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Now and Again: Reappraising Disability Leave as an Accommodation

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Now and Again: Reappraising Disability Leave as an Accommodation

*Ryan H. Nelson**

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INTRODUCTION: NOW AND AGAIN

In 2017, more than 6.5% of America’s civilian workforce identified as disabled.¹ With disability commonplace across our

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1. As of 2017, 12.8% of American civilians were disabled, 51.0% of whom were “people in the working ages of 18–64,” and 51.0% of 12.8% is 6.528%. LEWIS KRAUS,

workplaces, it is no surprise that employees with a disability often need leave from work “to attend medical appointments related to an episodic or chronic medical impairment,” “obtain medical treatment,” or “recuperate from an illness or surgery, or [the] exacerbation of symptoms associated with a[] . . . medical impairment,”² after which they generally return to work. When employers fail to provide employees with sufficient disability leave or threaten to discipline or terminate employees who would take such leave, employees often turn to the law for recourse.

Yet, federal law is lacking in robust workplace leave entitlements, including vis-à-vis disability leave. In fact, the only federal law to provide leave explicitly to employees on account of their own health condition remains the Family and Medical Leave Act of 1993 (FMLA),³ which provides certain employees with up to twelve workweeks of unpaid leave in any rolling twelve-month period “[b]ecause of a serious health condition that makes the employee unable to perform the functions of the position of such employee.”⁴ Employees excluded from the FMLA’s coverage and/or employees who require more than the FMLA’s rather limited twelve-week leave entitlement often turn to the Americans with Disabilities Act of 1990 (ADA),⁵ arguing that employers must provide leave as an accommodation under Title I of the ADA’s requirement to offer “reasonable accommodations” to employees with a disability so long as doing so would not impose an undue hardship on business operations.⁶

Although Congress declined to mention leave explicitly in Title I of the ADA, it directed the agency with oversight over that title,

ERIC LAUER, RACHEL COLEMAN & ANDREW HOUTENVILLE, REHAB. RSCH. & TRAINING CTR. ON DISABILITY STAT. & DEMOGRAPHICS, UNIV. OF N.H., 2017 DISABILITY STATISTICS ANNUAL REPORT 2 (2018), https://disabilitycompendium.org/sites/default/files/user-uploads/2017_AnnualReport_2017_FINAL.pdf.

2. *Leave*, JOB ACCOMMODATION NETWORK, <https://askjan.org/topics/leave.cfm> (last visited Feb. 17, 2021).

3. Family and Medical Leave Act of 1993, Pub. L. No. 103-3, 107 Stat. 6 (1993) (codified as amended at 29 U.S.C. §§ 2601-2654).

4. 29 U.S.C. § 2612(a)(1)(D).

5. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (1990) (codified as amended at 42 U.S.C. §§ 12101-12213).

6. 42 U.S.C. § 12112(b)(5)(A); *see also* John F. Wymer & Bryan A. Stillwagon, *How Much Leave Is Enough? Reasonable Accommodation, Undue Hardship, and the Intersection of the FMLA and the ADA*, 40 EMP. REL. L.J. 22, 22-30 (2014); Jessica B. Summers, *The Shifting Law Surrounding Leave as a Reasonable Accommodation Under the ADA*, 65 FED. LAW. 13, 13-14 (2018).

the U.S. Equal Employment Opportunity Commission (EEOC),⁷ to “issue regulations . . . to carry out [Title I] . . .”⁸ Following that directive, on February 28, 1991, the EEOC published a notice of proposed rulemaking construing the sorts of accommodations that may be required by Title I as including “providing additional unpaid leave [beyond accrued paid leave] for necessary treatment,” citing congressional reports that ostensibly supported its conclusion.⁹ A few months later, on July 26, 1991, the agency promulgated its final rule, once again listing “unpaid leave” as an example of an accommodation that may be required by the statute.¹⁰ From that moment on, employees with a disability began requesting, and their employers began granting, leaves as an accommodation bounded only by the requirements that such leaves be reasonable and impose no undue hardship. Indeed, leave has been described as “the most common reasonable accommodation” under Title I of the ADA¹¹ with stakeholders ranging from the EEOC, the plaintiffs’ bar, and disability-rights advocates to employer-industry groups, the management bar, and the judiciary nearly ubiquitously endorsing leave as an

7. *Laws Enforced by the EEOC*, U.S. EQUAL EMP. OPPORTUNITY COMM’N, <https://www.eeoc.gov/laws/statutes/index.cfm> (last visited Feb. 17, 2021) [hereinafter *Laws Enforced by the EEOC*].

8. 42 U.S.C. § 12116.

9. Equal Employment Opportunity for Individuals with Disabilities, 56 Fed. Reg. 8578, 8595 (Feb. 28, 1991) (citing S. REP. NO. 101-116, at 31 (1989); H.R. REP. NO. 101-485, pt. 2, at 62 (1990); H.R. REP. NO. 101-485, pt. 3, at 39 (1990)). The first and third of these reports do not support the proffered proposition. Senate Report 116 addresses, *inter alia*, part-time and modified work schedules and states that the law “does not entitle the individual with a disability to more paid leave time than non-disabled employees,” but it does not affirmatively address leave as an accommodation. S. REP. NO. 101-116, at 31. In the same vein, House Report 485(III) (the House Judiciary Report) addresses, *inter alia*, part-time and modified work schedules, but says nothing of leave as an accommodation. H.R. REP. NO. 101-485, pt. 3, at 39. Only House Report 485(II) (the House Labor Report) actually supports what the EEOC says it supports. H.R. REP. NO. 101-485, pt. 2, at 62. See *infra* section I.B for a discussion of the legislative history of leave as an accommodation.

10. Equal Employment Opportunity for Individuals with Disabilities, 56 Fed. Reg. 35,726, 35,744 (July 26, 1991) (codified at 29 C.F.R. pt. 1630 app. (2021)). See the explanation of 29 C.F.R. § 1630.2(o) for this discussion.

11. *Leave of Absence Is Not Accommodation of First Resort*, LEAVE & DISABILITY COORDINATION HANDBOOK NEWSL., March 2001 (summarizing statement of David Fram at the National Employment Law Institute’s Employment Law Conference 2000); accord Desda Moss, *How and Why You Can Create Reasonable Accommodations*, HRNEWS (Jun. 20, 2017) (stating that the “most common types” of accommodations include “allowing leave time”).

accommodation subject only to the reasonableness and undue hardship guardrails.¹²

In this Article, I challenge that conventional proposition. More specifically, I argue that disability leave—even when it is reasonable and imposes no undue hardship on the employer—is not always required under Title I of the ADA and similar statutes. *Viz.*, I contend that employers never need to provide accommodations to employees who presently cannot work¹³ on account of their disability or for any other reason, including when such employees need leave as an accommodation. In contrast, subject to the reasonableness and undue hardship inquiries, I argue that employers must accommodate only those employees who presently can work, but who choose to take disability leave instead of working. In other words, as with all accommodations, leave requests should not only be vetted to confirm: (1) their general reasonableness, and (2) that this specific leave will not impose an undue hardship on this employer, but also to confirm that (3) at the time of the leave’s inception, the employee can perform the essential functions of the job but takes disability leave in lieu of work, and (4) there exists a reasonable possibility of the employee returning to work. In other words, employees must be able to work *now* and *again*. By interposing these elements into the disability accommodation framework, I posit that some reasonable leaves imposing no undue hardship are legally required, whereas others are not.

To begin defending this provocative thesis, Part I presents a holistic, descriptive analysis of federal disability accommodation law, delving into statutory and regulatory texts, as well as their announced and implied purposes; legislative histories; and administrative agency, judicial, scholarly, and practitioner interpretations thereof. This Part proceeds to conduct a linguistic examination of the relevant statutory and regulatory texts which

12. See generally *infra* section I.C to see the widespread support for this conventional belief. For further information concerning the reasonableness and undue hardship inquiries, see 42 U.S.C. § 12112(b)(5)(A); *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 401–02 (2002).

13. Throughout this Article, I routinely use the word “work” for easy reading instead of tracking the cumbersome statutory language each and every time (i.e., “perform the essential functions of the employment position that such individual holds”). See 42 U.S.C. § 12111(8). This substitution is intended for brevity’s sake only and is not meant to have import. Quite obviously, an inability to work is not the same thing as an inability to perform the essential functions of the position as the latter could still imply an ability to work in another position.

has never been undertaken, a paramount element in the analyses of a growing-textualist judiciary. It also provides a unique exploration of the level of deference that courts must afford agency interpretations endorsing disability leave as an accommodation. This Part also digs deeper into the legislative history of the federal disability accommodation statutes than previous scholarship, citing and analyzing sources never before discussed in employment law scholarship for the proposition that leave may be required as an accommodation, at least some of the time. Finally, Part I clarifies the lower courts' burgeoning and confused debates over disability leave as an accommodation and situates this Article's thesis within the debate over indefinite leave and long-term disability leave as accommodations, the last of which was recently considered by the Supreme Court in a petition for *certiorari* that was ultimately denied, hopefully allowing the lower courts sufficient time to pursue clarity.

Part II takes the conclusion of Part I to be true. That is, assuming *arguendo* that Title I of the ADA and the other federal disability accommodation statutes do not require employers to provide leave as an accommodation when, at the start of the leave, the employee cannot perform the essential functions of the job, how can we harmonize such a construction with the remainder of federal law? To that end, this Part contextualizes leave as an accommodation for employees with a disability by comparing it with leave as an accommodation for employees' religious practices and beliefs under Title VII of the Civil Rights Act of 1964 (Title VII)¹⁴ and part-time and modified work schedules as accommodations for employees with a disability under the ADA. In sum, Part II resolves that this Article's thesis works within the larger structure of federal law.

Finally, Part III concludes with a call to action. A broad entitlement to disability leaves as accommodations carries great normative appeal. Indeed, all employers (not just those covered by the ADA and similar statutes) should provide all of their workers (including their independent contractors and not just their employees) with disability leave whenever possible to ensure their workers' ability to maintain gainful work once the need for leave abates without the imposition of unnecessary costs on all parties

14. Civil Rights Act of 1964, Title VII, Pub. L. 88-352, 78 Stat. 255 (1964) (codified as amended at 42 U.S.C. § 2000e to 2000e-17).

(e.g., job search costs for the worker, costs of recruiting for and backfilling the position for the employer, costs to the family related to the unemployment of a family member). Moreover, it benefits society as a whole to both encourage prompt and proper medical treatment of disabilities and to optimize workplace utility by ensuring that adept workers perform their jobs. In short – disability leave, as an accommodation, is good.

And, yet, we live in an era where fidelity to statutory text is respected out of convenience and not out of principle.¹⁵ We should abide by the text of all our laws, even those with which we disagree. I chose to write this Article not only to call attention to the rampant misinterpretation of federal law which, in and of itself, would be worthy of scrutiny, but specifically because my normative views oppose what I contend to be an accurate interpretation of the law. Disability leave should be accommodated even when an employee presently cannot work, but I argue that federal law does not yet entitle employees to such an accommodation, even when it would be reasonable and impose no undue hardship. Put another way, commitment to the text of the ADA should outweigh the normative appeal of a flawed interpretation of the ADA. It is my hope that those who read this Article will not only be convinced by my substantive argument addressing disability leaves as accommodations, but also will take with them my conviction that fidelity to the statutory text compels us to reach this Article's conclusion on one hand while reaching for a phone to urge Congress to amend that statute with the other. Title I of the ADA must be amended to explicitly provide accommodations to anyone who "can or may be able to perform" the essential functions of the position, thus permitting leave as an accommodation for employees with a disability even if those employees cannot, at present, do the job.

Prompt legislative action is necessary to codify a broad right of workers with a disability to take leave as an accommodation before the courts inflict a damaging and destabilizing, albeit accurate,

15. See generally Jason Scott Smith, *How Kellyanne Conway's Rules Violations Threaten Democracy*, WASH. POST (July 2, 2019), <https://www.washingtonpost.com/outlook/2019/07/02/how-kellyanne-conways-rules-violations-threaten-democracy/>; Garrett Epps, *What Pleases Trump Has the Force of Law*, ATLANTIC (May 19, 2019), <https://www.theatlantic.com/ideas/archive/2019/05/trump-doesnt-care-about-constitution/589654/>; Steve Denning, *How Trump's Cabinet Now Undermines the Rule of Law*, FORBES (May 19, 2019), <https://www.forbes.com/sites/stevedenning/2019/05/19/how-trumps-cabinet-now-undermines-the-rule-of-law/>.

blow to Title I of the ADA and similar laws by concluding that they do not require such leave when employees presently cannot work. In sum, I intend this Article to serve as a blinking warning light, hopefully exposing a dangerous eventuality for American employees that should be rectified promptly by Congress and the President before the Supreme Court eliminates a right that most observers assume the law already guarantees, leaving behind countless employees with a disability who rely on leaves of absence to remain valuable components of our workforce.

I. DISABILITY LEAVE AS AN ACCOMMODATION

Analyzing whether and when federal law requires employers to provide employees with unpaid leave¹⁶ as an accommodation requires untangling an intricate, often overlapping web of statutes, rules and regulations that purport to implement those statutes, subregulatory guidance from the agencies that administer those statutes, and judicial decisions interpreting the foregoing morass. This Part explains why textual fidelity to the disability accommodation statutes in the workplace—more specifically, Title I of the ADA; sections 501 and 503 of the Rehabilitation Act of 1973 (the Rehab Act);¹⁷ and the Vietnam Era Veterans' Readjustment Assistance Act of 1974 (VEVRAA)¹⁸—demands the conclusion that they do not obligate employers to provide disability leave as an accommodation to employees who cannot work at the time the leave would begin. Of vital import to that conclusion are the statutory and regulatory definitions of the term “qualified,” which use the present-tense verbs “can” or “has” or the gerund noun “having,” each instance of which is italicized in section I.A.1. for easy reference before they are analyzed in greater detail in section I.A.2–3.

A. Statutory and Regulatory Text

This section proceeds first with a cataloging of statutory and regulatory support for the proposition that leave may be required

16. No federal laws mandate *paid* leave to all, or even most, American workers. Thus, all leave referenced in this Article is *unpaid* leave.

17. Rehabilitation Act of 1973, Title V, §§ 501, 503, Pub. L. No. 93-112, 87 Stat. 355 (1973) (codified as amended at 29 U.S.C. §§ 791, 793).

18. Vietnam Era Veterans' Readjustment Assistance Act of 1974, Title IV, § 402, Pub. L. No. 93-508, 88 Stat. 1593 (1974) (codified as amended at 38 U.S.C. §§ 4212).

as an accommodation in certain circumstances; I present those sources objectively and without analysis at first. Subsequently, I analyze these sources to explain why certain leaves are not required accommodations. Finally, I consider what deference may be owed to agency interpretations that support, conflict with, or clarify statutory text.

1. Cataloging the law

To begin, Title I of the ADA prohibits any “covered entity,” which is defined as public or private employers with fifteen or more employees (excluding the United States and a few other entities that are immaterial to this analysis), employment agencies, labor organizations, and joint labor-management committees from discriminating against a “qualified individual” on the basis of disability.¹⁹ That prohibition includes “not making reasonable accommodations to the known physical or mental limitations of an otherwise *qualified* individual with a disability who is an . . . employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship.”²⁰ Title I defines “qualified individual” as “an individual who, with or without reasonable accommodation, *can* perform the essential functions of the employment position that such individual holds.”²¹ The EEOC has promulgated two regulations implementing Title I of the ADA stating that leaves of absence, under certain circumstances not delineated by the regulations, may be required accommodations for qualified individuals: (1) “an employee with an impairment that previously limited, but no longer substantially limits, a major life activity may need leave . . . to permit him or her to attend follow-up or ‘monitoring’ appointments with a health care provider”²²; and (2) “an employer, in spite of its ‘no-leave’ policy, may, in appropriate circumstances, have to consider the provision of leave to an employee with a disability as a reasonable accommodation, unless the provision of leave would impose an undue hardship.”²³ The EEOC’s voluminous subregulatory

19. 42 U.S.C. § 12112(a) (emphasis added); *see also id.* § 12111(2) (defining “covered entity”), (5)(A) (defining “employer”), (5)(B) (excluding the United States and other entities from the definition of “employer”).

20. *Id.* § 12112(b)(5)(A) (emphasis added).

21. *Id.* § 12111(8) (emphases added).

22. 29 C.F.R. § 1630.2(k)(3) (2021).

23. *Id.* pt. 1630 app. § 1630.15(b)–(c) (“Disparate Impact Defenses”).

guidance confirms the agency's conviction that Title I of the ADA, as well as its implementing regulations, require leave as an accommodation at least some of the time.²⁴

Similarly, section 501 of the Rehab Act prohibits disability discrimination by the federal government,²⁵ and section 504 clarifies that no "otherwise *qualified* individual with a disability" shall, solely by reason of disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under, any federal program or activity or any program or activity receiving federal financial assistance.²⁶ The Rehab Act defines "individual with a disability" by incorporating the definition from the ADA,²⁷ but unlike Title I of the ADA, the Rehab Act does not define the term "qualified." Like Title I of the ADA, the EEOC administers section 501 of the Rehab Act,²⁸ and although the EEOC has not promulgated any regulations explicitly stating that leave may be an accommodation under section 501,²⁹ the EEOC's subregulatory guidance confirms that the agency views sections 501, 503 (discussed below), and 504 of the Rehab Act as

24. *Employer-Provided Leave and the Americans with Disabilities Act*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, <https://www.eeoc.gov/eeoc/publications/ada-leave.cfm> (last visited Feb. 20, 2021) ("An employer must consider providing unpaid leave to an employee with a disability as a reasonable accommodation if the employee requires it, and so long as it does not create an undue hardship for the employer . . .") [hereinafter EEOC's ADA Leave Website]; U.S. EQUAL EMP. OPPORTUNITY COMM'N, EEOC-CVG-2003-1, ENFORCEMENT GUIDANCE: REASONABLE ACCOMMODATION AND UNDUE HARDSHIP UNDER THE AMERICANS WITH DISABILITIES ACT ¶¶ 17-20 (2002) [hereinafter EEOC Accommodation Enforcement Guidance], <https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada>; U.S. EQUAL EMP. OPPORTUNITY COMM'N, EEOC-NVTA-2008-3, THE AMERICANS WITH DISABILITIES ACT: APPLYING PERFORMANCE AND CONDUCT STANDARDS TO EMPLOYEES WITH DISABILITIES (2008), <https://www.eeoc.gov/facts/performance-conduct.html> [hereinafter EEOC Performance and Conduct Standards]; U.S. EQUAL EMP. OPPORTUNITY COMM'N, EEOC-M-1A, A TECHNICAL ASSISTANCE MANUAL ON THE EMPLOYMENT PROVISIONS (TITLE I) OF THE AMERICANS WITH DISABILITIES ACT § 3.10(4), at 63-64 (1992), <https://files.eric.ed.gov/fulltext/ED352763.pdf>.

