to both questions because of his inability to perform during flare-ups.[70] Based on these responses, the court found no claim present under the ADA because of the failure to meet the "essential function" threshold.[71]

The district court's decision misconstrues the requirements of the ADA and does not reflect the legislative intent of the ADA. In particular, this Article opposes the court's holding in five ways: (A) Cullotta's request for FMLA leave was effectively a request for reasonable accommodations; (B) Cullotta is a "qualified individual"; (C) Cullotta's proposed absences were not excessive given the requirements of his position; (D) the court's reliance on Cullotta's responses to the leave form is unreasonably formalistic and does not reflect the legislative intent of the protections provided by the ADA; and (E) Cullotta met the necessary elements to establish a prima facie case of discrimination.

A. *Cullotta's Request for FMLA Leave*

Cullotta requested FMLA leave "to attend outpatient treatment three days per week, eight hours per day" for sixth months.[72] He also requested two additional days "per month for an indefinite period."[73] While this may seem excessive at first glance, his position required him to be available to handle issues at United Surgical Partners' facilities twenty-four hours a day, seven days a week.[74] By only requesting eight hours per day for three days, Cullotta requested a mere twenty-four hours of leave from the one hundred sixty-eight hours he was required to be available.[75] This type of request was undoubtedly of the nature contemplated by Congress when the ADA was drafted and enacted.[76] Although the list in the ADA is neither exhaustive nor mandatory, the Act does provide examples of reasonable

69. *Id.*
70. *Id.*
71. *Id.*
72. *Id.* at *2.
73. *Id.* at *3.
74. *Id.* at *4.
75. *Id.* at *2.
76. *See* Americans with Disabilities Act (ADA), 42 U.S.C.A. § 12111(9)(B) (explaining that a "part-time or modified work schedule" is an example of a reasonable accommodation).

accommodations.[77] Part-time and modified schedules are included among these examples.[78] Cullotta's three, eight-hour breaks during the week might be considered a temporary modified work schedule under the Act.[79]

The court acknowledged that intermittent breaks during the week "may, in appropriate circumstances, be a reasonable ADA accommodation."[80] However, the court concluded that "employers are not required to accommodate disabled employees by excusing continuous absences."[81] The court cited *Taylor-Novotny v. Health Alliance Medical Plans, Inc.*,[82] stating: "Employers are 'generally permitted to treat regular attendance as an essential job requirement.'"[83] The court also referenced an older opinion by the Seventh Circuit stating: "Common sense dictates that regular attendance is usually an essential function in most every employment setting."[84] The court cited further authority from the Seventh Circuit in *E.E.O.C. v. Yellow Freight Systems, Inc.*,[85] which held that "no business is 'obligated to tolerate erratic, unreliable attendance.'"[86] However, Cullotta's proposed leave of absence was far from erratic or unreliable.[87] While attendance is undoubtedly an essential function of a job, the Seventh Circuit has also "le[ft] open the possibility that a brief period of leave to deal with a medical condition could be a reasonable accommodation in some circumstances."[88] While the court conceded this possibility, it nonetheless viewed Cullotta's requested absences as excessive, relying on the Seventh

77. *Id.* § 12111(9).

78. *Id.* § 12111(9)(B).

79. *Cullotta*, 2021 WL 3367193, at *2; Americans With Disabilities Act (ADA), 42 U.S.C.A. § 12111(9)(B).

80. *Cullotta*, 2021 WL 3367193, at *3 (quoting Severson v. Heartland Woodcraft Inc., 872 F.3d 476, 481 (7th Cir. 2017)) (internal quotations omitted).

81. *Id.*

82. Taylor-Novotny v. Health All. Med. Plans, Inc., 772 F.3d 478 (7th Cir. 2014).

83. *Cullotta*, 2021 WL 3367193, at *3 (quoting *Taylor-Novotny*, 772 F.3d at 489).

84. *Id.* (quoting Jovanovic v. In-Sink-Erator Div. of Emerson Elec. Co., 201 F.3d 894, 899 (7th Cir. 2000)).

85. E.E.O.C. v. Yellow Freight Sys., Inc., 253 F.3d 943 (7th Cir. 2001) (en banc).

86. *Cullotta*, 2021 WL 3367193, at *4 (quoting Waggoner v. Olin Corp., 169 F.3d 481, 485 (7th Cir. 1999)).

87. *Cullotta*, 2021 WL 3367193, at *2 (requesting three eight-hour blocks of time off out of the 168-hour availability requirement). The time off would be planned well in advance and could not be described as 'erratic' in any sense of the word. *See id.*

88. Severson v. Heartland Woodcraft Inc., 872 F.3d 476, 481 (7th Cir. 2017).

Circuit's decision in *Severson v. Heartland Woodcraft Inc.*[89] However, the facts in Cullotta's case are easily distinguishable from *Severson*.

In *Severson*, the Seventh Circuit held that Raymond Severson's request for FMLA leave could not be a reasonable accommodation.[90] However, Severson's request for FMLA leave would have indeed created excessive absences.[91] Severson was requesting two additional months of leave after already exhausting his FMLA entitlement of twelve weeks of leave.[92] The Seventh Circuit stated: "a long-term leave of absence cannot be a reasonable accommodation."[93] Thus, the *Severson* court concluded that Severson's employer did not violate the ADA by denying his leave request and firing him.[94]

The leave requested by Severson is not comparable to the leave requested by Cullotta.[95] Cullotta's request for leave was not an attempt to excuse himself for not working.[96] Cullotta was attempting to attend necessary treatment for his mental disability so he could continue to perform his job functions.[97]

The ADA states that a "reasonable accommodation" may include "part-time or modified work schedules."[98] Rather than requesting an extended period of not working, Cullotta was requesting very specific, intermittent leave for a fixed period of time to treat his mental illness.[99] This type of

89. *Id.* at 476; Cullotta, 2021 WL 3367193, at *3.

90. Severson, 872 F.3d at 481; *see* Smith v. Cook Cnty., No. 17 C 7609, 2019 WL 1515007, at *5 (N.D. Ill. Apr. 8, 2019) (explaining the distinction between the FMLA and ADA as "the FMLA protects employees temporarily unable to perform a job's essential functions, while the ADA protects employees who can perform those essential functions with or without a reasonable accommodation").

91. *See* Severson, 872 F.3d at 478 (stating "Severson took a 12-week medical leave," and subsequently "underwent back surgery, which required that he remain off of work for another two or three months.").

92. *Id.* at 479.

93. *Id.* at 481.

94. *Id.*

95. *Compare id.* at 478 (stating that Severson needed two or three additional *months* after exhausting his 12-week FMLA leave)(emphasis added), *with* Cullotta v. United Surgical Partners International, Inc., No. 19-cv-06490, 2021 WL 3367193, at *2 (N.D. Ill. Aug. 3, 2021) (stating that Cullotta was requesting eight-hours of leave, three times a week, for six months plus two discretionary days off per month).

96. Cullotta, 2021 WL 3367193, at *2.

97. *Id.*

98. Americans With Disabilities Act (ADA), 42 U.S.C.A. § 12111(9).

99. Cullotta, 2021 WL 3367193, at *2.

leave should be a reasonable accommodation under the ADA. The Seventh Circuit in *Severson* noted, "[i]ntermittent time off or a short leave of absence—say, a couple of days or even a couple of weeks—may, in appropriate circumstances, be analogous to a part-time or modified work schedule, two of the examples listed in [the ADA]."[100] The Seventh Circuit further referenced its previous decision in *Byrne v. Avon Prod., Inc.*,[101] noting that "*Byrne* leaves open the possibility that a brief period of leave to deal with a medical condition could be a reasonable accommodation in some circumstances."[102]

In *Byrne*, the Seventh Circuit recognized that intermittent "time off "may be an apt accommodation for intermittent conditions" such as arthritis or lupus.[103] Severson's requested leave of absence was far from intermittent.[104] Severson was requesting an additional two months of leave after exhausting his twelve weeks of FMLA leave.[105] As the court stated, "an extended leave of absence does not give a disabled individual the means to work; it excuses his not working."[106] The *Severson* court correctly concluded that "medical leave spanning multiple months does not permit the employee to perform the essential functions of his job."[107] Severson's request clearly fell out of the realm of the ADA and solely into the realm of the FMLA.

This Comment does not contend the holding in *Severson*. Surely, requiring employers to accommodate an almost half-year leave of absence is unreasonable. Rather, this Comment seeks to distinguish *Cullotta* from *Severson* and to demonstrate that the *Cullotta* court's reliance on *Severson* is misguided. Cullotta's requested leave was not at all comparable to the 5-month leave that Severson was requesting.[108] The decision in *Severson* relied

100. Severson, 872 F.3d at 481.

101. Byrne v. Avon Products, Inc., 328 F.3d 379 (7th Cir. 2003).

102. Severson, 872 F.3d at 481 (7th Cir. 2017) (quoting Byrne, 328 F.3d at 382).

103. Byrne, 328 F.3d at 381.

104. Severson, 872 F.3d at 479–80.

105. *Id.* at 479.

106. *Id.* at 481.

107. *Id.*

108. *Compare* Cullotta, 2021 WL 3367193, at *2 (stating the Cullotta sought to attend outpatient treatment three days a week with two additional days off a month) *with* Severson, 872 F.3d at 479 (7th Cir. 2017) (explaining Severson requested additional FMLA medical leave for surgery after using the maximum time for leave).

heavily on the fact that Severson was requesting an extended period of leave.[109] The intermittent leave requested by Cullotta was of the exact nature the *Severson* court deemed "an apt accommodation."[110] Moreover, Cullotta's requested modified schedule was similar to those requested by individuals who are recovering from physical conditions. As the Seventh Circuit noted in *Pals v. Schepel Buick & GMC Truck, Inc.*,[111] "[e]mployees who have experienced serious medical problems often return to work part-time and increase their hours until they are working full time."[112] The *Cullotta* court provided examples of *physical* conditions that would require intermittent time off such as arthritis and lupus.[113] The court reasoned that these conditions could make working so painful that intermittent time off was necessary.[114] While this is undoubtedly true, the same charitability should be afforded to *mental* conditions as well. The ADA protects individuals with physical and mental disabilities equally.[115] The leave requested by Cullotta was of the exact nature contemplated by Congress in passing the ADA, whose purpose was to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."[116]

While Cullotta did not officially request a "reasonable accommodation," Cullotta's leave request was, in effect, a request for an accommodation.[117] As the Seventh Circuit stated in *Bultemeyer v. Fort Wayne Cmty. Sch.*,[118] "[a]n

109. *See* Severson, 872 F.3d at 481 ("[A] medical leave spanning multiple months does not permit the employee to perform the essential functions of his job. To the contrary, the inability to work for a multi-month period removes a person from the class protected by the ADA." (quoting Byrne v. Avon Products, Inc., 328 F.3d 379, 381 (7th Cir. 2003) (internal quotations omitted))).

110. *See* Severson, 872 F.3d at 481 (stating that intermittent time off could be an "apt accommodation" for conditions such as arthritis or lupus).

111. *Id.* at 495.

112. *Id.* at 498.

113. Cullotta, 2021 WL 3367193, at *4 (stating short leaves of absence may be an appropriate accommodation); *see also* Severson, 872 F.3d at 481 (explaining some chronic conditions may flare up, requiring time off to recover).

114. Severson, 872 F.3d at 481.

115. Byrne v. Avon Products, Inc., 328 F.3d 379, 380 (7th Cir. 2003); Americans With Disabilities Act (ADA), 42 U.S.C.A. § 12102(1)(A) (defining a "disability" as "a physical *or mental* impairment that substantially limits one or more major life activities") (emphasis added).

116. 42 U.S.C.A. § 12101(b)(1).

117. Cullotta, 2021 WL 3367193, at *2 (describing Cullotta's allegation that the defendant failed to provide a reasonable accommodation).

118. Bultemeyer v. Fort Wayne Cmty. Sch., 100 F.3d 1281 (7th Cir.1996).

employee's request for reasonable accommodation requires a great deal of communication between the employee and employer."[119] The Seventh Circuit further cited its precedent in *Beck v. Univ. of Wisconsin Bd. of Regents*,[120] stating: "both parties bear responsibility for determining what accommodation is necessary."[121] Both the employee and employer must act in good faith, and "[a] party that obstructs or delays the interactive process is not acting in good faith."[122] The *Bultemeyer* court further recognized that, in "case[s] involving an employee with mental illness, the communication process becomes more difficult."[123] The employer must "help the other party determine what specific accommodations are necessary."[124]

Moreover, "[a]n affirmative request for accommodations is not required where an employer both (1) 'know[s] that the employee has a disability' and knows (2) 'that the employee is seeking assistance from the employer' in the form of accommodations."[125] "[T]he employee's request for a reasonable accommodation does not have to be in writing . . . or formally invoke the magic words 'reasonable accommodation' as long as it make[s] clear that the employee wants assistance for his or her disability."[126] Notably, the Third Circuit has also held, in *Taylor v. Phoenixville Sch. Dist.*,[127] that "it would be especially inappropriate" to require an employee to "specifically invok[e] the ADA or us[e] the words 'reasonable accommodations'" when the employer has "more than enough information to put it on notice that [the employee] might have a disability."[128]

In *Cullotta*, United Surgical Partners wholly failed to communicate and work with Cullotta to find a reasonable accommodation that worked for both parties after they had sufficient information to put them on notice of

119. *Id.* at 1285.

120. Beck v. University of Wisconsin Bd. of Regents, 75 F.3d 1130 (7th Cir. 1996).

121. Bultemeyer, 100 F.3d at 1285 (quoting Beck, 75 F.3d at 1135).

122. *Id.*

123. *Id.*

124. *Id.* (quoting Beck, 75 F.3d at 1135).

125. Pappas v. D.C., 513 F. Supp. 3d 64, 89 (D.D.C. 2021) (quoting Thompson v. Rice, 305 F. App'x 665, 668 (D.C. Cir. 2008).

126. Lee v. D.C., 920 F. Supp. 2d 127, 136 (D.D.C. 2013) (quoting Loya v. Sebelius, 840 F. Supp. 2d 245, 259 n.14 (D.D.C. 2012)) (internal quotations omitted).