25. 29 U.S.C. § 791 (preempted with respect to airport security screeners as stated in *Joren v. Napolitano*, 633 F.3d 1144, 1146 (7th Cir. 2011)); *see also* *Lane v. Pena*, 518 U.S. 187, 193 (1996) ("[Section] 501 of the Rehab Act, 29 U.S.C. § 791, . . . prohibits discrimination on the basis of disability in employment decisions by the Federal Government.").

26. 29 U.S.C. § 794(a) (emphasis added).

27. *Id.* § 705(20)(B) ("The term 'individual with a disability' means, for purposes of . . . subchapter[] . . . IV . . . of this chapter [which includes Sections 501, 503, and 504 of the Rehab Act], . . . any person who has a disability as defined [in the ADA].").

28. *Laws Enforced by the EEOC*, *supra* note 7.

29. *See generally* 29 C.F.R. § 1614.203 (2021) (Rehab Act regulations).

requiring leave as an accommodation, at least in some cases,³⁰ even though the EEOC does not administer the provisions of section 503 or the provisions of section 504 unrelated to employment discrimination.³¹ Similarly, the U.S. Office of Personnel Management's Federal Personnel Manual states that, before a federal agency fires an employee with a disability who "no longer can perform the duties of his or her position efficiently and safely," it should consider granting to that employee "a liberal grant of leave without pay when paid leave is exhausted."³²

In a similar vein to section 501 of the Rehab Act, Presidents Clinton and Obama signed executive orders regarding accommodations for federal employees, although none of the orders mention leave.³³ However, the EEOC published two subregulatory guidance documents for one of those orders—Executive Order 13,164.³⁴ In one of those guidance documents, the EEOC asks, "Are there steps an agency can take prior to receiving a request for reasonable accommodation that will avoid unnecessary delays in responding if a request is made?", to which it replies:

30. EEOC's ADA Leave Website, *supra* note 24 ("This document also applies to Federal employees protected under section 501 of the Rehabilitation Act, which has the same non-discrimination requirements as the ADA."); EEOC Accommodation Enforcement Guidance, *supra* note 24, at 2 n.1 ("The analysis in this guidance applies to federal sector complaints of non-affirmative action employment discrimination arising under section 501 of the Rehabilitation Act of 1973. 29 U.S.C. § 791(g) (1994). It also applies to complaints of non-affirmative action employment discrimination arising under section 503 and employment discrimination under section 504 of the Rehabilitation Act. 29 U.S.C. §§ 793(d), 794(d) (1994).").

31. *Laws Enforced by the EEOC*, *supra* note 7.

32. *Rodgers v. Lehman*, 869 F.2d 253, 258 (4th Cir. 1989) (citing U.S. OFF. OF PERS. MGMT., FEDERAL PERSONNEL MANUAL § 339-1-3(b) (1979)). Note that this provision contains a recommendation (i.e., "should"), not a mandate. *Id.*

33. See Exec. Order No. 13,548, 75 Fed. Reg. 45,039 (July 26, 2010), *reprinted in* 29 U.S.C. § 791; Exec. Order No. 13,163, 65 Fed. Reg. 46,563 (July 26, 2000), *reprinted in* 29 U.S.C. § 791; Exec. Order No. 13,164, 65 Fed. Reg. 46,565 (July 26, 2000), *reprinted in* 29 U.S.C. § 791.

34. U.S. EQUAL EMP. OPPORTUNITY COMM'N, EEOC-CVG-2001-2, POLICY GUIDANCE ON EXECUTIVE ORDER 13164: ESTABLISHING PROCEDURES TO FACILITATE THE PROVISION OF REASONABLE ACCOMMODATION (2000) [hereinafter EO 13164 Policy Guidance], <https://www.eeoc.gov/laws/guidance/policy-guidance-executive-order-13164-establishing-procedures-facilitate-provision>; U.S. EQUAL EMP. OPPORTUNITY COMM'N, QUESTIONS AND ANSWERS: POLICY GUIDANCE ON EXECUTIVE ORDER 13164: ESTABLISHING PROCEDURES TO FACILITATE THE PROVISION OF REASONABLE ACCOMMODATION (2000), <https://www.eeoc.gov/federal-sector/questions-and-answers-policy-guidance-executive-order-13164-establishing-procedures>.

Yes. To anticipate and limit impediments that may cause unnecessary delay in providing reasonable accommodation, agencies should review and modify, in advance of a specific request, policies that might affect the agency's ability to respond promptly to requests for reasonable accommodation. Among the policies that agencies should review are those that affect . . . the flexibility to approve leave . . .³⁵

Based on this document and the EEOC's other subregulatory guidance on section 501 of the Rehab Act,³⁶ it is clear that the agency views section 501 and/or its regulations as imposing on federal agencies the obligation to provide leave as an accommodation at least under certain circumstances.

Section 503 of the Rehab Act does not, itself, prohibit discrimination based on disability status, but rather it requires federal contracts and subcontracts for the procurement of personal property and nonpersonal services in excess of \$10,000 to contain a provision "requiring that the party contracting with the United States shall take affirmative action to employ and advance in employment *qualified* individuals with disabilities."³⁷ Hence, it is by operation of contract that such federal contractors and subcontractors are prohibited from engaging in discrimination based on disability status, although many firms big enough to secure a contract or subcontract with the federal government likely are already barred from engaging in such discrimination by Title I of the ADA.³⁸ The agency that administers section 503, the U.S. Department of Labor's (DOL) Office of Federal Contract Compliance Programs (OFCCP),³⁹ has promulgated regulations implementing section 503 confirming that

[i]t is unlawful for the contractor to fail to make reasonable accommodation to the known physical or mental limitations of an otherwise *qualified* applicant or employee with a disability . . . unless such contractor can demonstrate that the

35. EO 13164 Policy Guidance, *supra* note 34, ¶ 15.

36. Rehabilitation Act of 1973, Title V, § 501, Pub. L. No. 93-112, 87 Stat. 355 (1973) (codified as amended at 29 U.S.C. § 791).

37. 29 U.S.C. § 793(a) (emphasis added).

38. See 42 U.S.C. §§ 12112(a), 12111(2).

39. *Jurisdiction Thresholds and Inflationary Adjustments*, U.S. OFF. OF FED. CONT. COMPLIANCE PROGRAMS, <https://www.dol.gov/ofccp/taguides/jurisdiction.htm> (last visited Feb. 22, 2021) [hereinafter OFCCP, *Jurisdiction Thresholds*].

accommodation would impose an undue hardship on the operation of its business.⁴⁰

Those regulations define “*qualified* individual” as one “who satisfies the requisite skill, experience, education, and other job-related requirements of the employment position such individual holds or desires, and who, with or without reasonable accommodation, *can* perform the essential functions of such position.”⁴¹ The regulations themselves list leave as an accommodation: “Other reasonable accommodations of this type may include . . . providing additional unpaid leave for necessary treatment.”⁴²

VEVRAA, too, does not prohibit discrimination explicitly, but rather it requires that federal contracts and subcontracts for the procurement of personal property and nonpersonal services in excess of \$100,000 contain a provision “requiring that the party contracting with the United States take affirmative action to employ and advance in employment *qualified* covered veterans,”⁴³ where “*qualified*” means “*having* the ability to perform the essential functions of the position with or without reasonable accommodation for an individual with a disability,”⁴⁴ and the definition of “covered veteran” includes “[d]isabled veterans.”⁴⁵ Therefore, like section 503 of the Rehab Act, it is by operation of contract that such federal contractors and subcontractors are barred from engaging in discrimination based on covered veteran status, although the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA),⁴⁶ likely would prohibit such discrimination as well.⁴⁷ Moreover, the subset of “[d]isabled veterans” protected by VEVRAA would almost always be protected by Title I of the ADA⁴⁸ and section 503 because the monetary threshold triggering VEVRAA exceeds that of section

40. 41 C.F.R. § 60-741.21(a)(6) (2021) (emphasis added); *see also* U.S. OFF. OF FED. CONT. COMPLIANCE PROGRAMS, FEDERAL CONTRACT COMPLIANCE MANUAL § 1G04, at 42–43 (2021), https://www.dol.gov/sites/dolgov/files/OFCPP/FCCM/508_FCCM_05012020.pdf [hereinafter OFCCP, FCCM].

41. 41 C.F.R. § 60-741.2(r) (emphases added).

42. *Id.* pt. 60-741 app. A, § 7.

43. 38 U.S.C. § 4212(a)(1) (emphasis added).

44. *Id.* § 4212(a)(3)(B) (emphases added).

45. *Id.* § 4212(a)(3)(A)(i).

46. Uniformed Services Employment and Reemployment Rights Act of 1994, Pub. L. No. 103-353, 108 Stat. 3149.

47. *See* 38 U.S.C. § 4311.

48. *See* 42 U.S.C. § 12112(a); 42 U.S.C. § 12111(2).

503.⁴⁹ As with section 503, the OFCCP administers VEVRAA⁵⁰ and has promulgated regulations implementing it stating that

[i]t is unlawful for the contractor to fail to make reasonable accommodation to the known physical or mental limitations of an applicant or employee who is a *qualified* disabled veteran [among others], unless such contractor can demonstrate that the accommodation would impose an undue hardship on the operation of its business.⁵¹

In turn, those regulations define “*qualified* disabled veteran” as one who “*has* the ability to perform the essential functions of the employment position with or without reasonable accommodation.”⁵² Furthermore, like the regulations implementing section 503 of the Rehab Act, VEVRAA’s regulations explicitly list leave as a permissible accommodation without clarifying when VEVRAA requires it: “Other reasonable accommodations of this type may include . . . providing additional unpaid leave for necessary treatment.”⁵³

Finally, the standards applicable to Title I of the ADA and sections 501 and 503 of the Rehab Act are materially identical. Indeed, Title I of the ADA ensures that all complaints filed under it and operative sections of the Rehab Act are “dealt with in a manner that . . . prevents imposition of inconsistent or conflicting standards.”⁵⁴ Moreover, section 501(a) of the ADA confirms that “[e]xcept as otherwise provided in [the ADA], nothing in [the ADA] shall be construed to apply a lesser standard than the standards applied under [the applicable title of the Rehab Act] or the regulations issued by [f]ederal agencies pursuant to such title.”⁵⁵ Similarly, sections 501, 503, and 504 of the Rehab Act state that the “standards used to determine whether [these sections have] been violated in a complaint alleging employment discrimination under [these sections] shall be the standards applied under title I of the [ADA].”⁵⁶

49. Compare 29 U.S.C. § 793(a), with 38 U.S.C. § 4212(a)(1).

50. OFCCP, *Jurisdiction Thresholds*, *supra* note 39.

51. 41 C.F.R. § 60-300.21(f)(1) (2021) (emphasis added); see also OFCCP, FCCM, *supra* note 40, § 1H04, at 48–49.

52. *Id.* § 60-300.2(s) (emphases added).

53. *Id.* pt. 60-300 app. A.

54. 42 U.S.C. § 12117(b).

55. *Id.* § 12201(a).

56. 29 U.S.C. §§ 791(f), 793(d), 794(d).

2. Interpreting the text

In this section, I present four hypothetical employees to whom I return as touchpoints throughout my analysis: (1) Ada (A), who works as an inventory stocker and injures her back at work, exacerbating an undiagnosed condition and forcing her to leave work immediately, so she cannot work until she undergoes back surgery and recovers from it several months from now;⁵⁷ (2) Brenda (B), who works as an on-air radio personality, gets diagnosed with an esophageal tumor and needs surgery sometime in the next few weeks to remove it, during which she would be placed under general anesthesia, but she can work until her surgery and after a few months of recovery;⁵⁸ (3) Carlos (C), who works as a prison guard, suffers from an anxiety disorder that causes him to suffer a panic attack at work lasting twenty minutes, rendering him unexpectedly, temporarily, and completely unable to do his job;⁵⁹ and 4) Dinesh (D), who works as a design manager, suffers from bipolar disorder and needs to leave work for a few hours to attend a single doctor's appointment sometime in the near future for a consultation, but he can work until the appointment and after it.⁶⁰

If accommodating the non-work described in these four scenarios were reasonable and imposed no undue hardship, and the employers were covered by a relevant statute (e.g., Title I of the ADA), a conventional analysis would conclude that employers must accommodate C (i.e., short-term, involuntary non-work) and D (i.e., short-term, voluntary⁶¹ non-work). Until recently, a conventional analysis likewise would conclude that the employers also must accommodate A (i.e., long-term, involuntary non-work)

57. These facts materially track those in *Severson v. Heartland Woodcraft, Inc.*, 872 F.3d 476 (7th Cir. 2017).

58. These facts materially track those in *Soria v. Univision Radio L.A., Inc.*, Cal. App. 5th 570 (2016), although I added the fact of B being placed under general anesthesia to highlight an example where an employee can perform the essential functions of the job at the start of the leave, but physically cannot do so at some point during the leave.

59. These facts materially track those in *Smith v. Leis*, No. 97-3373, 1998 WL 739881 (6th Cir. Oct. 8, 1998), although I altered the disability from a seizure disorder to an anxiety disorder to showcase how disabilities rendering employees mentally and/or emotionally incapacitated are materially identical for our purposes to disabilities rendering employees physically incapacitated, as with employee A.

60. These facts materially track those in *Nieman v. Gen. Motors Corp.*, No. 07-CV-12629, 2008 WL 4940585 (E.D. Mich. Nov. 17, 2008).

61. Later in this section, I contend with the degree to which attending a medically necessary doctor's appointment or other similar acts are truly voluntary.

and *B* (i.e., long-term non-work, the starting date of which was discretionary) so long as the employee could identify a return-to-work date given that many courts have concluded that indefinite leave would be unreasonable.⁶² Recently, however, more and more courts have held that *A* and *B* need not be accommodated on account of the long-term nature of their leave.⁶³ I contend that the conventional analysis, as well as the modern gloss thereon invoking long-term leaves, belies the statutory text. Instead of accommodating *C* and *D* with certainty and potentially accommodating *A* and *B*, I contend that these statutes require employers to accommodate *B* and *D* (i.e., employees taking leaves with a discretionary start time), subject, as always, to the reasonableness and undue hardship inquiries, and never require employers to accommodate *A* and *C* (i.e., employees taking leave involuntarily, regardless of whether that leave is for a few minutes or several months). Here's why.

The statutory text of Title I of the ADA limits accommodations only to “*qualified individual[s]*,” meaning those who “*can* perform the essential functions of the [job].”⁶⁴ The word “*can*,” as used in this definition, is a present-tense verb—a present-tense, auxiliary verb with indicative mood and dynamic modality, to be exact⁶⁵—used to express *present-tense ability*, meaning a qualified individual is one who presently has the ability to (i.e., *can*) perform the essential functions of the job. To that end, in dictionaries published around the enactment of the ADA, as well as in more-modern dictionaries, the word “*can*” is always denoted as being in the present tense and never in the future tense.⁶⁶ Put in the terms of the “plain meaning”

62. See, e.g., *infra* note 176 and accompanying text.

63. See, e.g., *infra* notes 179–180, 183, 186, and accompanying text.

64. 42 U.S.C. § 12111(8) (emphases added).

65. *García-Ayala v. Lederle Parenterals, Inc.*, 212 F.3d 638, 655 (1st Cir. 2000) (O’Toole, J., dissenting) (citing this language as the present tense and indicative mood); cf. *Can*, OXFORD DICTIONARY OF ENGLISH GRAMMAR (2d ed. 2014) (citing as an example of dynamic modality, “Nadine *can* read a novel in an evening,” as attributing the ability to read to Nadine) (emphasis in original); *Can*, 2 OXFORD ENGLISH DICTIONARY (2d ed. 1989) (denoting the word “*can*” as having the present tense, being an auxiliary verb, and having indicative mood).

66. *Can*, NEW OXFORD AMERICAN DICTIONARY (3d ed. 2010); *Can*, MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY (11th ed. 2004); 2 OXFORD ENGLISH DICTIONARY, *supra* note 65. The word “*can*” appears in several editions of *Black’s Law Dictionary*, but they do not specify its tense. See *Can*, BLACK’S LAW DICTIONARY (9th ed. 2009); *Can*, BLACK’S LAW DICTIONARY (7th ed. 1999); *Can*, BLACK’S LAW DICTIONARY (Rev. 4th ed. 1968).

doctrine,⁶⁷ a person can do something if they are able to do it *now*. An individual who might, should, or will be able to perform the essential functions of the job at some time in the future—be that a few minutes or several months from now—is not a qualified individual under Title I of the ADA unless that individual presently can perform the essential functions of the job. Indeed, the ADA could have defined a qualified individual as “an individual who, with or without reasonable accommodation, can *or may be able to* perform the essential functions of the job,” but the ADA does not say that.