127. Taylor v. Phoenixville Sch. Dist., 184 F.3d 296 (3d Cir. 1999).

128. *Id.* at 314.

Cullotta's disability.[129] Rather than working with Cullotta, United Surgical Partners repeatedly denied Cullotta's FMLA leave requests, demoted him, and fired him.[130] United Surgical Partners' actions fall short of the federal regulations regarding the ADA which states:

> To determine the appropriate reasonable accommodation it may be necessary for the [employer] to initiate an informal, interactive process with the qualified individual with a disability in need of the accommodation. This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations.[131]

If United Surgical Partners attempted to work with Cullotta, they surely could have reached a solution that worked for both parties.

Working with Cullotta was also in United Surgical Partners' best interest as they would not have been required to endure any sort of "undue hardship" by accommodating Cullotta.[132] The ADA requires employers to make reasonable accommodations for their employees with a disability "unless such covered entity can demonstrate that the accommodation would impose an *undue hardship* on the operation of the business of such covered entity."[133] The ADA defines an "undue hardship" as "an action requiring significant difficulty or expense, when considered in light of the factors set forth in subparagraph (B)."[134] Subparagraph B provides a list of relevant factors in determining whether the accommodation would impose an undue burden such as the "nature and cost of the accommodation," "the overall financial resources of the covered entity," "the impact otherwise of such accommodation upon the operation of the facility," "the number of its employees," and "the number, type, and location of its facilities[.]"[135] Courts have been fairly charitable to employers facing ADA failure to

129. Cullotta v. United Surgical Partners Int'l, Inc., No. 19-cv-06490, 2021 WL 3367193, at *1 (N.D. Ill. Aug. 3, 2021) (stating the plaintiff and defendant disagreed on leaves of absences requested).

130. *Id.*

131. 29 C.F.R. § 1630.2(o)(3) (2012); *Beck*, 75 F.3d at 1130.

132. *See Cullotta*, 2021 WL 3367193, at *2 (stating the defendant initially approved Cullotta's request before revoking the accommodation and firing him); 42 U.S.C.A. § 12112(b)(5)(A) (explaining a covered entity may refuse accommodations in limited circumstances).

133. 42 U.S.C.A. § 12112(b)(5)(A) (emphasis added).

134. *Id.* § 12111(10)(A).

135. *Id.* § 12111(10)(B)(i)–(iv).

accommodate claims when analyzing whether the accommodation would have caused the employer to experience an "undue hardship," going so far as to consider the rights of other employees.[136] For example, in *Eckles v. Consol. Rail Corp.*,[137] the Seventh Circuit held that Eckles's employer did not violate the ADA by prioritizing another employee's seniority rights over accommodating Eckles's disability.[138] Courts have generously defined an "undue hardship" in other ways as well.[139] Thus, United Surgical Partners had virtually nothing to lose by working with Cullotta to find a reasonable accommodation for his mental illness because they would not have endured any sort of undue burden as a result of the accommodation.

B. *Cullotta is a Qualified Individual*

The *Cullotta* court ultimately held that Cullotta was not protected by the ADA because he was not a "qualified individual."[140] "To state an ADA failure to accommodate claim, Plaintiff must first allege that he is a 'qualified individual'—i.e., 'an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.'"[141] The Seventh Circuit articulated a standard for determining whether an individual is a "qualified individual" with a two-prong test: "First, the disabled individual satisfies the requisite skill, experience, education and other job-related requirements of

136. *See* Kralik v. Durbin, 130 F.3d 76, 83 (3d Cir. 1997) (recognizing "an accommodation to one employee which violates the seniority rights of other employees in a collective bargaining agreement simply is not reasonable"); *see also* Foreman v. Babcock & Wilcox Co., 117 F.3d 800, 810 (5th Cir. 1997) (holding "the ADA does not require an employer to take action inconsistent with the contractual rights of other workers under a collective bargaining agreement").

137. Eckles v. Consol. Rail Corp., 94 F.3d 1041 (7th Cir. 1996).

138. *Id.* at 1047 (recognizing unanimity among the courts that reassignment is not required in an established seniority system).

139. *See* EEOC v. Amego, Inc., 110 F.3d 135, 148 (1st Cir. 1997) (holding disruption of employer's "one-staff-member-to-two-clients ratio" went "beyond the scope of a reasonable accommodation"); *see also* Wiggins v. DaVita Tidewater, LLC, 451 F. Supp. 2d 789, 799 (E.D. Va. 2006) ("[t]o the extent that, in order to accommodate Wiggins, DaVita would have to insure that she would be guarded against stress and criticism from supervisors in general, this type of accommodation is not reasonable and would impose an undue burden on DaVita.").

140. Cullotta v. United Surgical Partners Int'l, Inc., No. 19-cv-06490, 2021 WL 3367193, at *4 (N.D. Ill. Aug. 3, 2021) (stating Cullotta's request was "excessive relative to his job responsibilities").

141. *Id.* at *3.

the employment position he holds or desires. Second, he can perform the essential functions of such position with or without accommodation."[142]

Cullotta began working for United Surgical Partners International in 2004.[143] Cullotta "suffered from post-traumatic stress disorder, depression, anxiety, and disassociation since at least 2007."[144] Cullotta worked and performed the essential functions of his job, without accommodations, for eleven years.[145] His long history with the company indicates that he possessed the requisite skills and experience required for his position. Seeking treatment for mental illness did not revoke his skills and experience.

Crucial to the "essential function" prong of the analysis is first determining the essential functions of the position. "A job function is essential if its removal would fundamentally alter the position."[146] Although employers are entitled to treat "[r]egular, in-person attendance [as] an essential function[,]" the Sixth Circuit has stated "it is not unconditionally so; courts must perform a fact-intensive analysis."[147] The Code of Federal Regulations provides a list of factors to consider when determining whether a job function is essential:

Evidence of whether a particular function is essential includes, but is not limited to:

> (i) The employer's judgment as to which functions are essential;
> (ii) Written job descriptions prepared before advertising or interviewing applicants for the job;
> (iii) The amount of time spent on the job performing the function;
> (iv) The consequences of not requiring the incumbent to perform the function;
> (v) The terms of a collective bargaining agreement;
> (vi) The work experience of past incumbents in the job; and/or
> (vii) The current work experience of incumbents in similar jobs.[148]

142. Nowak v. St. Rita High Sch., 142 F.3d 999, 1002–03 (7th Cir. 1998) (internal quotations omitted).

143. *Cullotta*, 2021 WL 3367193, at *1.

144. *Id.*

145. *Id.* (explaining Cullotta worked from 2007 to 2018 when he was fired).

146. Mosby-Meachem v. Memphis Light, Gas & Water Div., 883 F.3d 595, 603 (6th Cir. 2018) (quoting Kiphart v. Saturn Corp., 251 F.3d 573, 584 (6th Cir. 2001)).

147. Hostettler v. Coll. of Wooster, 895 F.3d 844, 854 (6th Cir. 2018).

148. 29 C.F.R. § 1630.2(n)(3) (2012).