Now, consider this linguistic analysis in the context of an employee requesting leave as an accommodation. Is a request for leave, *ipso facto*, a concession of the employee’s inability to perform the essential functions of the job presently? In some cases—yes. Both *A* and *C* in the scenarios above cannot work right now. Even if their employers demanded (cruelly, to be sure) that they work notwithstanding their disability, they would be unable to comply on account of a back injury preventing physical work and an incapacitating panic attack, respectively. Focusing on the text of the ADA and its use of the present-tense verb “can,” these employees presently cannot work, meaning they are not “qualified individual[s]” under the statute at the time that their accommodation would begin, so their employers need not accommodate their leave. Yet, not all cases of leave imply a present-tense inability to perform the essential functions of the position. Indeed, *B* and *D* can work now, even if it may be against medical best practices for them to do so. To that end, *B* and *D* both need time off—several months for *B*; just a few hours for *D*—sometime in the near future (i.e., leave doesn’t need to start right away, in the strictest sense of the word “need”). Accordingly, *B* and *D* can perform the essential functions of their jobs at the time they would take leave, even if they choose not to, meaning they are “qualified individual[s],” so their employers must accommodate them, subject to the reasonableness and undue hardship inquires. Not all cases will be as clear cut, thereby necessitating fact finding, but the boundary between permissible and impermissible leave is the present-tense ability to perform the essential functions of the job.

67. ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 69–77 (2012) (“Words are to be understood in their ordinary, everyday meanings—unless the context indicates that they bear a technical sense.”).

One might ask whether the statement, “Can I go to the store tomorrow?” implies a future-tense ability (i.e., “Yes, you can go to the store tomorrow.”), thereby undercutting the contention that “can” always denotes a present-tense ability. As demonstrated by dictionaries cited herein, the parenthetical reply to my hypothetical question is, in fact, an expression of a present-tense ability to undertake a future action (i.e., “Yes, right now, you have the ability to go to the store tomorrow.”). If you were to ask instead, “Tomorrow, will I have the ability to go to the store?”, the only proper response would be, “I don’t know.”

Yet, what legitimate purpose behind the ADA, expressed or theoretical, could support the inclusion of accommodations for employees who can work at the time the accommodation would begin and the exclusion of accommodations for employees who, potentially through no fault of their own, cannot? I contend that a preference for the continuity of business operations over flexibility for employees with a disability is such a purpose. That is, while section I.B, *infra*, demonstrates the congressional silence on any express purpose animating disability leave as an accommodation that might guide our path, a theoretical purpose behind providing such leave only to those employees who can work at the time of the accommodation could be affording flexibility to employees with a disability only when their employers can be provided enough time to get their affairs in order before leave begins. After all, before an employee begins leave, an employer may need to shuffle schedules, engage temporary replacements, adjust service levels and customer expectations, and otherwise ensure business continuity during the leave. Through this lens, *A* and *C*—through no fault of their own—gave their employers no time to ensure that business would carry on during their leave. In contrast, *B* and *D* can work with their employers and plan to start leave once business continuity is ensured, presuming that the leave is reasonable and imposes no undue hardship. Now, does this interpretation provide the optimal balance of employees’ and employers’ interests? Nowhere near it! Employers’ interests in ensuring that their business sufficiently continues during a disability leave should kowtow to their employees’ interests in taking disability leave, especially when such leave was necessitated through no fault of the employee. But such a value judgment is not mine to make. It is what the text demands, and it is reasonable. That is enough.

But, can the demarcation that I propose withstand practical scrutiny? That is, I draw a line at the voluntariness of the leave – involuntary leaves implying, *ipso facto*, that the employee suddenly and unexpectedly cannot perform the essential functions of the position and is thereby excluded from being a “qualified individual” under the ADA, and voluntary leaves implying the opposite, viz., that the employee has the discretion whether to take leave, meaning the employee can work right now if he or she chooses. So, are the sorts of leave requested by *B* and *D* above truly voluntary? In a way, no, because they present the employees with an untenable hard choice of caring for their welfare or working a job that, in many cases, is necessary for their welfare.

In this way, perhaps it is somewhat involuntary that *B* and *D* take leave, even if the start date and time of that leave remains in their discretion, which would imply that they, too, cannot perform the essential functions of their jobs because, at some point, they will be compelled into non-work by their disability. Does this imply that Title I of the ADA excludes from its scope all leaves of absence because no employees needing leave can perform the basic functions of their jobs? I argue that such an extreme position lacks logical mooring. Borrowing from the “difficult choice” voluntariness line of argument from criminal law jurisprudence and scholarship, “[a] strong, but not completely overpowering, compulsion is analogous to duress,” which “is not involuntary.”⁶⁸ Put another way, the decision to continue to work in these cases is voluntary because it “may be unwilling, but it is not unwilling.”⁶⁹ Thus, both *B* and *D* are voluntarily able to work, meaning they are qualified individuals, whereas *A* and *C* are compelled involuntarily into non-work, meaning they are not.

Ostensibly, further support for this conclusion can be found in the EEOC’s enforcement guidance, which provides that, because “reasonable accommodation is always prospective, an employer is not required to excuse past misconduct [(e.g., an unapproved absence)] even if it is the result of the individual’s disability.”⁷⁰

68. Ian P. Farrell & Justin F. Marceau, *Taking Voluntariness Seriously*, 54 B.C. L. REV. 1545, 1609 (2013) (italics removed).

69. See Joshua Dressler, *Exegesis of the Law of Duress: Justifying the Excuse and Searching for Its Proper Limits*, 62 S. CAL. L. REV. 1331, 1360 (1989) (citations omitted).

70. EEOC Accommodation Enforcement Guidance, *supra* note 24, at 25 ¶ 36.

Ample case law supports this contention.⁷¹ As applied here, the involuntariness of A and C's incapacitating leaves implies that they began their putative accommodations before requesting them, meaning that any accommodation would necessarily need to be retroactive. Therefore, one would expect the EEOC to oppose involuntary leaves as an accommodation.

However, confusingly, the EEOC's enforcement guidance cites at least two cases putatively involving involuntary leaves as examples of where an employer should have provided leave as an accommodation.⁷² In all likelihood, the EEOC excused the involuntariness of these leaves and the retrospective nature of the accommodation because the employers clearly knew that the employees had a disability, could not work on account of it, and could not request the necessary accommodation prior to availing themselves of it.⁷³ Thus, I would not point to the statements made by the EEOC and these courts opposing retroactive accommodations as support for my thesis as they could counterargue that what they *really* meant was that accommodations are not required when employers lack knowledge of an employee's disability, the employee's inability to work, and the employee's inability to request an accommodation because of that disability. Instead, I reiterate that the permissible purpose animating my reconceived analytic of the ADA (i.e., ensuring the continuity of business operations) also animates the gut instinct of the EEOC and these courts—an instinct supported only by policy considerations

71. *Dewitt v. Sw. Bell Tel. Co.*, 845 F.3d 1299, 1316 (10th Cir. 2017); *McElwee v. Cnty. of Orange*, 700 F.3d 635, 641 (2d Cir. 2012); *Hill v. Kansas City Area Transp. Auth.*, 181 F.3d 891, 894 (8th Cir. 1999); *Burch v. Coca-Cola Co.*, 119 F.3d 305, 319 (5th Cir. 1997); *Siefken v. Vill. of Arlington Heights*, 65 F.3d 664, 666–67 (7th Cir. 1995); *Isley v. Aker Phila. Shipyard, Inc.*, 275 F. Supp. 3d 620, 631 (E.D. Pa. 2017).

72. EEOC Accommodation Enforcement Guidance, *supra* note 24, at 16 n.55 (citing *Matthews v. Commonwealth Edison Co.*, 128 F.3d 1194 (7th Cir. 1997)), 18 n.63, 24 n.98 (citing *Ralph v. Lucent Techs., Inc.*, 135 F.3d 166 (1st Cir. 1998)). According to the district court opinion in *Matthews*, the plaintiff “suffered a severe heart attack and was forced to leave ComEd temporarily due to his medical condition.” *Matthews v. Commonwealth Edison Co.*, 941 F. Supp. 721, 722–23 (N.D. Ill. 1996) (emphasis added). In *Ralph*, the plaintiff was accommodated with four weeks of part-time work due to a “mental breakdown” that rendered him “able to attend work only briefly [thereafter].” *Ralph*, 135 F.3d at 168 (emphasis added). Oddly, the EEOC cited to *Ralph*, a case involving a part-time work schedule accommodation, in support of leave as an accommodation.

73. *Cf.* EEOC Accommodation Enforcement Guidance, *supra* note 24, 26–27 ¶ 40 (relating these elements as the conditions under which employees need not initiate a request for an accommodation).

and not by any citations to statutory text, I note – that the ADA does not require retroactive accommodations.

The EEOC regulations implementing Title I of the ADA support the notion that some leaves may qualify as accommodations whereas other leaves may not. Indeed, the regulations provide only that an employee “*may* need leave . . . to permit him or her to attend follow-up or ‘monitoring’ appointments with a health care provider”⁷⁴ (as was the case for employee *D* and which I contend the statute already mandated without the need of such a regulation) and that “an employer . . . *may*, in appropriate circumstances, have to consider the provision of leave to an employee with a disability as a reasonable accommodation, unless the provision of leave would impose an undue hardship.”⁷⁵ The second of these regulations should be read not only as permitting the interpretation that I have forwarded, as the first regulation does, but as supporting it. Under a conventional analysis, an employer must accommodate an employee with disability leave if it is reasonable and imposes no undue burden. However, this regulation presumes a leave that is both reasonable and imposes no undue hardship, and yet it does not say that the employer must provide such an accommodation; it says an employer “*may*, in appropriate circumstances,” need to do so. The only plausible reading of this regulation is that reasonable leaves that impose no undue hardship sometimes are permissible (e.g., when the employee presently can perform the essential functions of the position) and, other times, are impermissible (e.g., when the employee cannot).

Some courts have invoked the “essential functions” language from Title I of the ADA to reach a similar end, concluding that “regular and reliable attendance is an essential function of most jobs,” in which cases the employees requesting leave are unqualified and leave cannot be an accommodation.⁷⁶ On the other hand, the EEOC and a minority of courts have held that, in all circumstances, attendance “is not an essential function as defined by the ADA

74. 29 C.F.R. § 1630.2(k)(3) (2021) (emphasis added) (quotations in original).

75. 29 C.F.R. pt. 1630 app. § 1630.15(b)–(c) (“Disparate Impact Defenses”).

76. Rachel L. Berry & Sara J. Robertson, *Four Circuits Agree: Regular and Reliable Attendance Is an Essential Job Function*, NAT’L L. REV. (Feb. 14, 2019), <https://www.natlawreview.com/article/four-circuits-agree-regular-and-reliable-attendance-essential-job-function> (collecting cases); accord Franklin J. Rooks, Jr., *Employee Absences and the Americans with Disabilities Act*, 32 J. MED. PRAC. MGMT. 98, 99 (2016) (“Leave as a reasonable accommodation would seem to run contrary to the assertion that regular attendance is an essential job function.”).

because it is not one of 'the fundamental job duties of the employment position.'"⁷⁷ Respectfully, these courts and the EEOC are engaging in a debate with a flawed premise, rendering the debate itself moot. Title I of the ADA defines a "qualified individual" as one who "*can* perform the essential functions of the employment position,"⁷⁸ even if the employee *is not* performing those essential functions at present because the employee is on leave. The debate over regular attendance as an essential function of the job makes sense only if we replace the word "can" in the statute with the word "will." If we ask whether an employee will perform the essential functions of the job while on leave, the obvious answer is, "no, the employee will not work during non-work (i.e., while on leave)." This truism leads the EEOC to note that "essential functions," is undefined by Title I of the ADA, meaning the agency's regulations interpreting that phrase as "the fundamental job duties of the employment position"⁷⁹ should be given controlling deference. From those accurate statements, the EEOC argues that "job duties" presumes that the employee is working in the first place, so attendance cannot be an essential function of any job, meaning a lack of attendance cannot be grounds upon which to construe an employee as being unqualified. In other words, as per the EEOC, the employee will perform the essential functions of the job after the leave. Both sides of this debate are wrong. Having the ability to perform and performing are different things. We need not ask whether an employee on leave will be performing the "essential functions" of the job after the leave, necessitating an interpretation of what "essential functions" means; we need only ask whether an employee who takes leave can perform the essential function of the job, even if the employee chooses not to do so.

I also want to address a potential ambiguity uncovered by my analysis. I argue that, in the scenarios above, both *B* and *D* must be accommodated with leave. There is no doubt that *D*, who is taking leave to attend a doctor's appointment, can perform the essential

77. EEOC Accommodation Enforcement Guidance, *supra* note 24, at 18 n.65 (quoting 29 C.F.R. § 1630.2(n)(1)); see generally James A. Passamano, *Employee Leave Under the Americans with Disabilities Act and the Family Medical Leave Act*, 38 S. TEX. L. REV. 861 (1997); Audrey E. Smith, *The "Presence Is an Essential Function" Myth: The ADA's Trapdoor for the Chronically Ill*, 19 SEATTLE U. L. REV. 163 (1995).

78. 42 U.S.C. § 12111(8) (emphasis added).

79. 29 C.F.R. § 1630.2(n)(1).

duties of the job at all times during his leave. He is never incapacitated. He remains lucid and able-bodied. He could, theoretically, be called into work at the drop of a hat to perform the essential functions of his job, and he would be able to comply. Indeed, *D* would be just as able to work during his doctor's appointment as an employee asleep in bed at night, away from the office, who uses a screen reading tool to accommodate his poor vision at the office. They both can work, even if they are not doing so presently, so they both remain qualified. Not so with *B*. Recall that *B* needs to take leave to undergo tumor-removal surgery and recovery. While she can perform the essential functions of her job now and at all times leading up to the leave, as well as when she concludes her recovery, there will, at least, be a period of time during her leave when she will be under anesthesia and literally unable to work, if she were asked to do so. Parts of her recovery may also render her physically, mentally, or emotionally incapable of coming to work and doing her job, even if she were compelled to try. How, then, does she remain a "qualified individual" throughout the life of her accommodation?

To answer that question, consider another hypothetical employee, Elie (*E*), who works as a soccer coach and develops migraines if she is overly exposed to sunlight. Her employer accommodates her by allowing her to coach only indoor games inside a company-operated building abutting some outdoor fields. However, after her employer's profits decline, it forfeits its lease of the building, forcing it to operate only on the outdoor fields, potentially forcing it to terminate *E* because she cannot work outside for long periods of time.⁸⁰ Although *E* was able to perform the essential functions of the job at the start of her accommodation, that changed during the life of the accommodation. She went from being qualified to being unqualified. As such, *E*'s employer would be within its rights to terminate her employment after losing the ability to let her work indoors, assuming, of course, that it sufficiently engaged in the interactive process to try to otherwise accommodate *E*, but failed. Would the same not be true of *B*? *B* also went from being qualified to being unqualified during the life of

80. This employer would be obligated to engage in an interactive process to attempt other means of accommodating *E* such as part-time work, installing structures that provide shade, allowing *E* to coach pre-dawn or post-dusk games, etc. Assume, for argument's sake, that the employer engaged in this process and attempted to accommodate *E* in good faith, but failed.

her accommodation – that is, when *B* went under anesthesia during surgery, could not leave her bed post-surgery, and was otherwise incapacitated during her leave. During those times, *B* could not have performed the essential functions of her job. In that case, would *B*'s employer be legally obligated to accommodate her by providing her leave to start her surgery, knowing full-well that it could terminate her as soon as she went under anesthesia? Similarly, must an employer accommodate a nurse with Alzheimer's disease who needs an early shift to avoid sundowning⁸¹ (i.e., a modified work schedule) knowing full-well that it could rescind that accommodation after his shift ends at the point when he experiences sundowning and, therefore, cannot perform the essential functions of his job?

Of course not! It would be patently absurd to require an employer to provide leave to an employee when both the employer and the employee know with certainty that, during that life of that leave, the employer could lawfully be permitted to rescind it and fire the employee. To be clear, it would be reasonable, albeit ill-advised, to craft a law that does not require an employer to accommodate an employee with any disability leave at all if the employee would, during that leave, be unable to perform the essential functions of that position; perhaps the legislature values an employer's ability to force employees to work over the needs of employees with a disability, for example. Conversely, it would also be reasonable, and a good idea, for a law to require an employer to accommodate an employee with disability leave even if the employee will or may become unable to perform the job during the leave. What is unreasonable and something that no reasonable legislature could have intended is requiring an employer to allow disability leave to begin when that employer can fire the employee during the pendency of that leave.

In cases where the text of a statute yields such ambiguity, we must turn to administrative agency guidance for aid. See, *infra* section I.A.3, for my analysis of deference to the EEOC here, which ultimately concludes that Title I of the ADA, as interpreted in the EEOC's subregulatory guidance, requires leave as an

81. *Sundowning: Late-Day Confusion*, MAYO CLINIC, <https://www.mayoclinic.org/diseases-conditions/alzheimers-disease/expert-answers/sundowning/faq-20058511> (last visited Feb. 22, 2021).

accommodation in cases like that of *B*, who is qualified when her leave begins but becomes unqualified during that leave.