"Although the employer's judgment receives some weight in the analysis . . . it is not the end-all—*especially* when an employee puts forth competing evidence."[149]

Instead of analyzing whether being available 24/7 was actually an essential function of Cullotta's position, the court concluded that 24/7 availability was an essential function of the job simply because United Surgical Partners said it was.[150] The court's cursory analysis of whether availability twenty-four hours a day, seven days a week, was an essential function of the job is not in line with the Code of Federal Regulations.[151] Moreover, the court stated that Cullotta's responses to the request for leave form "unambiguously state[d] that he could not perform the essential functions of his job."[152] The court then provided the questions and responses on Cullotta's form:

> • Form: "Identify the job functions the employee is unable to perform[.]"
> [] Response: "Any and all, not functioning[] . . . "
>
> • Form: "Describe other relevant medical facts, if any, related to the condition for which the employee seeks leave[.]"
> []Response: "Unable to function . . . [.]"
>
> • Form: "Will the condition cause episodic flare-ups periodically preventing the employee from performing his/her job functions? Is it medically necessary for the employee to be absent from work during the flare-ups? If so, explain[.]"
> []Response: "Yes" and "Yes" because "Becomes non-functional[.]"[153]

Although Cullotta's responses to the form technically stated he was unable to perform his job functions, the court's reliance on these responses to conclude that Cullotta was not protected under the ADA is unreasonable.

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149. Hostettler v. Coll. of Wooster, 895 F.3d 844, 855 (6th Cir. 2018).

150. Cullotta, 2021 WL 3367193, at *4 (explaining Cullotta was required to be available seven days a week to assits with issues).

151. *See* 29 C.F.R. § 1630.2(n)(3)(i)–(vii) (2012) (providing a list of factors to consider when analyzing whether a function of a job is "essential").

152. *Cullotta*, 2021 WL 3367193, at *4.

153. *Id.*

Following the court's line of reasoning, filling out an FMLA request for leave form is automatically a waiver of one's protection under the ADA.

When filling out the FMLA request for leave form, it is hard to believe that Cullotta was consciously and voluntarily waiving his protections under the ADA. Cullotta and his employer "had gone back and forth . . . regarding leaves of absence he said he needed because of his mental disabilities."[154] Given the presumably tense relationship between Cullotta and his employer following the discord surrounding his requests, Cullotta's responses on the form may not have been entirely accurate.[155] It is possible that Cullotta was attempting to be as short and frank as possible in order to finally get his FMLA leave request approved. Unfortunately, given that FMLA leave is only appropriate when one is "unable to perform the functions of the position," Cullotta was given no choice but to respond the way he did.[156] Cullotta was essentially put in a position where he had to "admit" that he could not perform the essential functions of his job in order to potentially get his request for leave approved.[157] Additionally, as previously mentioned, "[o]nce the employer knows of the disability and the employee's desire for an accommodation, it makes sense to place the burden on the employer to request additional information to determine whether a reasonable accommodation is available."[158]

In cases where the courts have held that the plaintiff was not a qualified individual, the facts clearly demonstrated that the plaintiff could not perform the essential functions of the position, even with reasonable accommodations.[159] Moreover, courts have held that individuals in

154. *Id.* at *1.

155. *Id.* (stating one of Cullota's arguments as to why he was fired included his FMLA request).

156. Family Medical Leave Act (FMLA) of 1993, 29 U.S.C.A. § 2612(a)(1)(D).

157. *See id.* (affording FMLA protection only to those individuals who cannot "perform the functions of the position").

158. Armstrong v. Burdette Tomlin Mem'l Hosp., 438 F.3d 240, 247 (3d Cir. 2006) (quoting Taylor v. Phoenixville Sch. Dist., 184 F.3d 296, 315 (3d Cir. 1999) (internal quotations omitted)).

159. *See* Oestringer v. Dillard Store Servs., Inc., 92 F. App'x 339, 341–42 (7th Cir. 2004) (stating the plaintiff was not a qualified individual "because she could not attend work" and had not been attending work for over six weeks); *see also* Bombard v. Fort Wayne Newspapers, Inc., 92 F.3d 560, 564 (7th Cir. 1996) (concluding that plaintiff's inability to work for a year disqualifies him from being a qualified individual); Kotaska v. Fed. Express Corp., 966 F.3d 624, 631 (7th Cir. 2020) (holding plaintiff not a qualified individual because her condition prevented her from lifting packages weighing up to seventy-five pounds, which was an essential function of the position).

situations similar to Cullotta's were qualified individuals and entitled to the protections of the ADA.[160]

C. *Cullotta's Proposed Absences Were Not Excessive Given the Requirements of His Position*

The court further concluded that the requested leave of absence was "excessive relative to his job responsibilities."[161] "[O]n March 26, 2018, [Cullotta] formally requested FMLA leave to attend outpatient treatment three days per week, eight hours per day through September 21, 2018."[162] Cullotta also requested "at least two days off per month to recover from 'flare-ups.'"[163] Although the amount of absences appear excessive on their face, this impression is quickly mitigated by the fact that Cullotta's job required his availability twenty-four hours a day, seven days a week.[164] Essentially, Cullotta requested leave for twenty-four hours out of a 168-hour work week.[165] This is the functional equivalent of requesting one day off per week. Moreover, the requested absences were only going to last six months.[166] In support of its conclusion that the proposed absences were excessive, the court cited *Jovanovic v. In-Sink-Erator Division of Emerson Electric Co.*[167] and *Byrne v. Avon Products, Inc.*.[168] However, *Jovanovic* and *Byrne* do not support the court's position.

In *Jovanovic*, the Seventh Circuit concluded that Jovanovic's employer did not have to tolerate Jovanovic's "erratic attendance record."[169] The distinction between *Jovanovic* and *Cullotta* is that Jovanovic did not actually

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160. *See* Haschmann v. Time Warner Ent. Co., 151 F.3d 591, 601 (7th Cir. 1998) (determining an employee with lupus who requested two to four weeks of FMLA leave was a qualified individual); *see also* Johnson v. Bennet Auto Supply, Inc., 319 F. Supp. 3d 1278, 1286 (S.D. Fla. 2018) (holding an employee with arthritis who struggled with his position due to his arthritis for nearly four years was a qualified individual).

161. *Cullotta*, 2021 WL 3367193, at *4.

162. *Id.* at *2.

163. *Id.*

164. *Id.* at *4.

165. *See id.* at *2 ("[Cullotta] formally requested FMLA leave to attend outpatient treatment three days per week, eight hours per day . . . .").

166. *Id.*

167. *Id.* at *4 (citing Jovanovic v. In-Sink-Erator Div. of Emerson Elec. Co., 201 F.3d 894, 899 (7th Cir. 2000)).

168. *Id.* (citing Byrne v. Avon Prod., Inc., 328 F.3d 379, 381 (7th Cir. 2003)).