However, that is not to say that employers must continue to provide disability leave when the employee becomes unable to perform the essential functions of the job during the leave and there is no reasonable possibility of that employee *ever* being able to do so again. In such cases, employees may want to remain employed not because of the prospect of returning to work, but because employee benefits may extend to an employee on disability leave, depending on how the employer treats employees taking similar leaves,⁸² and employees may want to remain employed to honestly list continued employment on their résumés. However, it would be unreasonable to require an employer to accommodate an employee in this manner when there is no reasonable chance of the employee working for that employer ever again. Note that this differs in degree from employees who request indefinite leave but who may be able to return to work eventually.⁸³

I will note, for the sake of completeness, that one may be drawn to criticize the thesis of this Article on the grounds that it (1) perversely encourages employees to try to work even if they should be treating their disability instead and (2) appears to perversely authorize employers to encourage employees to delay the start of their voluntary disability leave, which would often mean delaying necessary or recommended medical treatment. I wholeheartedly agree with the first criticism. Under my analysis, employees with a disability would be encouraged to try to prove an ability to work just so they can qualify for leave. For example, in the scenarios above, *A* might try to grit and bear it by coming into work despite excruciating back pain to ensure that she earns the right to take leave (lest she be designated unable to perform her job and lose that right), possibly exacerbating her condition in the process. It is awful public policy to discourage the medical treatment of disabilities and encourage employees to make them worse in the name of business continuity. However, it is reasonable

82. Amber Clayton, *When Do Group Health Plan Benefits Terminate for an Employee Who Is Not on Federal Family and Medical Leave Act Leave?*, HR MAG. (July 2014), <https://www.shrm.org/resourcesandtools/tools-and-samples/hr-qa/pages/whendogrouphplanbenefitsterminateforanemployeeonanonfmlaleaveofabsence.aspx> (“If an employee is on leave as a reasonable accommodation under the Americans with Disabilities Act (ADA), an employer must continue an employee’s health insurance benefits during the leave if it does so for other employees on similar leave.”).

83. See, e.g., *infra* note 176 and accompanying text.

to come to such a conclusion, and democracy demands adherence to laws borne of awful public policy.

That said, I disagree with the second criticism. My thesis advances no such incentive because the ADA already permits employers to provide an alternative accommodation that meets the needs, not the wants, of the employee.⁸⁴ As perverse as it may sound, an employer already can delay an employee's requested start date for disability leave so long as that start date sufficiently accommodates the employee's disability; the employer does not even need to point to the requested start date imposing an undue hardship to effectuate such a delay. As the EEOC's enforcement guidance states, "If there are two possible reasonable accommodations, and one costs more or is more burdensome than the other, the employer may choose the less expensive or burdensome accommodation as long as it is effective"⁸⁵

One final corollary of my argument deserves attention. The FMLA affords to eligible employees the right to take twelve weeks of leave "[b]ecause of a serious health condition that makes the employee *unable to perform the functions of the position* of such employee."⁸⁶ The italicized language including employees within the FMLA's scope is materially identical to the language excluding employees from the ADA's scope. Hence, employees taking FMLA leave for their own serious health condition are, by their own admission, "unable to perform the functions of the position," meaning they are "unqualified individual[s]" under the ADA. This is true regardless of whether they have a "disability" or not.⁸⁷ Therefore, the commonly accepted belief that reasonable ADA leave that imposes no undue hardship must be tacked on to the end of FMLA leave based on an employee's serious health condition⁸⁸

84. EEOC Accommodation Enforcement Guidance, *supra* note 24, at 9 ¶ 9 ("The employer may choose among reasonable accommodations as long as the chosen accommodation is effective.").

85. *Id.*

86. 29 U.S.C. § 2612(a)(1)(D) (emphasis added).

87. Compare 29 C.F.R. § 825.102 (2021) (defining "serious health condition"), with 42 U.S.C. § 12102(1) (defining "disability"). See also 29 C.F.R. § 825.702(b) (explaining the relevant interaction between the FMLA and ADA).

88. EEOC's ADA Leave Website, *supra* note 24 (example 11); Tracie DeFreitas, *ADA Leave Beyond FMLA*, 12 JOB ACCOMMODATION NETWORK, no. 3, 2014 <https://askjan.org/articles/ADA-Leave-Beyond-FMLA.cfm> (last visited Feb. 22, 2021). ADA leave would not commonly follow other forms of FMLA leave (e.g., leave for childbirth or caring for certain family members with a serious health condition) because the employee would not

is wrong. As demonstrated herein, because such an employee would not be able to work at the start of the accommodation (i.e., the end of the FMLA leave), the employee is unqualified for an accommodation. I justify such a categorical conclusion as reasonable based on business continuity rationales similar to the rationale that could justify my thesis. Employees taking involuntary FMLA leave for their own serious health condition, which is permitted since FMLA leave can be designated retroactively,⁸⁹ certainly invoke such a rationale. The employer cannot ensure continuity of business operations if an employee leaves involuntarily to take FMLA leave; tacking ADA leave on to the end of that leave merely makes things worse for the employer. Moreover, reasonable legislators could view employees taking voluntary FMLA leave for their own serious health condition as telling their employers to plan for twelve week of leave and no more; legislators could consider leave as an accommodation beyond those twelve weeks to be less valuable than an employer's right to fill the position permanently. Such purposes unjustly tip the scales too far in favor of management at employees' expense, but such poorly conceived value judgments are reasonable in and of themselves, and the statutory text requires as much, so we must acquiesce.

With this reconceived analytic of the ADA in mind, consider the remainder of the federal disability accommodation statutes. Per the statutory text of all operative sections of the Rehab Act, the standards used to assess violations of the Rehab Act are the same as those applied under Title I of the ADA,⁹⁰ and, lest there be any doubt, the regulations implementing section 503 limit accommodations only to "*qualified individual[s]*," meaning those who "*can perform the essential functions of such position.*"⁹¹ As such, an employee who cannot work and requests leave is also not qualified under any section of the Rehab Act, meaning employers need not accommodate the request. The regulations implementing

necessarily have a disability triggering the ADA's accommodation requirements. However, an employee taking FMLA leave for such reasons who is also unable to work (e.g., an employee who develops incapacitating postpartum depression midway through her twelve weeks of FMLA childbirth leave) would likewise be (cruelly) unqualified for ADA leave after the FMLA leave concludes.

89. 29 C.F.R. § 825.301(d).

90. 42 U.S.C. §§ 12117(b), 12201(a); 29 U.S.C. §§ 791(f), 793(d), 794(d).

91. 41 C.F.R. § 60-741.2(r) (emphases added).

section 503 of the Rehab Act, like those implementing Title I of the ADA, do not alter this analysis as they state that leave may be an accommodation, but do not clarify when.⁹²

The text of VEVRAA limits accommodations only to “*qualified* covered veterans,” meaning individuals “*having* the ability to perform the essential functions of the position.”⁹³ As used in the statutory text, “*having*” is either a present participle verb or a gerund noun.⁹⁴ In either sense, the word “*having*” must be construed in the present tense either explicitly (as a present participle verb) or impliedly (as a gerund noun) because, at the time an employee would need leave, that employee cannot be amongst those individuals “*having*” the ability to perform the essential functions of the position. In a similar vein, VEVRAA’s implementing regulations confirm that “*qualified*” means one who “*has* the ability to perform the essential functions of the employment position.”⁹⁵ As used in the regulatory text, “*has*” is the third-person singular conjugation of the verb “*to have*” in the present tense and indicative mood, meaning to presently possess the ability, as an attribute, quality, faculty, or function.⁹⁶ Once again, the statutory and regulatory texts’ use of present-tense verbs or gerund nouns mean that employees who cannot work and request leave are not “*qualified*” under the statutes and regulations. Finally, like the regulations implementing section 503 of the Rehab Act, the regulations implementing VEVRAA confirm this Article’s thesis as they list leave as a permissible accommodation without clarifying the conditions under which it is permissible.⁹⁷ For these reasons, under VEVRAA, just as with Title

92. 41 C.F.R. pt. 60-741 app. A, § 7.

93. 38 U.S.C. § 4212(a)(3)(B) (emphases added).

94. Compare *Having*, WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY (2002) (defining “*having*” as a present participle verb), and *Having*, 7 OXFORD ENGLISH DICTIONARY, *supra* note 65 (same), with Devon Balwit, *How to Use “Being” and “Having” as Gerunds*, PORTLAND ENG. LANGUAGE ACAD., <https://portlandenglish.edu/blog/how-to-use-being-and-having-as-gerunds/> (last visited Feb. 17, 2021) (defining “*having*” as a gerund noun), and Martine Johnston, *Using Gerunds and Infinitives*, UNIV. OF TORONTO, <https://advice.writing.utoronto.ca/english-language/gerunds/> (last visited Feb. 17, 2021) (same). See also CAMBRIDGE GRAMMAR OF THE ENGLISH LANGUAGE 1220-22 (Cambridge Univ. Press. 2002) (English lacks a material distinction between present participle verbs and gerund nouns).

95. 41 C.F.R. § 60-300.2(s) (emphases added).

96. *Has*, NEW OXFORD AMERICAN DICTIONARY, *supra* note 66; *Has*, 6 OXFORD ENGLISH DICTIONARY, *supra* note 65; *Have*, 7 OXFORD ENGLISH DICTIONARY, *supra* note 65.

97. 41 C.F.R. pt. 60-300 app. A, § 7.

I of the ADA and all relevant sections of the Rehab Act, employers need not accommodate disability leave when the employee presently cannot work.

Accordingly, when it comes to an employee's ability to work, there are two requirements imposed by the federal disability accommodation statutes—requirements implied by the title of this Article. An employee must be able to work *now* (i.e., the present-tense ability to perform the essential functions of the job) and *again* (i.e., a reasonable likelihood of the ability to work again eventually, but not necessarily soon). These two requirements, when considered in tandem with the reasonableness and undue hardship inquiries, constitute the textually accurate analytical framework for disability leave as an accommodation under federal law.

3. *Heeding the guidance*

Administrative agencies like the EEOC and the OFCCP are entitled to a certain level of deference to their interpretations of the statutes that they administer so long as Congress has not spoken directly on the issue at hand and, in cases of statutory silence or ambiguity, as long as the interpretation is permissible.⁹⁸ Assuming congressional silence or statutory ambiguity and a permissive agency interpretation, the level of deference owed to the agency is absolute where the agency's interpretation carries the force of law (e.g., via congressionally authorized regulations) (*Chevron* deference),⁹⁹ whereas deference owed to the agency is lesser—more akin to a court considering persuasive authority—where its interpretation does not carry the force of law (e.g., agency websites, enforcement guidance, technical assistance manuals, regulations promulgated absent congressional authority) (*Skidmore* deference or *Skidmore* weight).¹⁰⁰

Recall that Title I of the ADA, the Rehab Act, and VEVRAA compel four conclusions elucidated by the four hypothetical employees: A and C (i.e., employees taking involuntary leave) are not qualified individuals, meaning employers need not

98. *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984).

99. *Id.*; see also *Christensen v. Harris Cnty.*, 529 U.S. 576, 587 (2000).

100. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944), *superseded by statute on other grounds as stated in* *Bridges v. Empire Scaffold, LLC*, 875 F.3d 222, 228 (5th Cir. 2017); see also William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083, 1188 (2008).

accommodate them with leave, whereas *B* and *D* (i.e., employees taking voluntary leave, at least at the time the leave starts) are qualified individuals, meaning they qualify for leave as an accommodation. Everyone agrees that the law may require leave as an accommodation for *D*, so I'll proceed to the trickier cases.

Regarding employees *A* and *C*, deference would be irrelevant with respect to the EEOC's regulations implementing Title I of the ADA and the OFCCP's regulations implementing section 503 of the Rehab Act and VEVRAA as those regulations merely restate what the statutes already imply—viz., that leave can be an accommodation some of the time.¹⁰¹ To that end, none of these regulations say *when* leave is a required accommodation. Accordingly, any regulatory deference notwithstanding, my conclusion vis-à-vis employees *A* and *C* remains untouched so far. Conflict only arises regarding *A* and *C* upon review of the EEOC's subregulatory enforcement guidance, which does not carry the force of law,¹⁰² yet contends that involuntary leaves such as these may nonetheless qualify as an accommodation. To be clear, that guidance does not explicitly state that "involuntary leaves do not render an employee unqualified" or anything of the sort, but the guidance cites at least two cases involving involuntary leaves as examples of employers that should have provided leave as an accommodation.¹⁰³ The EEOC's website on accommodating

101. 29 C.F.R. §§ 1630.2(k)(3); *id.* pt. 1630 app. § 16.30.15(b)–(c); 41 C.F.R. pt. 60-741 app. A, § 7; *id.* pt. 60-300 app. A, § 7; *see also* 29 C.F.R. § 825.702(b). The DOL, an agency without Congressional authority to promulgate regulations interpreting the ADA, has similarly endorsed disability leave as an accommodation generally in a regulation implementing the FMLA—"the ADA allows an indeterminate amount of leave, barring undue hardship, as a reasonable accommodation." 29 C.F.R. § 825.702(b).

102. *See Townsend v. Benjamin Enters., Inc.*, 679 F.3d 41, 53 (2d Cir. 2012); *EEOC v. U.S. Steel Corp.*, No. 10-1284, 2013 WL 625315, at *21 (W.D. Pa. Feb. 20, 2013). The EEOC's regulations implementing Title I of the ADA, on the other hand, do carry the force of law. *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 478–79 (1999), *superseded by statute on other grounds*, ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (2008). Some courts have also opined that "[d]eference to the EEOC regulations [implementing Title I of the ADA] is also appropriate when reviewing claims brought under [the federal employment provisions of] the Rehabilitation Act," *Badwal v. Bd. of Trs. of Univ. of D.C.*, 139 F. Supp. 3d 295, 308 n.9 (D.D.C. 2015) (citation omitted), and that the OFCCP's regulations implementing section 503 of the Rehab Act carry the force of law, *Associated Builders & Contractors, Inc. v. Shiu*, 30 F. Supp. 3d 25, 35 (D.D.C. 2014), *aff'd*, 773 F.3d 257 (D.C. Cir. 2014), whereas no court has considered the level of deference owed to VEVRAA's implementing regulations. However, given that deference to any regulations carrying the force of law is unnecessary here, I decline to analyze these lines of cases further.

103. *See supra* note 72.

leave buttresses those citations with an example involving involuntary leave.¹⁰⁴

Yet, even if we give the EEOC the benefit of the doubt and construe its subregulatory guidance as opposing my conclusions with respect to *A* and *C*, it would not matter. Because the relevant statutes exclude employees who take involuntary leaves from the definition of who is “qualified” for accommodations for the reasons explained, *supra*, those statutes have not “explicitly left a gap for an agency to fill,”¹⁰⁵ meaning agency guidance endorsing such leave as an accommodation is impermissible, and there is no need to weigh the degree of *Skidmore* deference or weight owed to such guidance. Similarly, even if the EEOC were to promulgate revised regulations permitting involuntary leave as an accommodation, they would fail under *Chevron* for lack of permissibility given the statutory text to the contrary. If these statutes were lacking in such exclusionary language, courts would likely still give the EEOC’s enforcement guidance some weight because, “while not controlling upon the courts by reason of [its] authority, [it] do[es] constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.”¹⁰⁶ However, because there are no statutory gaps here, the EEOC’s subregulatory guidance, like its regulations, are moot.

Regarding employee *B*, none of the regulations cited herein clarify whether leave can be an accommodation for an employee who takes leave that starts out as voluntary but during which the employee is rendered completely unable to perform the essential functions of the job. The regulations merely state that leave can be an accommodation without clarifying when. Once again, it is not until we review subregulatory enforcement guidance that we discern some degree of clarity, even if we must dig to find it once again. In its enforcement guidance, the EEOC fails to explicitly

104. EEOC’s ADA Leave Website, *supra* note 24 (example 11).

105. See *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984); accord *United States v. Mead Corp.*, 533 U.S. 218, 227 (2001).

106. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). Theoretically, the EEOC would not be entitled to deference to its interpretation of section 503 of the Rehab Act because it does not administer that statute, and the EEOC does not purport to interpret VEVRAA. However, if courts were to defer to the EEOC’s subregulatory guidance addressing Title I of the ADA, section 503 of the Rehab Act contains language confirming that it is to be interpreted under the same standards as Title I of the ADA, 29 U.S.C. § 793(d), so any theoretical lapse in *Skidmore* deference or weight owed to the EEOC regarding its interpretation of section 503 would be moot.

support the belief that the law requires employers to accommodate leaves that start out voluntary during which the employee may or will become unable to work; after all, the EEOC does not contend that employees' present-tense ability to work matters, so why would it cite such examples?¹⁰⁷ However, as I noted in the preceding paragraph, that guidance cites at least two cases involving *involuntary* leaves as examples of where employers should have provided leave as an accommodation, plus a similar example from the EEOC's website, meaning the employees in those situations were unable to perform the essential functions of the position at the start of the leave *and* at some time during that leave, if not throughout the leave entirely. It is the latter part of that proposition that carries us across the finish line, albeit barely. The EEOC posits that the law requires leave as an accommodation even when the employee is unable to do the job during the leave—precisely the situation that faces employee *B*. Because the statute itself is ambiguous concerning employees that start out qualified but become unqualified during their leave, and the regulations also offer no clarity, we must defer, per *Skidmore*, to guidance suggesting that the law requires leave as an accommodation even when an employee is unqualified at some time during the leave of absence, subject to the reasonableness and undue hardship inquiries. After all, generally, the greater (i.e., belief that leave may be required when an employee is unable to perform the essential functions of the position at the start of the leave *and* during leave) includes the lesser (i.e., belief that leave may be required when an employee cannot perform the essential functions of the position during leave).¹⁰⁸ Accordingly, to be clear, we must defer to the EEOC's enforcement guidance as applied to employee *B* only because the statute and the regulations are ambiguous; where the statutes and regulations are clear, as they are when applied to employees *A* and *C*, such deference is not warranted.

107. The EEOC does state that leave "is a form of reasonable accommodation when *necessitated* by an employee's disability," EEOC Accommodation Enforcement Guidance, *supra* note 24, at 14 (emphasis added), but the voluntary leave taken by *B*, during which she would be under general anesthesia, is also *necessitated* by her disability. The necessity of the leave does not necessarily imply an inability to work at some point during leave.

108. See Michael Herz, *Justice Byron White and the Argument that the Greater Includes the Lesser*, 1994 BYU L. REV. 227 (1994).

To be fair, the EEOC could state its position with far-greater clarity as one could argue, rightly, I might add, that the EEOC is silent on leave as an accommodation when an employee is qualified at the beginning of a leave and *becomes unqualified* during its pendency. However, beggars can't be choosers. Unless and until the EEOC promulgates contradictory regulations or issues alternative guidance, there is no further clarity vis-à-vis employee B to be gleaned in any source beyond a pure appeal to sound public policy, which I argue supports providing disability leave to all employees who need it anyway, not just those like employee B.

It is worth briefly analyzing the provision in the ADA that purports to subsume, as part of its statutory text, regulations issued by agencies interpreting the Rehab Act. As you may recall, section 501(a) of the ADA states that, “[e]xcept as otherwise provided in [the ADA], nothing in [the ADA] shall be construed to apply a lesser standard than the standards applied under [the applicable title of the Rehab Act] or the regulations issued by [federal agencies pursuant to such title].”¹⁰⁹ On its face, section 501(a) of the ADA purports to elevate the regulations promulgated by the OFCCP—for example, the regulation construing leave as an accommodation under section 503 of the Rehab Act¹¹⁰—to the same level as a statute, thereby creating an ostensible right for the OFCCP to promulgate new regulations permitting involuntary leave as an accommodation under section 503 and imbue such regulations with the force of a statute.

However, Congress cannot delegate legislative power to an agency to exercise an “unfettered discretion” to create laws.¹¹¹ In contrast, “[i]f Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to [interpret it] is directed to conform, such legislative action is not a forbidden delegation of legislative power.”¹¹² Section 501(a) of the ADA offers no such intelligible principle. Rather, because it ostensibly vests with an agency the legislative authority delegated only to Congress by Article I of the Constitution, the

109. 42 U.S.C. § 12201(a) (emphasis added).

110. 41 C.F.R. pt. 60-741 app. A, § 7 (2021).

111. A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 537–38 (1935).

112. J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928); *see also* Whitman v. Am. Trucking Assocs., 531 U.S. 457, 458 (2001) (“An agency cannot cure an unlawful delegation of legislative power by adopting in its discretion a limiting construction of the statute.”).

provision of section 501(a) of the ADA that purports to elevate agency regulations to the level of a statute is unconstitutional. Indeed, as Justice Scalia once noted, “A law that simply stated ‘it shall be unlawful to do ‘X’, however ‘X’ shall be defined by an independent agency,’ would seem to offer no ‘intelligible principle’ to guide the agency’s discretion and would thus raise very serious delegation concerns”¹¹³

B. Legislative History

Legislative history confirms that leave can be an accommodation at least some of the time, but that history fails to clarify when. To that end, I proceed chronologically in analyzing the history of the Rehab Act (1973), VEVRAA (1974), and finally the ADA (1990) to explain whether and when Congress believed that leave could be an accommodation.

Both the Rehab Act and VEVRAA have their roots in helping American soldiers with a disability integrate back into civilian life after returning from war. After World War I, the 65th Congress passed and President Wilson signed the first federal law to provide help to employees with a disability, the Vocational Rehabilitation Act of 1918,¹¹⁴ which assisted veterans in dealing with their disabilities when they came home.¹¹⁵ The new law proved so successful that federally funded programs for veterans with a disability continued to expand throughout the twentieth century¹¹⁶ leading up to March 1, 1971, when Sen. Jennings Randolph introduced a new bill that would ultimately replace the Vocational Rehabilitation Act of 1918—the Rehab Act.¹¹⁷ In 1972 and then again in early 1973, Congress passed similar versions of the bill that would ultimately become the Rehab Act only to have President Nixon veto both of them,¹¹⁸ leading to protests in Washington.¹¹⁹ A

113. *United States v. O’Hagan*, 521 U.S. 642, 695 n.10 (1997) (Scalia, J., concurring in part and dissenting in part) (citing *J.W. Hampton, Jr., & Co.*, 276 U.S. at 409).

114. Vocational Rehabilitation Act of 1918, Pub. L. No. 65-178, 40 Stat. 617 (1918).

115. 1 HENRY H. PERRITT, JR., *AMERICANS WITH DISABILITIES ACT HANDBOOK* 490-91 (4th ed. 2003).

116. *Id.*

117. S. 1030, 92d Cong. (1971).

118. *Vetoed by President Richard Nixon*, U.S. SENATE <https://www.senate.gov/reference/Legislation/Vetoed/NixonR.htm> (last visited Mar. 12, 2021) (citing vetoes of S.7, 93d Cong., 1st Sess. and H.R. 8395, 92d Cong., 2d Sess.).

119. *Disabled Tie Up Traffic Here to Protest Nixon Aid-Bill Vote*, N.Y. TIMES, Nov. 3, 1972, at 43.

few months later, in 1973, after further wrangling between Congress and the White House, Congress passed and President Nixon finally signed the Rehab Act.¹²⁰

Since the Rehab Act's enactment in 1973, sections 501 and 503 have been amended multiple times.¹²¹ Yet, nowhere in the legislative history of the Rehab Act or its amendments does a legislator or congressional report state or suggest, even *once*, that leaves of absence are accommodations required by the Rehab Act (or its regulations, for that matter). On the contrary, legislators and congressional reports sometimes listed the sort of accommodations that sections 501 and 503 of the Rehab Act and/or its regulations ostensibly require *without* listing leave as an example.¹²² Occasionally, legislators and their witnesses at hearings stated that sections 501 and 503 and/or their regulations generally required accommodations,¹²³ but no one argued that leave may be required as an accommodation. In hearings on Rehab Act amendments,

120. Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355 (1973).

121. Workforce Innovation and Opportunity Act of 2014, Pub. L. No. 113-128, Title IV, § 456(a), 128 Stat. 1675; Rosa's Law of 2010, Pub. L. No. 111-256, § 2(d)(3), 124 Stat. 2643; Postal Accountability and Enhancement Act of 2006, Pub. L. No. 109-435, Title VI, § 604(d), 120 Stat. 3242; Workforce Investment Act of 1998, Pub. L. No. 105-220, Title III, § 341(c), Title IV, § 408(a)(1), 112 Stat. 1092, 1202; Rehabilitation Act Amendments of 1993, Pub. L. No. 103-73, Title I, § 112(a), 107 Stat. 727; Rehabilitation Act Amendments of 1992, Pub. L. No. 102-569, Title I, § 102(p)(29), (31), Title V, §§ 503, 505, 106 Stat. 4360, 4424, 4427; Veterans Housing, Memorial Affairs, and Technical Amendments of 1991, Pub. L. No. 102-54, § 13(k)(1)(B), 105 Stat. 276; Handicapped Programs Technical Amendments Act of 1988, Pub. L. No. 100-630, Title II, § 206(a), (c), 102 Stat. 3310, 3312; Rehabilitation Act Amendments of 1986, Pub. L. No. 99-506, Title I, § 103(d)(2)(B), (C), Title X, §§ 1001(f)(1)-(3), 1002(e)(1), (e)(2)(A), (e)(3), 100 Stat. 1810, 1843, 1844; Rehabilitation Amendments of 1984, Pub. L. No. 98-221, Title I, § 104(b)(3), 98 Stat. 18; Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, Pub. L. No. 95-602, Title I, § 122(d)(1), 92 Stat. 2987.

122. See, e.g., H.R. REP. NO. 102-357, at 78; 138 CONG. REC. S16608-05, S16611 (1992), (statement of Sen. Tom Harkin).

123. See, e.g., H.R. REP. NO. 98-298, at 13 ("[C]ontractors are required . . . to make accommodations to the disabilities of employees or applicants unless undue hardship would result . . ."); *Oversight Hearings on Rehabilitation of the Handicapped Programs and the Implementation of Same by Agencies Under the Rehabilitation Act of 1973 Before the S. Subcomm. on the Handicapped of the Comm. on Labor and Public Welfare*, 94th Cong. 1593 (1976) (statement of Lawrence Z. Lorber, Deputy Asst. Sec'y Dir., OFCCP) ("[Under 'our new regulations,' c]ontractors are also required to make reasonable accommodations to workers' handicaps."); 121 CONG. REC. 32911, 32913 (1975) (statement of Sen. Chris Dodd) ("[The DOL] issued regulations (20 C.F.R. [§] 741) . . . to implement section 503. . . . The regulations require, [i]n part, that . . . [f]ederal contractors and subcontractors with contracts exceeding \$2,500 take affirmative action to employ and advance [i]n employment qualified handicapped persons, [i]ncluding . . . actions to accommodate physical and mental limitations of employees.").

some witnesses listed accommodations to which employees with a disability should be legally entitled, including leave,¹²⁴ and accommodations that employers have provided to employees irrespective of legal obligations (which sometimes included leave¹²⁵ and sometimes did not¹²⁶). However, nowhere will you find a legislator, or anyone else for that matter throughout this entire legislative history, opining that the Rehab Act and/or its regulations require employers to provide disability leave as an accommodation even some of the time. Rather, on multiple occasions, the same Congresses that passed substantive amendments to sections 501 and 503 of the Rehab Act failed to pass bills that would have explicitly required certain employers to provide leave to certain employees.¹²⁷

The lack of any legislator citing leave as an accommodation throughout the history of sections 501 and 503 of the Rehab Act and its amendments offers no guidance as “congressional silence lacks persuasive significance.”¹²⁸ In contrast, Congress’s failure to pass explicit employee leave bills during the sessions in which it considered substantive amendments to the Rehab Act arguably supports the conclusion that the statutory text of the Rehab Act does not require leave as an accommodation under any circumstances.

124. See, e.g., *Hearing Before the H. Subcomm. on the Select Education of the Comm. on Education and Labor*, 99th Cong. 105 (statement of Barbara Hoffman, Esq., Foundation for Dignity, Cancer Patients Employment Rights Project) (“Employees who are undergoing treatment for cancer may need a leave of absence or reduced work hours.”).

125. See, e.g., *Field Hearing on Reauthorization of the Rehabilitation Act Before the H. Subcomm. on Select Education of the Comm. on Education and Labor*, 102d Cong. 57, 61 (statement of Rehabilitation Specialist and Caregiver Jacqueline Rotteveel).

126. See, e.g., *Oversight and Reauthorization Hearing on the Rehabilitation Act of 1983 Before the H. Subcomm. on Select Education of the Comm. on Education and Labor*, 98th Cong. 295–96 (1983) (statement of the United Cerebral Palsy Association, Inc.).

127. An earlier version of the FMLA was introduced in and passed by the 102nd Congress but was vetoed by President George H.W. Bush. Family and Medical Leave Act, S. 5, 102d Cong. (1991). This is the same Congress to pass the Rehabilitation Act Amendments of 1992, H.R. 5482, 102d Cong., which amended sections 501 and 503 of the Rehab Act when President Bush signed it into law, Pub. L. No. 102-569, 106 Stat. 4344. A bill that would have “[e]ntitled[d] employees to temporary medical leave . . . in cases involving inability to work because of a serious health condition” was introduced in the 100th Congress. Parental and Medical Leave Act, S. 2488, 100th Cong. (1988). This is the same Congress to pass the Handicapped Programs Technical Amendments Act of 1988, H.R. 5334, 100th Cong. (1988), section 206(a) of which amended section 501 of the Rehab Act when President Reagan signed it into law, Pub. L. No. 100-630, 102 Stat. 3289. See also Rehabilitation Act Amendments of 1992, H.R. 5482, 102d Cong.; Handicapped Programs Technical Amendments Act of 1988, H.R. 5334, 100th Cong.

128. *Brown v. Gardner*, 513 U.S. 115, 121 (1994).

VEVRAA was born out of veterans from a different era returning from war. During the height of the Vietnam War and the height of the 1972 Presidential election, Congress passed and President Nixon signed the precursor to VEVRAA—the Vietnam Era Veterans’ Readjustment Assistance Act of 1972 (not VEVRAA, which was enacted in 1974)—requiring that all contracts with federal agencies contain provisions requiring contractors to “give special emphasis to the employment of qualified disabled veterans and veterans of the Vietnam era.”¹²⁹ Two years later, in December 1974 during the waning months of the Vietnam War, Congress passed and newly inaugurated President Ford signed VEVRAA into law.¹³⁰ VEVRAA has been amended several times since then,¹³¹ but legislative history on references to accommodations throughout those amendments is sparse. Undoubtedly, this is because, *inter alia*, the statutory text defining “qualified” as “having the ability to perform the essential functions of the position with or without reasonable accommodation for an individual with a disability” did not become part of VEVRAA until the Jobs for Veterans Act of 2002,¹³² not to mention VEVRAA’s significant overlap with the ADA and the Rehab Act. Witnesses at congressional hearings on VEVRAA occasionally cited some examples of accommodations for veterans with a disability that they believed were required by VEVRAA without listing leave as an example,¹³³ and other

129. Vietnam Era Veterans’ Readjustment Assistance Act of 1972, Pub. L. No. 92-540, Title V, § 503(a), 86 Stat. 1097 (1972).

130. Vietnam Era Veterans’ Readjustment Assistance Act of 1974, Pub. L. No. 93-508, Title IV, § 402, 88 Stat. 1593.

131. Honoring America’s Veterans and Caring for Camp Lejeune Families Act of 2012, Pub. L. No. 112-154, Title VII, § 708, 126 Stat. 1207; Jobs for Veterans Act of 2002, Pub. L. No. 107-288, § 2(b)(1), (2)(A)–(C), 116 Stat. 2034, 2035; Veterans Benefits and Health Care Improvement Act of 2000, Pub. L. No. 106-419, Title III, § 322(a), (b), 114 Stat. 1855; Veterans Employment Opportunities Act of 1998, Pub. L. No. 105-339, §§ 7(a), 8, 112 Stat. 3188, 3189; Veterans’ Benefits Improvements Act of 1994, Pub. L. No. 103-446, Title VII, § 702(a), 108 Stat. 4674; Department of Veterans Affairs Codification Act of 1991, Pub. L. No. 102-83, §§ 4(b)(8), 5(a), (c)(1), 105 Stat. 405, 406; Veterans’ Compensation, Education, and Employment Amendments of 1982, Pub. L. No. 97-306, Title III, § 310(a), 96 Stat. 1442; Veterans’ Rehabilitation and Education Amendments of 1980, Pub. L. No. 96-466, Title V, § 509, Title VIII, § 801(j), 94 Stat. 2206, 2217; Veterans’ Administration Programs Extension Act of 1978, Pub. L. No. 95-520, § 6(a), 92 Stat. 1821; Veterans’ Education and Employment Assistance Act of 1976, Pub. L. No. 94-502, Title VI, §§ 605, 607(2), 90 Stat. 2405.

132. Jobs for Veterans Act of 2002, Pub. L. No. 107-288, § 2(b)(1), 116 Stat. 2034.

133. See, e.g., *Hearings Before the H. Subcomm. on Education, Training and Employment of the Comm. on Veterans’ Affairs*, 97th Cong. 83–84 (handbook of the U.S. Postal Service listing examples of ostensibly required employee accommodations).

witnesses mentioned veterans getting fired for taking leave for doctor's appointments¹³⁴ or argued for increased training concerning providing accommodations to veterans with a disability.¹³⁵ Yet, throughout the entire legislative history of VEVRAA and its amendments, no legislator mentions VEVRAA requiring leave as an accommodation. Furthermore, as was the case with the Rehab Act, the same Congresses that passed substantive amendments to VEVRAA considered, but failed to pass, at least one bill that would have required employee leave.¹³⁶ Similarly, unrelated sections of VEVRAA itself provide leave rights to veterans called to military training and service.¹³⁷ Legislative silence on leave as an accommodation throughout VEVRAA's history provides no guidance on the issue, whereas congressional inaction regarding employee leave during sessions in which Congress considered VEVRAA and its substantive amendments arguably supports the conclusion that VEVRAA does not require leave as an accommodation at all.

Finally, we turn to Title I of the ADA. The bill that would ultimately become the ADA was first drafted by the National Council on Disability, an independent federal agency whose members were appointed by President Reagan, and first introduced in Congress in April 1988 by Sen. Lowell Weicker and Rep. Tony Coelho.¹³⁸ Debate over the ADA lasted for years, spanning two

134. *Health Concerns of Persian Gulf Veterans: Hearing Before the H. Comm. on Veterans' Affairs*, 103d Cong. 111 (1994) (statement of Penny Larrisey, Organizer, Operation Desert Shield/Storm).

135. See, e.g., *Hearing Before the H. Subcomm. on Education, Training and Employment of the Comm. on Veterans' Affairs*, 97th Cong. 118 (statement of Ronald W. Drach, National Employment Director, Disabled American Veterans) ("We believe that much needs to be done in the area of affirmative action for [qualified disabled veterans, amongst others,] and suggest that OPM consider the establishment of training programs for Personnel Directors and other staff involved in the personnel process to train them in the area of affirmative action[, including] reasonable accommodations to physical handicaps.").

136. A bill that, *inter alia*, would have excluded short-term illnesses and other conditions from coverage under the FMLA was introduced in the 107th Congress. Family and Medical Leave Clarification Act, H.R. 2366, 107th Cong. (2001). This is the same Congress to pass the Jobs for Veterans Act, H.R. 4015, 107th Cong. (2001), section 2 of which amended VEVRAA when President George W. Bush signed it into law, Pub. L. No. 107-288, 116 Stat. 2033.

137. Vietnam Era Veterans' Readjustment Assistance Act of 1974, Pub. L. No. 93-508, Title IV, § 404, 88 Stat. 1578 (1974).