169. *Jovanovic*, 201 F.3d at 899.

request an accommodation or leave of absence.[170] Instead, Jovanovic erratically missed work and claimed that his employer fired him because of his disability *after* the absences had already occurred.[171] Moreover, by "fail[ing] to request any form of accommodation from [his employer,]" his employer did not have the opportunity to discuss possible accommodations with Jovanovic and thus could not be punished for failing to provide an accommodation.[172]

The *Jovanovic* court believed that "the standard rule is that a plaintiff must normally request an accommodation before liability under the ADA attaches."[173] However, the court also noted that this requirement is subject to exceptions.[174] Particularly relevant to *Cullotta*, in situations where employees have a mental disability, "the communication process becomes more difficult and the employer must meet the employee halfway—if the employee needs an accommodation but is unable to ask for one, the employer should do what it can to help."[175] The Seventh Circuit recognized that mental disabilities provide unique challenges to the request for the accommodation process.[176] Indeed, as the Seventh Circuit has noted, and as the Code of Federal Regulations require, "it may be necessary for the covered entity to initiate an informal, interactive process with the individual with a disability in need of the accommodation. This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations."[177]

In *Byrne*, the Seventh Circuit quickly moved away from a discussion about the ADA because Byrne repeatedly fell asleep on the job, and thus could not perform the essential functions of the job.[178] Byrne suffered from

170. *Id.* at 898.

171. *Id.* at 895–96.

172. *Id.* at 898–99.

173. *Id.* at 899.

174. *Id.*

175. *Id.*

176. *Id.*

177. 29 C.F.R. § 1630.2(o)(3) (1995); *see* Beck v. University of Wisconsin Bd. of Regents, 75 F.3d 1130, 1135 (7th Cir. 1996) ("[E]ither the employer or the employee, bears the ultimate responsibility for determining what specific actions must be taken by the employer."). The court in *Beck v. University of Wisconsin Board of Regents* interpreted 29 C.F.R. § 1630.2(o)(3) as requiring a good faith attempt by the employer or employee to bear responsibility for establishing an employer's good faith accommodations. *Beck*, 75 F.3d at 1135.

178. Byrne v. Avon Prod., Inc., 328 F.3d 379, 380–81 (7th Cir. 2003).

major depression, which caused him to fall asleep at work.[179] Bryne's employer caught him reading and lingering around while on the job.[180] Byrne then left work early and stated he would not be returning to work for the rest of the week.[181] His only explanation for his behavior and absence was that "he was not feeling well."[182] Byrne was eventually hospitalized for his mental illness and attempted to commit suicide.[183] After two months, Byrne was able to recover from his mental illness.[184] The court went on to discuss whether a trier of fact could have found that FMLA protection was applicable to Byrne's situation.[185] While the court ultimately held that a request for two months of leave was not a reasonable request, but Byrne's request for leave is not comparable to Cullotta's request for leave.[186]

The factual distinctions between *Jovanovic*, *Byrne*, and *Cullotta* made the *Cullotta* court's reliance on *Jovanovic* and *Byrne* unreasonable. The court relied on *Jovanovic* and *Byrne* to say that "employers were not required to accommodate far more modest periods of absence in less demanding jobs."[187] However, based on the facts of *Jovanovic* and *Byrne*, the court's statement takes the periods of absence entirely out of context. In *Jovanovic*, leave was never actually requested.[188] Moreover, Jovanovic attempted to retroactively apply ADA protection to absences that occurred without any request for an accommodation.[189] In *Byrne*, Byrne's absences also occurred prior to a request for leave.[190] In *Cullotta*, Cullotta formally requested time off *prior* to his absence from work.[191] This distinction is important because

179. *Id.* at 380.

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.* at 382.

186. *Id.* at 381.

187. Cullotta v. United Surgical Partners Int'l, Inc., No. 19-cv-06490, 2021 WL 3367193, at *4 (N.D. Ill. Aug. 3, 2021).

188. Jovanovic v. In-Sink-Erator Div. of Emerson Elec. Co., 201 F.3d 894, 898 (7th Cir. 2000).

189. *Id.* at 899; *see also* Beck v. University of Wisconsin Bd. of Regents, 75 F.3d 1130, 1134 (7th Cir. 1996) (holding an employee bears the responsibility to inform the employer before ADA liability extends to an employer for failure to provide reasonable accommodations).
common sense rule for an employee to notify an employer of a disability before filing an ADA liability claim).

190. Byrne, 328 F.3d at 380.

191. Cullotta, 2021 WL 3367193, at *2.

the *Cullotta* court ignored the fact that the *Jovanovic* and *Byrne* courts partly based their decision on the fact that employers do not need to tolerate erratic or excessive absences.[192] Tolerating absences that have already occurred, without prior notification, is very different than accommodating a request for a modified work schedule. A modified work schedule was included in the ADA as an example of a reasonable accommodation.[193] The *Cullotta* court's reliance on *Jovanovic* and *Byrne* to conclude that Cullotta's employer did not need to provide a reasonable accommodation for Cullotta was misguided. Moreover, Cullotta's absences were not excessive given his job responsibilities.

D. *The Court's Reliance on Cullotta's Responses to the Leave Form is Unreasonably Formalistic and Does Not Reflect the Legislative Intent of the Protections Provided by the ADA*

The ADA was enacted to "expand 'civil rights protection' to the disabled, akin to those protections given to individuals on the basis of race or sex."[194] Upon enacting the ADA, Congress found that "physical or mental disabilities in no way diminish a person's right to fully participate in all aspects of society, yet many people with physical or mental disabilities have been precluded from doing so because of discrimination."[195] The ADA's explicitly stated purpose is to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."[196] The Act further provides that it seeks to "provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities."[197] The ADA also seeks to "ensure that the Federal Government plays a central role in enforcing the standards . . . on behalf of individuals with disabilities."[198] Upon signing the ADA, President George Bush stated: "The Americans with Disabilities Act presents us all with a historic opportunity. It signals the end to the unjustified segregation

192. Jovanovic, 201 F.3d at 899; Byrne, 328 F.3d at 381.
193. 42 U.S.C.A. § 12111(9)(B).
194. Latsos, *supra* note 34, at 195.
195. 42 U.S.C.A. § 12101(a)(1).
196. *Id.* at § 12101(b)(1).
197. *Id. at* § 12101(b)(2).
198. *Id.* at § 12101(b)(3).

and exclusion of persons with disabilities from the mainstream of American life."[199]

Despite the optimism and sense of relief surrounding the enactment of the ADA, the case law that has developed around the ADA continues to narrow the protections provided by the Act.[200] In response to the Supreme Court's decisions in *Sutton v. United Air Lines, Inc.*[201] and *Toyota Motor Mfg., Kentucky Inc., v. Williams*,[202] which strictly construed the ADA's definition of a qualified individual, Congress amended the ADA in 2008.[203] Despite the amendments made to the ADA, decisions such as *Cullotta* only further narrow the protections afforded by the ADA. The *Cullotta* court placed an unreasonable amount of reliance on the leave form filled out to conclude that Cullotta was not protected by the ADA.[204] Although Cullotta's response on the form indicated that he could not perform the essential functions of the job, the court should not have stopped their analysis there.[205] The court should have taken into consideration Cullotta's ability to perform his job functions for the years that he worked while suffering

199. 1990 U.S.C.C.A.N. 601, 602.

200. *See* Nathan Catchpole & Aaron Miller, *supra* note 39, at 1349 (discussing the case law surrounding the narrowing of the ADA) (addressing how contemporary jurisprudence has narrowed the scope of the ADA purpose) (introducing the effect of the Court's contradictory position on ADA-as-enacted cases).