138. ARLENE MAYERSON, DISABILITY RTS. EDUC. & DEF. FUND, THE HISTORY OF THE AMERICANS WITH DISABILITIES ACT (1992), <https://dredf.org/about-us/publications/the-history-of-the-ada/>.

sessions of Congress, myriad hearings, and consideration by an unprecedented four House committees and one Senate committee, until it was finally passed by the 101st Congress – first by the Senate on September 9, 1989; then by the House on May 22, 1990 in a different form; and by both chambers in July 1990 via a Conference Report – and signed by President George H.W. Bush on July 26, 1990.¹³⁹ The final vote on the Conference Report was 377-28 in the House and 91-6 in the Senate.¹⁴⁰

Throughout the ADA's long legislative history, leave is mentioned several times, most often in the context of leave needed for employees to treat HIV.¹⁴¹ However, the first instance of leave appearing in the legislative history does not occur until May 1990, two years after the bill was first introduced and several months after the Senate had first approved it. On May 15, 1990, after the Senate had voted on the initial bill but before the House did, the twenty-two majority members of the House Committee on Education and Labor¹⁴² delivered a report to the House summarizing their view that "[r]easonable accommodation may also include providing additional unpaid leave days, if such provision does not result in an undue hardship for the employer."¹⁴³ Of those twenty-two members, only nineteen ultimately voted for the bill during the roll call vote on July 12, 1990; two did not vote, and one could not vote.¹⁴⁴ Two days later, in

139. *Id.*; Americans with Disabilities Act of 1990, S. 933, 101st Cong. (enacted).

140. 136 CONG. REC. 17, 296-97 (1990) [hereinafter ADA Final House Vote]; *id.* 17,375-76 (1990) [hereinafter ADA Final Senate Vote].

141. For a recounting of the savvy politicking undertaken to include HIV and AIDS as disabilities within the ADA's scope, see Lennard J. Davis's *tour de force* book on the legislative history of the ADA, *Enabling Acts: The Hidden Story of How the Americans With Disabilities Act Gave the Largest US Minority Its Rights* (2015), especially Chapters 6 and 13.

142. CLERK OF THE HOUSE OF REPRESENTATIVES, 101ST CONGRESS, OFFICIAL LIST OF STANDING COMMITTEES & SUBCOMMITTEES FOR THE 101ST CONGRESS 14 (Sept. 5, 1990). [hereinafter 101st House Committee List]. Rep. Patsy Mink did not become a member of the committee until September 1990, which was several months after the committee's May 1990 report was delivered to the House. CLERK OF THE HOUSE OF REPRESENTATIVES, 101ST CONGRESS, OFFICIAL ANNOTATED MEMBERSHIP ROSTER BY STATE WITH VACANCY AND SPECIAL ELECTION INFORMATION FOR THE 101ST CONGRESS 495 (Jan. 3, 1989).

143. H.R. REP. NO. 101-485, pt. 2, at 63 (1990), as reprinted in 1990 U.S.C.C.A.N. 267, 345.

144. All voting majority members of the committee voted for the bill except Reps. Ford and Martinez, who were not present to vote. ADA Final House Vote, *supra* note 140. Resident Commissioner Fuster could not vote on the final disposition of legislation on the floor, so he did not vote on the bill. See R. ERIC PETERSEN, CONG. RSCH. SERV., RL31856, RESIDENT COMMISSIONER FROM PUERTO RICO (2009), <http://congressionalresearch.com/RL31856/document.php>.

debate on the House floor on May 17, 1990, before the House would vote on the bill five days thereafter, Rep. Theodore S. Weiss (who would also ultimately vote for the bill) opined that the ADA would “ensure that persons with HIV have the right to flexible hours and time off that are crucial to help accommodate the disease.”¹⁴⁵

After the House passed a bill on May 22, 1990, differing from the one that the Senate had passed the prior fall, twenty-one House managers submitted a Conference Report to the House on July 12, 1990, within which they advised that

if an individual has an infectious disease that can be eliminated by taking medication for a specified period of time, the employer must offer the employee the reasonable accommodation of allowing the individual time off to take such medication. Of course, this accommodation would be subject to the same “undue hardship” limitation which applies to all accommodations under this title.¹⁴⁶

Ultimately, twenty of those twenty-one managers would vote for the bill, with one abstaining.¹⁴⁷ Of the twenty, only three were also majority members of the House Committee on Education and Labor, and all of them voted for the bill.¹⁴⁸ Several representatives spoke on the floor of the House on behalf of the Conference Report on the day that it was submitted: Reps. Major R. Owens and Henry Waxman professed that “the bill will be particularly important in ensuring that people with HIV disease have the right to flexible work schedules and to time off to accommodate their treatment needs or their various disease-related conditions,” Rep. Don. Edwards cited “allowing the employee time off to recover from [a contagious] disease” as an example of a “reasonable accommodation,” and Rep. Howard Berman restated the Conference Report’s text concerning time off.¹⁴⁹

145. 136 CONG. REC. 10,872 (1990); *see also* ADA Final House Vote, *supra* note 140 (showing Rep. Weiss’s vote).

146. H.R. REP. NO. 101-596, at 67–68; 136 CONG. REC. 17,268 (1990).

147. ADA Final House Vote, *supra* note 140. Rep. Martinez did not vote. *Id.*

148. *Id.*; 101st House Committee List, *supra* note 142.

149. 136 CONG. REC. 17,289 (1990) (statement of Rep. Owens); *id.* at 17,290 (multiple statements of Rep. Edwards); *id.* at 17,293 (statement of Rep. Waxman); *id.* at 17,294 (statement of Rep. Berman). Reps. Owens and Edwards already signaled their support for leave as an accommodation by signing on to the Conference Report itself, but Reps. Waxman and Berman, both of whom voted for the final bill, ADA Final House Vote, *supra* note 140, add new names to the list of representatives supporting leave as an accommodation at least some of the time.

On the following day, the ten Senate managers submitted the Conference Report to the Senate, after which one of the managers, Sen. Ted Kennedy, cited “allowing [an] employee time off to recover from [a] disease” as an example of a “reasonable accommodation,” and went on to say that “the reasonable accommodation provision of the bill will be particularly important in ensuring that people with HIV disease have the right to flexible work schedules and to time off to accommodate their treatment needs or their various disease-related conditions.”¹⁵⁰ All ten of those managers voted for the final bill.¹⁵¹

In sum, the ADA’s legislative history demonstrates that at least 39 House members of the 377 who voted for the ADA,¹⁵² as well as at least 10 Senate members of the 91 who voted for the ADA, supported leave as an accommodation at least some of the time. Such sentiment comports with the ADA’s text and tracks the regulations later promulgated by the EEOC stating that leave can be an accommodation at least some of the time without clarifying when. Moreover, although this legislative history fails to evidence a majority of support for leave as an accommodation in either chamber, it is telling that the statements in support of leave were made on the floor of both chambers, in a key committee report, and in both Conference Reports, all of which were publicly available to the House and Senate members before their final votes. Significantly, not a single legislator opined that leave can never be an accommodation. Looking at this legislative history of the ADA suggests, but certainly does not make clear, that leave can be an accommodation at least some of the time.

However, it is worth looking outside the context of the ADA for contradictory evidence, as there was far more debate over employee leave throughout the halls of the 101st Congress beyond the confines of the ADA—that is, debate about the recently proposed FMLA.¹⁵³ That session, both houses of Congress passed the FMLA, which would have required employee leave in certain

150. 136 CONG. REC. 17,377 (1990).

151. H.R. REP. NO. 101-596, at 71-72 (listing the ten Senate managers); ADA Senate House Vote, *supra* note 140 (showing their votes).

152. The sum of the nineteen members of the House Committee on Education and Labor; the seventeen discrete House managers of the Conference Report; and Reps. Weiss, Waxman, and Burman is thirty-nine.

153. *See, e.g.*, H.R. REP. NO. 102-135, pt. 1 (1991).

situations, but it was vetoed by President George H.W. Bush.¹⁵⁴ Amid intense debate over employee leave during the very same congressional session in which the ADA passed, one could argue that, had Congress meant the ADA to require leave as accommodation, it probably would have said so explicitly. But it did not. In fact, in an extension of remarks not read on the floor, Rep. Larry Craig cited the ADA's obligations on employers as wholly distinct from the "medical leave" obligations that the FMLA would have imposed on employers had it passed that session,¹⁵⁵ potentially implying an understanding within Congress at the time that the ADA did not impose leave obligations on employers at all. Yet, if we must synthesize legislative history, neither the lack of more robust debate over leave during passage of the ADA nor Rep. Craig's implication that it may not require "medical leave" are as persuasive as the multiple statements of support for leave as an accommodation from dozens of members of both houses of Congress.

Finally, the section of the ADA defining "qualified individual" as one who "can perform" the job (and, indeed, all of Title I of the ADA) has been amended twice, first by the Civil Rights Act of 1991¹⁵⁶ and second by the ADA Amendments Act of 2008.¹⁵⁷ However, nowhere in the voluminous legislative history of either of these acts are leaves as an accommodation explicitly mentioned by any members of Congress. At best, at a hearing on the ADA Amendments Act of 2008 before the House Judiciary Committee on September 13, 2006, an interested organization, the Consortium for Citizens with Disabilities (CCD), told the committee about two instances of disability leave accommodations that were denied by courts, the first when the employee had mitigated her disability and the second because the disability allegedly did not substantially limit major life activities.¹⁵⁸ Both of these complaints went to the heart of the ADA Amendments Act of 2008—expanding the scope of "disability" under the ADA.¹⁵⁹ Presumably, if the committee members or the CCD were concerned that leave should not have

154. Family and Medical Leave Act of 1990, H.R. 770, 101st Cong.

155. 136 CONG. REC. E1774-02, E1774 (1990).

156. Civil Right Act of 1991, Pub. L. No. 102-166, § 109(a), 105 Stat. 1071, 1077.

157. ADA Amendments Act of 2008, Pub. L. No. 110-325, § 5(c)(1), 122 Stat. 3553, 3557.

158. *Americans with Disabilities Act: Sixteen Years Later: Hearing Before the Subcomm. on the Const. of the Comm. on the Judiciary H.R.*, 109th Cong. 915-16, 917-18 (2006).

159. See ADA Amendments Act § 2.

been an accommodation in those circumstances, someone would have said so, suggesting a widespread agreement that leave can be an accommodation at least some of the time. Yet, drawing conclusions from such silence is tenuous and unnecessary.

In sum, the review of legislative history provides limited, but reasonable, support for the text-and-regulation-based conclusion vis-à-vis Title I of the ADA that leave probably can be an accommodation at least some of the time, although the legislative history fails to provide the sort of nuanced support necessary to clarify which sorts of leave are permissible. Finally, the silence of legislative history concerning leave as an accommodation under the Rehab Act and VEVRAA is unhelpful, leaving us only with alternative sources like statutory text and agency guidance.

C. Extrinsic Interpretations

Having exhausted a capacious, albeit hermetic, analysis of the laws regulating leave as an accommodation in sections I.A–B, this section considers guidance from courts and scholars. Herein, I review interpretations of disability leave as an accommodation generally, as well as accommodating disability leave when the employee cannot work, disability leave that thwarts the predictability of business operations for employers, and long-term disability leave.

Although the Supreme Court has never considered leave as an accommodation under any of the federal disability accommodation laws, all but one circuit court with relevant jurisdiction has held that leave may be an accommodation at least some of the time.¹⁶⁰

160. *Delaval v. PTech Drilling Tubulars, LLC*, 824 F.3d 476, 481 (5th Cir. 2016) (“Time off . . . can be a reasonable accommodation”); *Wilson v. Dollar Gen. Corp.*, 717 F.3d 337, 345 n.7 (4th Cir. 2013) (“[A] leave request will not be unreasonable on its face so long as it [meets several requirements]”); *Santandreu v. Miami Dade Cnty.*, 513 F. App’x 902, 905 (11th Cir. 2013) (“[A] leave of absence may be a reasonable accommodation”); *Brannon v. Luco Mop Co.*, 521 F.3d 843, 849 (8th Cir. 2008) (“[A]llowing a medical leave of absence might, in some circumstances, be a reasonable accommodation”); *Taylor v. Rice*, 451 F.3d 898, 910 (D.C. Cir. 2006) (“An employee’s proposed accommodation seeking to use leave time to receive necessary medical care will be reasonable in many circumstances.”); *Fogleman v. Greater Hazleton Health All.*, 122 F. App’x 581, 585 (3d Cir. 2004) (“In some instances, it may be possible for a requested leave of absence to constitute a reasonable accommodation.”); *Humphrey v. Mem’l Hosps. Ass’n*, 239 F.3d 1128, 1135 (9th Cir. 2001) (“A leave of absence for medical treatment may be a reasonable accommodation under the ADA.”); *García-Ayala v. Lederle Parenterals, Inc.*, 212 F.3d 638, 650 (1st Cir. 2000) (“[R]etaining the ailing employee’s slot while granting unsalaried leave may be a reasonable

To date, only the Second Circuit is silent on leave as an accommodation,¹⁶¹ although nearly all of the district courts within that circuit concur with the majority of circuits.¹⁶² Indeed, other than the U.S. District Court for the District of Vermont, which has yet to consider the issue, the country is on the same page in concluding that leave may be an accommodation at least some of the time. Courts have analyzed section 501 of the Rehab Act in a materially identical manner, although fewer courts have done so.¹⁶³ Finally, neither courts nor administrative law judges have considered section 503 of the Rehab Act or VEVRAA in the context of leave as an accommodation, most likely because there is no

accommodation required by the ADA.”); *Cehrs v. Ne. Ohio Alzheimer’s Rsch. Ctr.*, 155 F.3d 775, 783 (6th Cir. 1998) (“[A] medical leave of absence can constitute a reasonable accommodation under appropriate circumstances.”); *Haschmann v. Time Warner Ent. Co.*, 151 F.3d 591, 601 (7th Cir. 1998) (“[T]here was sufficient evidence from which a reasonable juror could conclude that the second medical leave, as requested, would have been a reasonable accommodation.”); *Hudson v. MCI Telecomms. Corp.*, 87 F.3d 1167, 1169 (10th Cir. 1996) (“[A] reasonable allowance of time for medical care and treatment may, in appropriate circumstances, constitute a reasonable accommodation.”).

161. *Wenc v. New London Bd. of Educ.*, 702 F. App’x 27, 30 (2d Cir. 2017) (“[W]e have not squarely addressed in a published opinion when a medical leave may constitute a ‘reasonable accommodation’ under the ADA . . .”).

162. *Forgione v. City of New York*, No. 11-CV-5248, 2012 WL 4049832, at *9 (E.D.N.Y. Sept. 13, 2012) (“[A] request for leave may constitute a reasonable accommodation in certain circumstances . . .”); *Graves v. Finch Pruyn & Co.*, No. 103-CV-266 (GLS/RFT), 2009 WL 819380, at *5 (N.D.N.Y. Mar. 27, 2009) (stating that a request for leave “may constitute a reasonable accommodation”), *aff’d on other grounds*, 353 F. App’x 558 (2d Cir. 2009); *Cousins v. Howell Corp.*, 113 F. Supp. 2d 262, 271 (D. Conn. 2000); *Karn v. Williams Advanced Materials*, No. 02-CV-0852E(F), 2005 WL 1397014, at *2 (W.D.N.Y. June 13, 2005) (holding that “a short leave of absence” may be a reasonable accommodation); *Powers v. Polygram Holding, Inc.*, 40 F. Supp. 2d 195, 201–02 (S.D.N.Y. 1999) (“[T]he ADA contemplates leaves of absence as a possible reasonable accommodation under the ADA.”).

163. *Fuller v. Frank*, 916 F.2d 558, 562 (9th Cir. 1990) (holding the agency “reasonably accommodated” an employee’s disability under the Rehab Act by allowing leave); *Rodgers v. Lehman*, 869 F.2d 253, 259 (4th Cir. 1989) (explaining that federal agencies must, before firing an employee with a disability, “afford him [or her] an opportunity to participate in an inpatient program, using accrued or unpaid leave, unless the agency can establish that it would suffer an undue hardship from the employee’s absence”); *Nandori v. City of Bridgeport*, No. 3:12CV673 JBA, 2014 WL 186430, at *5 (D. Conn. Jan. 16, 2014) (“[M]edical leave may be a reasonable accommodation under the [Rehabilitation Act].”); *Johnson v. Sullivan*, 824 F. Supp. 1146, 1156 (D. Md. 1991) (stating that “leave to attend to medical problems” is an accommodation under the Rehab Act), *rev’d on other grounds sub nom. Johnson v. Shalala*, 991 F.2d 126 (4th Cir. 1993); *Whitlock v. Donovan*, 598 F. Supp. 126, 137 (D.D.C. 1984) (“[T]he reasonable accommodation duty [imposed by the Rehab Act] requires the agency to evaluate whether . . . leave . . . would have imposed an undue hardship on the agency.”), *aff’d sub nom. Whitlock v. Brock*, 790 F.2d 964 (D.C. Cir. 1986).

private right of action under either statute¹⁶⁴ and because they largely overlap with other statutes like the ADA.

A handful of decisions interpreting the Rehab Act as requiring leaves as accommodations in some situations predate the enactment of the ADA,¹⁶⁵ potentially suggesting that these earlier decisions were ratified and incorporated by the legislators behind the ADA. If true, then perhaps the ADA definitively requires leave as an accommodation at least some of the time. After all, Title I of the ADA directs agencies with enforcement authority over the statutes to “prevent[] [the] imposition of inconsistent or conflicting standards for the same requirements under [Title I of the ADA] and the Rehabilitation Act of 1973,”¹⁶⁶ suggesting that the ADA intended to substantively copy-and-paste the extant law of the Rehab Act into a large swath of the private sector. Yet, if we are to rely on legislative intent to shape the meaning of the ADA, it speaks great volumes that Congress failed to cite either of these earlier Rehab Act cases in debate over the ADA, and the cases never received significant press. Thus, there is no evidence that Congress considered these cases, let alone ratified or incorporated them, when passing the ADA.

Proceeding to the heart of the matter, we next turn to how courts assess the central thesis of this Article. Foremost, courts are split on whether the law requires accommodating employees with reasonable leave that imposes no undue hardship when they cannot work presently. Courts run the gamut from rightly excluding such employees as unqualified for the *right* reason, rightly excluding such employees as unqualified for the *wrong* reason, and mistakenly including such employees as qualified. Starting with an example of a court to reach the correct holding for the correct reason, in an Eighth Circuit opinion written by Judge C. Arlen Beam, the court cites the ADA’s definition of “qualified individual” before holding that “it is axiomatic that in order for [an employee with a disability] to show that she could perform the essential functions of her job, she must show that she is at least able to show up for work.”¹⁶⁷ Applying that apt construction of the ADA

164. Riley v. Outlook Neb., Inc., No. 8:12CV168, 2013 WL 12123508, at *2 (D. Neb. Feb. 4, 2013) (collecting cases); Douris v. Bucks Cnty. Off. of Dist. Att’y, No. CIV.A.04-CV-232, 2005 WL 226151, at *12 (E.D. Pa. Jan. 31, 2005) (collecting cases).