201. *See* Sutton v. United Air Lines, Inc., 527 U.S. 471–72 (1999) (holding "[n]o agency has been delegated authority to interpret the term "disability" as it is used in the ADA") (restricting the scope of a "qualified individual" under ADA regulation).

202. Toyota Motor Mfg., Kentucky, Inc. v. Williams 534 U.S. 184, 196 (2002) (holding the ADA's disability definition precludes disabilities which interfere with performance of minor tasks) (considering the wording of the ADA disability definition itself and interpreting "substantially limits" to mean "considerable" or "to a large degree".)

203. *See* ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2(b)(2) 122 Stat. 3553, 3553 (2008) ("to reject the requirement enunciated by the Supreme Court in [Sutton 527 U.S. at 471] (1999) and its companion cases that whether an impairment substantially limits a major life activity is to be determined with reference to the ameliorative effects of mitigating measures"); *see also* ADA Amendments Act, § 2(b)(4) 122 Stat. at 3553 ("to reject the standards enunciated by the Supreme Court in ['Toyota Motor Mfg., 534 U.S. at 184] that the terms 'substantially' and 'major' in the definition of disability under the ADA 'need to be interpreted strictly to create a demanding standard for qualifying as disabled,' and that to be substantially limited in performing a major life activity under the ADA 'an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives.'").

204. Cullotta v. United Surgical Partners International, Inc., No. 19-cv-06490, 2021 WL 3367193, at *4 (N.D. Ill. Aug. 3, 2021).

205. *Id.*

from his mental illness.[206] The court should have also further analyzed whether Cullotta was indeed unable to perform any job functions.[207] It should be fairly evident that Cullotta was not suddenly incapable of performing any job functions whatsoever. Instead, the court chose to focus on a small section of a form, that was likely filled out by Cullotta under duress, given his prior arguments with his employer regarding his proposed absence.[208] The court should have recognized that, given the prior arguments with his employer, Cullotta was likely desperate to obtain leave to attend his outpatient treatment.[209] Accordingly, Cullotta may have filled out the form in a hyperbolic manner to simply get his request for leave approved by his employer. By solely relying on Cullotta's responses on the leave form, the court analyzed the facts far too formalistically to the point where the outcome did not align with the goals of the ADA.[210]

Congress did not intend for its findings and purpose of the ADA were not meant to go unrecognized. A notice-posting requirement is mandated by the ADA.[211] The ADA requires:

> [e]very employer, employment agency, and labor organization, as the case may be, shall post and keep posted in conspicuous places upon its premises where notices to employees, applicants for employment, and members are customarily posted a notice to be prepared or approved by the Commission setting forth excerpts from or, summaries of, the pertinent provisions of this subchapter and information pertinent to the filing of a complaint.[212]

The intent behind this provision of the ADA appears to put employees on notice of their rights and protections under the ADA. If Congress went so far as to require employers to post notices of employee's rights in "conspicuous places upon its premises where notices to employees, applicants for employment, and members are customarily posted," it is

206. *Id.* at *1.
207. *Id.* at *4.
208. *Id.* at *1.
209. *Id.*
210. *Id.* at *4.
211. Americans With Disabilities Act (ADA) 42 U.S.C.A. § 2000e-10(a).
212. *Id.*

highly unlikely that Congress would have intended for an individual to be able to relinquish their ADA protections with a response on a leave form.[213]

The *Cullotta* court did not offer any factually similar case where a response on a form was enough to determine that the employee could not perform the essential functions of his position.[214] Instead, the court again relied on *Byrne*, an easily distinguishable case, to support its conclusion that Cullotta's response on the form "establish[ed] that [Cullotta] was unable to perform the essential functions of his position, which precludes any ADA claim."[215] Nothing in the Seventh Circuit's opinion in *Byrne* supports such a formalistic interpretation of the requirements for ADA protection.[216] On the contrary, the *Byrne* court noted that "[t]ime off may be an apt accommodation for intermittent conditions. Someone with arthritis or lupus may be able to do a given job even if, for brief periods, the inflammation is so painful that the person must stay home."[217]

If the holding in *Cullotta* became the general rule surrounding the interaction of the FMLA and the ADA, employees would likely need professional legal advice before attempting to request leave or an accommodation to prevent an involuntary relinquishment of protection. It is unlikely that the legislature intended the interaction of the FMLA and the ADA to become so complex that employees could accidentally forfeit their protections with a few spoken words or a response on a form.

E. *Cullotta Established a Prima Facie Case of Discrimination*

The Sixth Circuit has stated that a plaintiff must prove five elements to "establish a prima facie case under the ADA": "1) he or she is disabled; 2) otherwise qualified for the position, with or without reasonable

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213. *Id.*

214. *See* Cullotta,2021 WL 3367193, at *4 (relying on *Byrne v. Avon Prod., Inc.,* 328 F.3d 379, 381 (7th Cir. 2003)).

215. Cullotta, 2021 WL 3367193, at *4; *Compare* Cullotta, 2021 WL 3367193,at *1 (holding request for leave 24 hours out of a 168-hour work week precludes ADA protection) *with* Byrne v. Avon Prod., Inc., 328 F.3d 379, 381 (7th Cir. 2003) (holding "the ADA applies only to those who can do the job," in the context of an individual who had a history of erratic attendance and an extended, unrequested two-month absence).

216. *See* Byrne, 328 F.3d at 381 (7th Cir. 2003) (concluding that the ADA did not apply to Byrne because "[i]nability to work for a multi-month period removes a person from the class protected by the ADA").

217. *Id.*

accommodation; 3) suffered an adverse employment decision; 4) the employer knew or had reason to know of the plaintiff's disability; and 5) the position remained open while the employer sought other applicants or the disabled individual was replaced."[218]

Cullota established a prima facie case of discrimination. First, Cullotta was clearly disabled, as shown by his medical records, and he made it known to his supervisors.[219] Cullotta had been struggling with various mental illnesses since 2007, which appears to be undisputed by United Surgical Partners.[220] Second, Cullotta was qualified for the position, having worked for United Surgical Partners for almost twenty years.[221] Third, Cullotta suffered an adverse employment decision because he was demoted and subsequently fired after his request for leave was denied.[222] Fourth, United Surgical Partners was aware of Cullotta's disability as it was the reason for his FMLA leave requests.[223] "[Cullotta] had gone back and forth with [United Surgical Partners] regarding leaves of absence he said he needed because of his mental disabilities."[224] Finally, the record does not indicate that United Surgical Partners immediately filled Cullotta's position after firing him.[225] Thus, Cullotta established all the necessary elements for "establish[ing] a prima facie case under the ADA."[226]

V. AN INCREASINGLY MENTALLY ILL WORKFORCE

America and the world at large are currently facing a mental health crisis.[227] "The State of Mental Health in America 2022," a report which

218. Hurtt v. Int'l Servs., Inc., 627 F. App'x 414, 419 (6th Cir. 2015); *cf.* McDonnell Douglass Corp. v. Green, 411 U.S. 792, 802 (1973) (outlining similar elements for a prima facie case of racial discrimination); Kocsis v. Multi-Care Mgmt., Inc., 97 F.3d 876, 882 (6th Cir. 1996).

219. Cullotta, 2021 WL 3367193, at *1.

220. *Id.*

221. *Id.*

222. *Id.*

223. *Id.*

224. *Id.*

225. *See id.* at *1–*13.

226. *See* Hurtt v. Int'l Servs., Inc., 627 F. App'x 414, 419 (6th Cir. 2015) (providing rules for a prima facie case under the ADA).

227. *See* Ronald C. Kessler et al., *Lifetime prevalence and age-of-onset distributions of mental disorders in the World Health Organization's World Mental Health Survey Initiative*, 6:3 WORLD PSYCHIATRY 168, 171 (2007) ("The projected lifetime risk estimates suggest that approximately half the population (47-55%) will eventually have a mental disorder in six countries (Colombia, France, New Zealand, South Africa,

compiled data from The Substance Abuse and Mental Health Services Administration, the Centers for Disease Control and Prevention (CDC), and the Department of Education (DoE), provides shocking statistics regarding the state of mental health in America.[228] For example, "nearly 50 [million] or 19.86% of American adults experienced a mental illness in 2019."[229] Moreover, "24.7% of adults with a mental illness report an unmet need for treatment. This number has not declined since 2011."[230] The mental health crisis is primarily affecting young adults and adolescents.[231] Major depressive episodes [MDE] increased by 52% among adolescents from 2005-2017.[232] However, this is not to say that mental illness in adults is not increasing as well, considering "MDE incidence among adults [was] at 9.3% in 2009 and 10.1% in 2017 (a 9% increase[])."[233] Suicide-related thoughts, plans, and attempts have also been increasing among young adults.[234] "Unlike the other outcomes, in which consistent increases only occurred for those ages 25 and under, the suicide rate also increased among those in their late 20s and early 30s at about the same rate as for those ages 20 to 25."[235] Moreover, every age group experienced an increase in completed suicides from 2008 to 2017.[236]

Young adults and adolescents are the future of the American workforce. However, labor force participation rates among those ages 16–24 have

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Ukraine, United States)."); *see* Maddy Reinert et al., *The State of Mental Health in America 2022*, MENTAL HEALTH AMERICA, Oct. 2021, at 8 (providing statistics on mental health in America such as: "4.58% of adults report having serious thoughts of suicide. This has increased every year since 2011-2012").

228. *See* Reinert, *supra* note 227, at 8 (highlighting statistics in over 13 categories related to mental health).

229. *Id.*

230. *Id.* at 2.

231. *See* Jean M. Twenge et al., *Age, Period, and Cohort Trends in Mood Disorder Indicators and Suicide-Related Outcomes in a Nationally Representative Dataset, 2005–2017*, 128 No. 3 J ABNORM PSYCHOL 185, 188 (2019) ("[Major depressive episodes] in the last 12 months increased among adolescents ages 12 to 17 and among young adults ages 18 to 25 but was either unchanged or declined slightly among those ages 26 and older[.]"); American Psychological Assoc., *Mental Health Issues Increased Significantly in Young Adults Over Last Decade* (Mar. 19, 2019), https://www.apa.org/news/press/releases/2019/03/mental-health-adults [https://perma.cc/N3AA-E6VU].

232. Twenge, *supra* note 231, at 188.

233. *Id.* at 191.

234. *Id.*

235. *Id.* at 193.

236. *Id.* at 196.

generally declined from 2000 to 2020.[237] Additionally, COVID-19 caused unemployment rates to rise to nearly record-breaking levels.[238] In February 2021, the U.S. unemployment rate was officially reported as 6.6%, but "may have been as high as 9.9%[.]"[239] "The rise in the number of unemployed workers due to COVID-19 is substantially greater than the increase due to the Great Recession."[240]

The culmination of the COVID-19 pandemic and the rise in mental illness may have paved the way for what is being referred to as the "Great Resignation."[241] "A record-high 4.4 million people . . . quit their job in September [of 2021]."[242] "Economists and pollsters are still investigating" exactly what is causing the ongoing Great Resignation; "Texas A&M psychologist Anthony Klotz, who predicted and coined the term the 'Great Resignation' . . . credits 'pandemic epiphanies' with motivating many workers to depart their jobs."[243] The Great Resignation has primarily affected industries that "experienced extreme increases in demand due to the pandemic, likely leading to increased workloads and burnout."[244] "People feel like they need to instill a boundary around themselves when

237. *Civilian Labor Force Participation rate by age, sex, race, and ethnicity*, U.S. Bureau of Labor Statistics (Sept. 8, 2021), https://www.bls.gov/emp/tables/civilian-labor-force-participation-rate.htm[https://perma.cc/JN56-922A].

238. Rakesh Kochhar & Jesse Bennett, *U.S. Labor Market Inches Back from the COVID-19 Shock, but Recovery is Far from Complete*, PEW RESEARCH CENTER at *2 (Apr. 14, 2021), https://www.pewresearch.org/fact-tank/2021/04/14/u-s-labor-market-inches-back-from-the-covid-19-shock-but-recovery-is-far-from-complete[https://perma.cc/BHS3-ZMPL].

239. *Id.* at *5.

240. Rakesh Kochhar, *Unemployment rose higher in three months of COVD-19 than it did in two years of the Great Recession*, PEW RESEARCH CENTER at *1 (June 11, 2020), https://www.pewresearch.org/fact-tank/2020/06/11/unemployment-rose-higher-in-three-months-of-covid-19-than-it-did-in-two-years-of-the-great-recession/ [**https://perma.cc/2YRN-TVSD].**

241. Greg Rosalsky *Why are so Many Americans Quitting Their Jobs?,* National Public Radio at *2 (Oct. 19, 2021), https://www.npr.org/sections/money/2021/10/19/1047032996/why-are-so-many-americans-quitting-their-jobs [https://perma.cc/S7BV-EFD2].

242. Jennifer Liu, *A Record 4.4 Million People Quit in September as Great Resignation Shows no Signs of Stopping,* CNBC MAKE IT at *1 (Nov. 12, 2021)* https://www.cnbc.com/2021/11/12/a-record-4point4-million-people-quit-jobs-in-september-great-resignation.html [https://perma.cc/5VKR-33EV].

243. Rosalsky, *supra* note 241 at *2–*3.

244. Ian Cook, *Who Is Driving the Great Resignation?*, HARV. BUS. REV. (Sep. 15, 2021), https://hbr.org/2021/09/who-is-driving-the-great-resignation [https://perma.cc/7YEU-RGK6].

they quit so they can focus on their needs and desires—including their physical and mental health."[245]

Mind Share Partners, a nonprofit organization that focuses on mental health in the workplace, conducted a study comparing "the state of mental health, stigma, and work culture in U.S. workplaces before and during the pandemic."[246] "When [they] examined the data on how employees experience mental health challenges, [they] found that prevalence increased from 2019 to 2021 and that younger and historically underrepresented workers still struggle the most."[247] The study found that "[m]ore employees are leaving their jobs for mental health reasons, including those caused by workplace factors like overwhelming and unsustainable work."[248] Importantly, "[68%] of Millennials (50% in 2019) and 81% of Gen Zers (75% in 2019) have left roles for mental health reasons."[249] A shocking "[76%] of respondents reported at least one symptom of a mental health condition in the past year, up from 59% in 2019."[250] While more employees are talking about issues regarding mental health, "only 49% of respondents described their experience of talking about mental health at work as positive or reported that they received a positive or supportive response."[251] The workplace negatively affected the mental health of the vast majority of respondents in the study.[252] Employees attributed the negative effect on their mental health to emotional drain from stress, boredom, monotonous work, work-life balance, poor communication practices, and "a low sense of connection to or support from one's colleagues or manager."[253]

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245. Holly Corbett, *The Great Resignation: Why Employees Don't Want to Go Back to the Office*, FORBES (July 28, 2021) https://www.forbes.com/sites/hollycorbett/2021/07/28/the-great-resignation-why-employees-dont-want-to-go-back-to-the-office/?sh=305b20fa2000 [https://perma.cc/GA2R-BYLC].