165. See, e.g., *Rodgers*, 869 F.2d at 259; *Whitlock*, 598 F. Supp. at 137.

166. 42 U.S.C. § 12117(b).

167. *Browning v. Liberty Mut. Ins.*, 178 F.3d 1043, 1048 (8th Cir. 1999).

to the facts at bar, Judge Beam noted that the plaintiff, a claims representative who was recovering from surgery and dealing with the emotional struggle of having to do so, was “unable to report to work” due to her physical and, at times, mental incapacity, rendering her unqualified for an accommodation.¹⁶⁸ Judge Beam’s opinion is emblematic of an ideal analysis.

In a similar vein, in a Fifth Circuit opinion penned by Judge Edith H. Jones, the court cited the same statutory provision before holding that “[b]ecause [a mechanic recuperating from ankle surgery] could not attend work, he is not a ‘qualified individual with a disability’ under the ADA.”¹⁶⁹ Had that concluded the matter, Judge Jones’s opinion would have been as ideal as that of Judge Beam’s. Yet, the opinion went on to (1) argue that attendance is an essential function of the job (which, as I explained, *supra*, is an unnecessary thicket to navigate), and (2) cite with approval a Fourth Circuit case concluding that an employee “who does not come to work cannot perform any of his job functions, essential or otherwise.”¹⁷⁰ Not true. Employees *B* and *D* did not come to work, but they could have performed the functions of the job if they had wanted to, meaning they were qualified.

In an unrelated Fourth Circuit opinion, Judge J. Harvie Wilkinson III remarked of Title I of the ADA and its regulations:

Significantly, these provisions contain no reference to an individual’s *future* ability to perform the essential functions of his position. To the contrary, they are formulated entirely in the present tense, framing the precise issue as whether an individual “can” (not “will be able to”) perform the job with reasonable accommodation.¹⁷¹

True enough. However, in that case, the panel denied the requested accommodation (i.e., indefinite leave) only on unreasonableness grounds without commenting on whether it was also indefensible because the employee was unable to do his job and, thus, unqualified.¹⁷² In a recent Sixth Circuit decision by Judge Ronald Lee Gilman, the panel likewise sidestepped the issue of whether and when disability leave as an accommodation renders

168. *Id.* at 1047–49 (emphasis added).

169. *Rogers v. Int’l Marine Terminals, Inc.*, 87 F.3d 755, 757, 759 (5th Cir. 1996).

170. *Id.* at 759 (quoting *Tyndall v. Nat’l Educ. Ctrs., Inc.*, 31 F.3d 209, 213 (4th Cir. 1994)).

171. *Myers v. Hose*, 50 F.3d 278, 283 (4th Cir. 1995).

172. *Id.*

employees unqualified, instead resting its holding entirely on indefinite leave being unreasonable.¹⁷³

As a brief tangent, while the DOL's regulations implementing the FMLA explicitly list "intermittent leave" as permissible,¹⁷⁴ neither the federal disability accommodation statutes nor the regulations that implement them provide any clarity on intermittent leave. As such, courts have split over the reasonableness of disability leaves that fail to provide employers sufficient certainty vis-à-vis when their employees can work (e.g., leaves that may be called intermittent, indefinite, irregular, reoccurring, sporadic, erratic, frequent, and/or unpredictable).¹⁷⁵ As an example, the Tenth Circuit has concluded that "the ADA does not require an employer to grant an employee indefinite leave as an accommodation" because indefinite leave is unreasonable.¹⁷⁶ On the other hand, representing the minority view, the First Circuit has concluded that indefinite leave can be reasonable in certain situations, so employers can deny such accommodations only if they impose an undue hardship on this particular set of facts.¹⁷⁷ Respectfully, these analyses jump the gun. Instead of first considering whether the employees requesting indefinite leave are qualified under the relevant statutory texts, these courts focus on the reasonableness and/or the undue hardship of such leave, both of which may be mooted by the unqualified inquiry.

Where some, like Judge Beam, rightly analyze whether employees requesting disability leave are qualified, other judges have muddied the waters with analyses that reach the right result for the wrong reason. For instance, Judge Frank Easterbrook, writing for a panel of the Seventh Circuit in considering leave as an accommodation for a night-shift engineer with depression that caused hallucinations, panic attacks, and suicidal ideation, held:

173. *Williams v. AT&T Mobility Servs. LLC*, 847 F.3d 384, 394–95 (6th Cir. 2017).

174. 29 C.F.R. § 825.202(a) (2021).

175. EEOC Performance and Conduct Standards, *supra* note 24, at n.76 (collecting agency interpretations and cases discussing whether indefinite leave requests are unreasonable and/or undue hardships).

176. *Hudson v. MCI Telecomms. Corp.*, 87 F.3d 1167, 1169 (10th Cir. 1996) (citing *Myers*, 50 F.3d at 283); *see also* Stacy A. Hickox & Joseph M. Guzman, *Leave as an Accommodation: When Is Enough, Enough?*, 62 CLEV. ST. L. REV. 437, 457–63 (2014).

177. *García-Ayala v. Lederle Parenterals, Inc.*, 212 F.3d 638, 648–50 (1st Cir. 2000); *see also* *Romanello v. Intesa Sanpaolo, S.p.A.*, 22 N.Y.3d 881, 885 (2013) (reaching a similar conclusion under New York City's municipal analog to the ADA).

The sort of accommodation contemplated by the [ADA] is one that will allow the person to “perform the essential functions of the employment position”. Not working is not a means to perform the job’s essential functions. An inability to do the job’s essential tasks means that one is not “qualified”; it does not mean that the employer must excuse the inability.¹⁷⁸

Here, Judge Easterbrook distorts the text of the ADA. He claims that the ADA permits only those accommodations that allow an employee to perform the job presently. In reality, the ADA permits accommodations only when an employee *can* do their job. The subtle distinction between these propositions is best elucidated, unsurprisingly, by a leave of absence. When one takes leave voluntarily, one can perform the job presently even if the employee is not doing so. “Can perform” and “will perform” mean different things.

Judge Easterbrook goes on to write that an “[i]nability to work for a multi-month period removes a person from the class protected by the ADA” because such person is not a “qualified individual.”¹⁷⁹ While it appears that the Seventh Circuit’s conclusion reached the correct result in that the employee here suffered from incapacitating depression and, hence, likely could not do the job at the start of his leave, the panel’s reasoning regrettably relies not on the employee being unqualified when his leave would have started, but instead on the length of that leave rendering him unqualified. The Seventh Circuit has repeated this faulty construction of the ADA in a few additional cases, most recently in one opinion, *Severson v. Heartland Woodcraft, Inc.*, which not only garnered significant press but was also considered on petition for *certiorari* by the Supreme Court; that petition was denied.¹⁸⁰ In that case,

178. *Byrne v. Avon Prods., Inc.*, 328 F.3d 379, 381 (7th Cir. 2003).

179. *Id.*

180. *Severson v. Heartland Woodcraft, Inc.*, 872 F.3d 476, 479 (7th Cir. 2017) (reasoning that an employee whose disability necessitates a “long-term medical leave cannot work and thus is not a ‘qualified individual’ under the ADA”), *cert. denied*, 138 S. Ct. 1441 (2018); *see also* *Basden v. Pro. Transp., Inc.*, 714 F.3d 1034, 1037 (7th Cir. 2013) (“A plaintiff whose disability prevents her from coming to work regularly cannot perform the essential functions of her job, and thus cannot be a qualified individual for ADA purposes.”). For sample press on *Severson*, *see* Case Comment, *Severson v. Heartland Woodcraft, Inc.: Seventh Circuit Rules That a Multimonth Leave of Absence Cannot Be a Reasonable Accommodation*, 131 HARV. L. REV. 2463 (2018); Tracie DeFreitas, *Long-Term Leave and the ADA After Severson*, JOB ACCOMMODATION NETWORK, <https://askjan.org/articles/Long-Term-Leave-and-the-ADA-after-Severson.cfm> (last visited Mar. 11, 2021); David J. Rowland &

which was also written by Judge Easterbrook, the court declared the ADA to be “an antidiscrimination statute, not a medical-leave entitlement.”¹⁸¹ Respectfully, this rather provocative language lacks any mooring in the text of the ADA or its legislative history, as I demonstrated in sections I.A–B, *supra*. Nothing about the statutory text or legislative history of the ADA says “leaves not required” in the same way that the most famous antidiscrimination statute in American history, Title VII, also carries with it a leave entitlement, as construed by the Supreme Court.¹⁸²

In a vein similar to that of Judge Easterbrook, then-Judge Neil Gorsuch, writing for the Tenth Circuit, wrote that “reasonable accommodations . . . are all about enabling employees to work, not to not work” before holding that lengthy leaves as accommodations (six months, in the case at bar) are both unreasonable and render the employee unqualified.¹⁸³ This opinion is of particular interest given that its author now sits on the Supreme Court, thus giving us a glimpse into how the Court might view disability leaves as accommodations. Unfortunately, then-Judge Gorsuch makes one of the same mistakes as Judge Easterbrook by hinging the ADA’s “qualified individual” inquiry on the length of the leave and not on whether the employee can work at the start of that leave.

Similarly, Judge George A. O’Toole, Jr., a district court judge sitting by designation on a First Circuit panel, writing in a dissent in another case, claimed that leave as an accommodation, *ipso facto*, harbors an “oxymoronic anomaly”—viz., granting an accommodation not to work to an employee who must be able to work.¹⁸⁴ “It cannot be overlooked,” Judge O’Toole argued, “that the statute speaks in the present tense, indicative mood. A ‘qualified individual with a disability’ entitled to the statute’s protection is a person who ‘can perform the essential functions of the employment position’ with reasonable accommodation. ‘Can perform,’ as in ‘now.’”¹⁸⁵ Yet, Judge O’Toole confuses the analysis by stating that

Cheryl A. Luce, *A Shocker from the Heartland: A Long Term Leave of Absence Is NOT a Reasonable Accommodation Under the ADA*, EMP. L. LOOKOUT (Sept. 25, 2017), <https://www.laborandemploymentlawcounsel.com/2017/09/a-shocker-from-the-heartland-a-long-term-leave-of-absence-is-not-a-reasonable-accommodation-under-the-ada/>.

181. *Severson*, 872 F.3d at 479.

182. See *infra* note 203 and accompanying text.

183. *Hwang v. Kan. State Univ.*, 753 F.3d 1159, 1162 (10th Cir. 2014) (citations omitted).

184. *García-Ayala v. Lederle Parenterals, Inc.*, 212 F.3d 638, 651–52 (1st Cir. 2000) (O’Toole, J., dissenting).

185. *Id.* at 655 (citing 42 U.S.C. § 12111(8)) (emphasis omitted).

employers must accommodate employees with disability leave only if the length of that leave is “tolerably consistent with the statutory words, ‘can perform,’” from which one can only imply that brief leaves can be accommodations whereas longer leaves cannot.¹⁸⁶ Judge O’Toole also missteps by describing accommodating disability leave as an “oxymoron” because he clearly believes that the statute, if read literally in a manner that he describes as “cramped and unrealistic,” entirely excludes disability leaves as accommodations.¹⁸⁷ Not so. Employees who take voluntary disability leave are “qualified” for leave as an accommodation because they can opt not to.

Finally, emblematic of a court reaching the wrong conclusion by including employees as qualified when they are requesting involuntary leaves is a Ninth Circuit opinion written by Judge David R. Thompson. That case dealt with a sales associate who physically could not work at the start of her leave or during its pendency due to “a fainting disorder that caused episodes during which she lost consciousness,” but the court deemed her not to be an “unqualified individual” on that basis, reasoning that “her inability to work during the leave period would not automatically render her unqualified.”¹⁸⁸ Although the panel is technically correct that inability to work during a leave does not render one unqualified, as was the case for employee *B* who became unable to work during her leave, the sales associate here was also unable to perform the essential functions of her job when leave began. That is the end of the matter. On that basis alone, she should have been deemed unqualified for leave as an accommodation, but the court reasoned otherwise. In effect, the Ninth Circuit here was focused only on the ability of the employee to work again, not the ability to work now.

Likely in an attempt to circumvent the ADA’s purported “oxymoronic anomaly,” courts have invented new standards that are highly practical but divorced from the statutory text: an employee requesting leave is “qualified” if the employee can perform the essential functions of the job presently or will be able to perform those functions “upon [the employee’s] return”¹⁸⁹ or in

186. *Id.*

187. *Id.*

188. *Nunes v. Wal-Mart Stores, Inc.*, 164 F.3d 1243, 1245, 1247 (9th Cir. 1999).

189. *Humphrey v. Mem’l Hosps. Ass’n*, 239 F.3d 1128, 1135 (9th Cir. 2001); *accord Nunes*, 164 F.3d at 1247.

the “near”¹⁹⁰ or “immediate”¹⁹¹ future. Had Congress meant to include employees who cannot work now but will be able to do the job at some point in the future—or, I should say, probably will, or may, be able to do the job, since neither employers nor their employees have crystal balls that predict whether the employee will be able to work at some undefined future time—in the definition of “qualified individual” in the disability accommodation statutes, it would have done so. It did not. Title I of the ADA, sections 501 and 503 of the Rehab Act, and VEVRAA leave no room for any alternative interpretation; employees who cannot work now are not qualified for leave or any other accommodations under the text of those statutes.

Scholars and practitioners tend to conclude that leave can be an accommodation at least some of the time without expounding upon when, if ever, an employee’s inability to work would render that employee unqualified,¹⁹² although some have called out, as Judge O’Toole did, the supposed “counterintuitive” nature of providing leave as an accommodation to a putatively unqualified employee.¹⁹³ Some scholars maintain that leave must be an

190. *Conoshenti v. Pub. Serv. Elec. & Gas Co.*, 364 F.3d 135, 151 (3d Cir. 2004), *modified on other grounds by* *Erdman v. Nationwide Ins. Co.*, 582 F.3d 500 (3d Cir. 2009); *Hudson v. MCI Telecomms. Corp.*, 87 F.3d 1167, 1169 (10th Cir. 1996).

191. *Wood v. Green*, 323 F.3d 1309, 1314 (11th Cir. 2003); *Myers v. Hose*, 50 F.3d 278, 283 (4th Cir. 1995).

192. See Lawrence P. Postol, *ADA Open Issues: Transfers to Vacant Positions, Leaves of Absence, Telecommuting, and Other Accommodation Issues*, 8 ELON L. REV. 61, 75 (2016) (“[S]hort, unpaid leaves of absence are a required reasonable accommodation under the ADA.”); Ann C. Hodges, *Working with Cancer: How the Law Can Help Survivors Maintain Employment*, 90 WASH. L. REV. 1039, 1078–85 (2015); Nicole Buonocore Porter, *The New ADA Backlash*, 82 TENN. L. REV. 1, 73 (2014) (“Generally, leaves of absence are a reasonable form of accommodation . . .”); Megan G. Rosenberger, *Absenteeism and the ADA: The Limits and the Loopholes*, 50 CATH. U. L. REV. 957, 964 (2001) (“[I]ndividuals with chronic illnesses that require sporadic or extended periods of time off may be covered by the ADA.”); Laura F. Rothstein, *The Employer’s Duty to Accommodate Performance and Conduct Deficiencies of Individuals with Mental Impairments Under Disability Discrimination Laws*, 47 SYRACUSE L. REV. 931, 960 (1997) (“[L]eave time for rehabilitation is an accommodation that should be considered as a possible reasonable accommodation . . .”); *but see* Passamano, *supra* note 77, at 894 (“[L]eave is effectively not available as a reasonable accommodation under the ADA” because “the employer is under no obligation to accommodate” an employee with leave because “regular and predictable attendance is[,] as a matter of law[,] an essential function of practically all employment”).

193. See, e.g., *EEOC Issues New Guidance on Leave and the ADA*, PAYROLL MANAGER’S LETTER, July 2016, at 6 (2016) (“To be protected by the ADA, an employee must show that he or she is able to perform the essential functions of the job with or without reasonable accommodation. And it would seem that an essential function of any job is the ability to show

accommodation, at least in part, because they contend that a “literal reading” of the ADA would be “unreasonably narrow and impractical” as such a reading, ostensibly, would require an accommodation to be “effective immediately in terms of enabling an employee to perform the essential functions of the job.”¹⁹⁴ With respect, this analysis tracks Judge O’Toole’s misconstruction of the statutory text and is mistaken for the reasons outlined above.

As a concluding note, the title of this Article is imbued with irony. Idiomatically, “now and again” means “occasionally” or “every once in a while,”¹⁹⁵ whereas the literal meaning of “now and again” is “presently and at some time in the future.” This dichotomy bares a strikingly similarity to the attitude with which most stakeholders view the statutory requirement that an employee be able to perform the essential functions of the job to qualify for an accommodation on one hand and my reconceived analytic on the other. To put it another way, the conventional approach to disability leave as an accommodation is to the idiomatic meaning of “now and again” as this Article’s thesis is to its literal meaning. While the conventional approach dictates disability leave as an accommodation so long as, *inter alia*, the employee can work occasionally, every once in a while, in the immediate or near future, or some other likeminded, practical standard (i.e., the idiomatic “now and again”), this Article argues that an employee qualifies for disability leave as an accommodation only if, *inter alia*, the employee can work, quite literally, now and again.