246. Kelly Greenwood & Julia Anas, *It's a New Era for Mental Health at Work*, HARV. BUS. REV. (Oct. 4, 2021), https://hbr.org/2021/10/its-a-new-era-for-mental-health-at-work [https://perma.cc/Y8DT-TAPU].

247. *Id.*

248. *Id.*

249. *Id.*

250. *Id.*

251. *Id.*

252. *See id.* ("An overwhelming 84% of respondents reported at least one workplace factor that negatively impacted their mental health.").

253. *Id.*

At this critical point in time for the country and the economy, "[c]ompanies are finally investing more in mental health support out of necessity."[254] Companies are now providing more resources such as "paid time off, company-wide mental health days, and mental health training."[255] Employees now also utilize more accommodations to manage their mental health at work.[256] Employees take "extended or more frequent breaks from work and time during the workday for therapy appointments."[257] This shift in company culture will undoubtedly benefit companies and the economy in the long run. Finally,

> "[r]espondents who felt supported by their employer also tended to be less likely to experience mental health symptoms, less likely to underperform and miss work, and more likely to feel comfortable talking about their mental health at work. In addition, they had higher job satisfaction and intentions to stay at their company."[258]

VI. THE JUDICIAL SYSTEM'S ROLE IN AN INCREASINGLY MENTALLY ILL WORKFORCE

The FMLA and the ADA were enacted to provide protections for individuals with severe illnesses and disabilities, including mental illnesses.[259] However, given the historical narrowing of the ADA's protections, employees face difficulties understanding and exercising their protections under the ADA.[260] While some courts have liberally applied the FMLA and the ADA, decisions like *Cullotta* do not align with the

254. *Id.*

255. *Id.*

256. *Id.*

257. *Id.*

258. *Id.*

259. *See* 29 U.S.C. § 2612(a)(1)(D) (ensuring employees receive leave for "serious health condition[s]"); 42 U.S.C. § 12101(b)(1) (state the ADA's purpose is to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities").

260. *See* Cullotta v. United Surgical Partners Int'l, Inc., No. 19-cv-06490, 2021 WL 3367193, at *4 (N.D. Ill. Aug. 3, 2021) (concluding that filling out a FMLA request for leave form indicates that an employee cannot "perform the essential functions of his position, which precludes any ADA claim" (citing Byrne v. Avon Products, Inc., 328 F.3d 379, 381 (7th Cir. 2003))).

legislative intent behind the FMLA, ADA, or ADAAA.[261] Mental illnesses present the need for unique accommodations that may be difficult for employers to understand because they have little to no outward manifestation. However, this does not mean the judicial system should allow employers to evade making reasonable accommodations for individuals with mental illness. Decisions like *Cullotta* empower employers to ignore the mental health needs of their employees. Instead, the judiciary should look to opinions such as *Pappas v. District of Columbia*,[262] *Lee v. District of Columbia*,[263] and *Taylor v. Phoenixville School District* for guidance when analyzing the extent of the duty an employer bears in accommodating its employees' mental illness.[264] Had the *Cullotta* court imposed a duty similar to those mentioned in *Pappas*, *Lee*, and *Taylor* onto United Surgical Partners, the court may have found the employer fell short of its requirements.[265] This analysis would likely change the outcome of the case and shift the Overton window from asking "what the employee has done to request an accommodation" to "what has the employer done to address the needs of its employees."

Given the mental health crisis in America, the COVID-19 pandemic, and the Great Resignation, the judiciary's interpretation and application of the

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261. *See* 29 U.S.C. § 2601(a)(4) ("[T]here is inadequate job security for employees who have serious health conditions that prevent them from working for temporary periods."); *see also* ADA Amendments Act of 2008, Pub. L. No. 110-325, Sec. 2(b)(3), 122 Stat. 3553, 3553 ("The purposes of this Act are . . . to reject the Supreme Court's reasoning in Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999) with regard to coverage under the third prong of the definition of disability and to reinstate the reasoning of the Supreme Court in School Board of Nassau County v. Arline, 480 U.S. 273 (1987) which set forth a broad view of the third prong of the definition of handicap under the Rehabilitation Act of 1973 . . . .").

262. Pappas v. District of Columbia, 513 F. Supp. 3d 64 (D.D.C. 2021).

263. Lee v. District of Columbia, 920 F. Supp. 2d 127 (D.D.C. 2013).

264. *See Pappas*, 513 F. Supp. 3d at 89 ("An affirmative request for accommodations is not required where an employer both (1) 'know[s] that the employee has a disability' and knows (2) 'that the employee is seeking assistance from the employer' in the form of accommodations." (quoting Thompson v. Rice, 305 F. App'x 665, 668 (D.C. Cir. 2008) (citing *Lee*, 920 F. Supp. 2d at 136)); *see also Lee*, 920 F. Supp. 2d at 136 (explaining employees' requests for accommodations need only convey that they want accommodations for their disability rather than in writing with specific wording); Taylor v. Phoenixville Sch. Dist., 184 F.3d 296, 314 (3d Cir. 1999) (stating employee should not be required to ask for a reasonable accommodation once the employer has "more than enough information to put it on notice that [the employee] might have a disability").

265. *See Cullotta*, 2021 WL 3367193, at *4 (concluding Cullotta's employer did not violate the ADA without analyzing the employer's duty to explore possible accommodations).

FMLA and the ADA will play a crucial role in the future of the American workforce. Americans with mental illness should be able to treat their mental illness while maintaining employment. The ADA, while not necessarily drafted with the current state of America in mind, should provide employees with protections that will empower them to navigate through this difficult time in American history. Seeking treatment for mental illness is pivotal to that navigation.[266] The Supreme Court should resolve the circuit split by declaring that the FMLA and ADA are not mutually exclusive. Moreover, the Court should declare that intermittent FMLA leave to treat a mental illness is a reasonable accommodation under the ADA. Doing so would carry out the legislative intent of the FMLA, ADA, and ADAAA.

266. *See* Greenwood & Anas, *supra* note 246 ("[W]orkers who felt supported with their mental health overall were 26% less likely to report at least one symptom of a mental health condition in the past year. Respondents who felt supported by their employer also tended to be less likely to experience mental health symptoms, less likely to underperform and miss work, and more likely to feel comfortable talking about their mental health at work. In addition, they had higher job satisfaction and intentions to stay at their company.").