II. MAKING IT ALL WORK

Part II argues that federal disability accommodation law excludes employees needing involuntary leaves as unqualified for such accommodations. This Part assumes arguendo the correctness of that thesis. If we assume the correctness of my argument, can we implement it in such a way that practically makes sense within the overall corpus of federal law? To that end, I first consider why federal law always requires leave as an accommodation for

up for work. Nonetheless, while it may seem counterintuitive, the [EEOC] and many courts take the position that time off from the job may be a required reasonable accommodation.”).

194. Stephen F. Befort, *The Most Difficult ADA Reasonable Accommodation Issues: Reassignment and Leave of Absence*, 37 WAKE FOREST L. REV. 439, 459 (2002) (citing García-Ayala v. Lederle Parenterals, Inc., 212 F.3d 638, 655 (1st Cir. 2000) (O’Toole, J., dissenting)).

195. *Every now and then*, CHRISTINE AMMER, THE AMERICAN HERITAGE DICTIONARY OF IDIOMS: AMERICAN ENGLISH IDIOMATIC EXPRESSIONS & PHRASES (2d rev. ed. 2013).

religious practices and beliefs, so long as leave is reasonable and imposes no undue hardship, whereas I contend that federal law only sometimes requires such disability leaves as an accommodation (i.e., when the employee can work now). Second, I consider provisions of the disability accommodation laws stating that part-time and modified work schedules are permissible accommodations, asking how those provisions can be read in concert with the imperative that employees be able to work now to qualify for leave as an accommodation. In both cases, the theme of this Part is to discern whether we can harmonize federal law given Part II's reconceptualization of the preconditions for disability leave as an accommodation. I argue that we can.

A. Leave for Religious Practices and Beliefs

This section considers the only other federal employee accommodation statute (i.e., Title VII)¹⁹⁶ to glean why it appears, at least on the surface, dissimilar to Title I of the ADA vis-à-vis leave entitlements. *Inter alia*, section 703 of Title VII bars covered entities like employers with fifteen or more employees, employment agencies, and labor organizations from discriminating against employees based on "religion,"¹⁹⁷ which "includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he [sic] is unable to reasonably accommodate to an employee's . . . religious observance or practice without undue hardship on the conduct of the employer's business."¹⁹⁸ Though the EEOC lacks congressional authority to promulgate regulations implementing Title VII that carry the force of law,¹⁹⁹ it has issued interpretive guidance concerning

196. Federal law imposes no other affirmative accommodation obligations on employers unless they discriminate on impermissible grounds in accommodating some employees and not others. For example, there is no affirmative obligation to accommodate employees' pregnancies. *Young v. UPS, Inc.*, 135 S. Ct. 1338, 1344 (2015); Bradley A. Areheart, *Accommodating Pregnancy*, 67 ALA. L. REV. 1125, 1133–39 (2016). This Article does not consider antidiscrimination law.

197. 42 U.S.C. § 2000e-2.

198. *Id.* § 2000e(j).

199. *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 257–59 (1991), *superseded by statute on other grounds as stated in* *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 512 n.8 (2006); *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 141 (1976) ("Congress, in enacting Title VII, did not confer upon the EEOC authority to promulgate rules or regulations pursuant to that Title."), *superseded by statute on other grounds*, Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, § 995, 92 Stat. 2076 (1978).

religious accommodations that appears in the Code of Federal Regulations.²⁰⁰ While these guidelines mention accommodations because of “religious practices [that] conflict with [employees’] work schedules,”²⁰¹ leave is not explicitly mentioned as a permissible accommodation under Title VII. Rather, the first explicit mention of leave as an accommodation appears in the EEOC’s subregulatory guidance.²⁰² Relying on the text of Title VII and not any iterations of the EEOC’s guidance, in *Ansonia Board of Education v. Philbrook*, the Supreme Court held that reasonable leaves are accommodations under Title VII so long as they impose no undue hardship.²⁰³

Much like section 503 of the Rehab Act and VEVRAA, Executive Order 11,246 requires federal contracts and subcontracts to contain a provision wherein the private contracting entity agrees “not [to] discriminate against any employee . . . because of . . . religion. . . .”²⁰⁴ The OFCCP, which is the sole agency to administer Executive Order 11, 246,²⁰⁵ has promulgated regulations implementing that order requiring employers to “accommodate to the religious observances and practices of an employee . . . unless the employer demonstrates that it is unable to reasonably accommodate to an

200. 29 C.F.R. § 1605.2 (2021); *see also* EEOC v. Ithaca Indus., Inc., 829 F.2d 519, 522 (4th Cir. 1987), *rev’d on other grounds on reh’g en banc*, 849 F.2d 116 (4th Cir. 1988); EEOC v. E.I. DuPont de Nemours & Co., 623 F. Supp. 15, 17 (E.D.N.C. 1985) (“Unlike regulations issued by federal agencies, EEOC interpretative guidelines do not have the force of law because they are promulgated pursuant to statutory authority or according to the rulemaking process dictated by the EEOC Administrative Procedure Act. Though they are often entitled to a strong degree of deference, the interpretative guidelines are not dispositive of Title VII issues and not binding upon courts, as are federal regulations.”) (citations omitted).

201. 29 C.F.R. § 1605.2(d)(1).

202. EQUAL EMP. OPPORTUNITY COMM’N, EEOC-NVTA-0000-20, WHAT YOU SHOULD KNOW: WORKPLACE RELIGIOUS ACCOMMODATION (2014) (“Examples of common religious accommodations include . . . an adherent to Native American spiritual beliefs needs unpaid leave to attend a ritual ceremony”); *Religious Discrimination*, EQUAL EMP. OPPORTUNITY COMM’N, <https://www.eeoc.gov/laws/types/religion.cfm> (last visited Mar. 15, 2021) (“Unless it would be an undue hardship on the employer’s operation of its business, an employer must reasonably accommodate an employee’s religious beliefs or practices. This applies . . . to . . . leave for religious observances”).

203. *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 70 (1986) (“[The employer’s policy], requiring [the plaintiff-employee] to take unpaid leave for holy day observance that exceeded the amount allowed by the collective-bargaining agreement, would generally be a reasonable one.”); *id.* at 74 (Marshall, J., concurring in part and dissenting in part) (“[U]npaid leave will generally amount to a reasonable accommodation”) (emphasis omitted).

204. Exec. Order No. 11,246, § 202(1), 3 C.F.R. § 339 (1964–1965), *reprinted as amended in* 42 U.S.C. § 2000e.

205. OFCCP, *Jurisdiction Thresholds*, *supra* note 39.

employee's . . . religious observance or practice without undue hardship on the conduct of the employer's business."²⁰⁶ However, no court or administrative law judge has considered Executive Order 11,246 in the context of leave as an accommodation, most likely because, *inter alia*, "virtually every federal court to consider the issue has held that Executive Order 11[,]246 does not provide a private right of action."²⁰⁷ Regardless, there is no material distinction between Executive Order 11,246 and Title VII vis-à-vis leave as an accommodation, so any judge to consider the issue would certainly hold as the Court did in *Philbrook* by finding that leave is an accommodation for religious practices and beliefs when reasonable and imposing no undue burden on the employer.

Note the difference between Title VII and Executive Order 11,246 on one hand and the federal disability accommodation statutes on the other. Title VII and Executive Order 11,246 do not limit accommodations to "qualified" employees in the way that Title I of the ADA, sections 501 and 503 of the Rehab Act, and VEVRAA do. Accordingly, there are no phrases like "*can perform*," "*has the ability to perform*," or "*having the ability to perform*" that exclude employees who cannot presently work from leave as an accommodation. In that way, I contend that these laws are, textually and theoretically, distinct. Yet, I simply cannot imagine or locate a case of an involuntary religious leave that would concretize that distinction in practice. By involuntary religious leave, I mean leave to accommodate to an employee's religious observance or practice wherein the leave must be taken without any warning and, at the start of which, the employee is physically, emotionally, or mentally incapable of doing the job. The closest that I can come is an employee who suddenly sees the light, like Saul knocked to the ground en route to Damascus;²⁰⁸ needs immediate leave in compliance with a religious tenet; and whose abrupt religious zeal is so overpowering that, even if the employer demanded that the employee work, the employee could not, as if inhibited by a metaphysical wall, as if the prospect of blasphemy were so overpowering that it rendered the employee, quite literally, incapable of doing what they could otherwise do.

206. 41 C.F.R. § 60-50.3 (2021); *see also* U.S. OFF. OF FED. CONT. COMPLIANCE PROGRAMS, *supra* note 40, at 114.

207. *Riggs v. Boeing Co.*, No. 98-2091, 1999 WL 233285, at *1 (D. Kan. Mar. 4, 1999) (collecting cases).

208. *Acts* 9:1-9 (New American Bible).

Even if this far-out hypothetical were viable, can a religious devotion render someone incapable of working in the same way that some disabilities do? I doubt it. At most, employees may become unable to work during leave for religious practices (e.g., employees whose religion requires them to consume alcohol),²⁰⁹ but Title VII would still afford leave as an accommodation to such employees in the same way that I argue the ADA and similar laws would afford leave as an accommodation to employee *B*. In both cases, the employees can work at the start of their leave (i.e., when they haven't started drinking; when *B* hasn't undergone anesthesia for surgery yet), but they lose that ability during the leave. Hence, I contend that Title VII and Executive Order 11,246 actually cohere nicely with federal disability accommodation law, as I have reconceived of it, as none of these laws require an employer to accommodate an employee with involuntary leave when that employee, at present, cannot perform the essential functions of the job. The only difference is that laws like the ADA explicitly provide as much (i.e., via the "qualified individual" provision) whereas the nature of laws like Title VII inherently excludes involuntary leaves like accommodations for religious beliefs and practices. That said, even if I am wrong and there are cases of religious leave where the employee unexpectedly and literally cannot work on account of a religious belief or practice, but Title VII nonetheless requires that the employer accommodate such a leave for lack of any "qualified individual" provision, such divergence from federal disability accommodation laws could be rationally justified on the basis of a value judgment (i.e., federal law should offer more leeway to employees' religious beliefs and practices than it does to their disabilities). In other words, federal law remains coherent.

B. Part-Time and Modified Work Schedules

Title I of the ADA explicitly states that accommodations "*may* include . . . part-time or modified work schedules."²¹⁰ The EEOC interprets section 501 of the Rehab Act as requiring the same kind of accommodation,²¹¹ and the OFCCP's regulations implementing section 503 of the Rehab Act and VEVRAA likewise list "part-time

209. Yanki Tauber, *The Purim Drunk*, CHABAD.ORG, https://www.chabad.org/holidays/purim/article_cdo/aid/2814/jewish/The-Purim-Drunk.htm (last visited Mar. 15, 2021).

210. 42 U.S.C. § 12111(9)(B) (emphasis added).

211. EEOC Accommodation Enforcement Guidance, *supra* note 24, at 2 n.1.

or modified work schedules” as permissive accommodations.²¹² However, an employee may be unable to perform the essential functions of the job when either of these accommodations begins, seemingly contradicting the imperative that the employee be a “qualified individual.” To the extent possible, provisions of statutes should be interpreted “as a harmonious whole rather than at war with one another.”²¹³ Hence, we should find a way of reading these provisions in harmony if we can.

For the sake of context, it is helpful to briefly define these statutory terms of art as they are not defined by the statutes or any of their regulations. “Part-time” means “[e]mployed . . . for part of the time or for less than the customary time,”²¹⁴ and “modified” means “[l]imited, altered, [or] qualified.”²¹⁵ Notice that “part-time” work implies less work than the status quo (i.e., full-time), whereas a “modified” work schedule could imply more or less work than the status quo so long as the amount differs from that status quo. Also note that all part-time work is necessarily modified work whereas the reverse is not true. Moreover, I note that these statutory provisions are materially similar to those requiring leave in certain circumstances, meaning they imply only that part-time and modified schedules *may* be accommodations without clarifying when.

That being said, to explore these provisions, consider another set of five hypothetical employees: (1) Franco (F), who works as a prison guard and suffers from a seizure disorder like Carlos, *supra* section I.A.2, but his disorder causes so many seizures that he asks to work a part-time or modified work schedule of 35 hours a week, recognizing that approximately 5 hours each week, the timing of which will be erratic, will be consumed by incapacitating seizures; (2) Gina (G), who works as a car saleswoman who has muscular dystrophy, requests a part-time work schedule of 10 hours per week (worked all on one day or over multiple days; it does not

212. 41 C.F.R. §§ 60-300.2(v)(2)(ii), 60-741.2(u)(2)(ii) (2021).

213. *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1619 (2018).

214. *Part-time*, 11 OXFORD ENGLISH DICTIONARY, *supra* note 65; *accord Part-time*, WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY, *supra* note 94.

215. *Modified*, 9 OXFORD ENGLISH DICTIONARY, *supra* note 65; *accord. Modify*, WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY (2002). Synonyms for modify include *change*, *alter*, *adjust*, *adapt*, *amend*, *revise*, *refine*, and *tweak*. *Modify*, OXFORD DICTIONARY OF SYNONYMS AND ANTONYMS (3d ed. 2014).

matter) instead of 40 hours per week;²¹⁶ (3) Hiroshi (*H*), a computer programmer with chronic obstructive pulmonary disease (COPD), who requests a modified work schedule to begin in the next few weeks that would let him start working 3 hours earlier than his coworkers but still work his scheduled 8 hours per day;²¹⁷ (4) Inez (*I*) a computer programmer who works with Hiroshi, who suffers from Parkinson's Disease and requests a modified work schedule to begin in the next few weeks so she starts work 3 hours later than her coworkers but still work her scheduled 8 hours per day;²¹⁸ and (5) Julián (*J*), who works as a paralegal, has leukemia, and asks to modify his work schedule so he can take a full day off for chemotherapy treatment and work four ten-hour days instead of five eight-hour days during one particular week.²¹⁹

I classify these employees as follows. At the time his part-time or modified work would begin, *F* is unable to perform the essential functions of his job, just as *C* was unable to perform the essential functions of his job when his seizures started. Therefore, for the same reasons that *C* is unqualified, *F* is unqualified. In contrast, at the time that *G*'s part-time and modified work schedule would begin, she would be able to perform the essential functions of her job some of the time, but she cannot perform the job full-time. Note that I did not clarify whether *G* needs her accommodation to start now or could permit it to begin at some time in the near future. I declined to add this element because it does not matter; if working 10 hours per week as a car saleswoman is reasonable and such a schedule imposes no undue hardship on this employer (e.g., the employer could hire a new part-time salesperson to pick up the slack), the point is that *G* can work those 10 hours right now, whereas *F* cannot. Accordingly, the law requires that employers accommodate *G* and not *F*, subject, as usual, to the reasonableness and undue hardship inquiries.

Employees *H*, *I*, and *J* all need modified work schedules. So long as it is reasonable for a computer programmer to work an earlier

216. These facts materially track some of the facts in *Pals v. Schepel Buick & GMC Truck, Inc.*, 220 F.3d 495 (7th Cir. 2000).

217. These facts materially track Example C in the *Modified or Part-Time Schedule* section of the EEOC's enforcement guidance. EEOC Accommodation Enforcement Guidance, *supra* note 24, at 17–18 ¶ 22.

218. These facts materially track Example B in the same guidance. *Id.*

219. As explained *infra*, this example differs only in degree to employee *D*. See *supra* note 60 and accompanying text.

or later shift and this modified work schedule would impose no undue hardship on this employer, then both *H* and *I* can perform the essential functions of their jobs earlier or later than their coworkers, and employers must accommodate them as such. Put another way, when their accommodations would begin, they are able to perform the essential functions of their jobs, so they are qualified individuals under the law. Similarly, *J*'s proposed modified work schedule looks materially similar to *D*'s proposed leave to attend a doctor's appointment. The only difference other than degree (i.e., *J* needs a full day off; *D* needs only a few hours off) is that *J* intends to make up lost time. Fine. As long as it is reasonable for a paralegal to work ten-hour days four times per week and that modified work schedule would impose no undue hardship on this employer, *J*'s modified work schedule must be accommodated.

In conclusion, statutory provisions sometimes requiring leave as an accommodation are not materially distinct from statutory provisions sometimes requiring part-time or modified work schedules as an accommodation. In both cases, what matters, in addition to the reasonableness and undue hardship inquiries, is whether the employee can perform the essential functions of the job at the time the part-time or modified work schedule begins. In my conception, that coherent narrative persists throughout the federal disability accommodation laws.

III. A CONCLUDING CALL TO ACTION

With the elevation of Justices Gorsuch, Kavanaugh, and Barrett to the bench, the Supreme Court certainly has a textualist majority.²²⁰

220. See Evan Bernick, *Judge Amy Coney Barrett on Statutory Interpretation: Textualism, Precedent, Judicial Restraint, and the Future of Chevron*, YALE J. REG. NOTICE & COMMENT BLOG (July 3, 2018), <https://www.yalejreg.com/nc/judge-amy-coney-barrett-on-statutory-interpretation-textualism-precedent-judicial-restraint-and-the-future-of-chevron-by-evan-bernick/>; Emily Bazelon & Eric Posner, *Who Is Brett Kavanaugh?*, N.Y. TIMES (Sept. 3, 2018), <https://www.nytimes.com/2018/09/03/opinion/who-is-brett-kavanaugh.html>; Jonathan H. Adler, *Justice Gorsuch's First Opinions Reveal a Confident Textualist*, WASH. POST (June 23, 2017), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/06/23/justice-gorsuchs-first-opinions-reveal-a-confident-textualist/>; Scott A. Moss, *Judges' Varied Views on Textualism: The Roberts-Alito Schism and the Similar District Judge Divergence That Undercuts the Widely Assumed Textualism-Ideology Correlation*, 88 U. COLO. L. REV. 1 (2017) (generally detailing the varying textualisms of Chief Justice Roberts and Justices Alito and Thomas); Anita Krishnakumar, *Textualism and Statutory Precedents*, 104 VA. L. REV. 157, 161 (2018) (describing Chief Justice Roberts and Justices Alito and Thomas as "self-avowed textualist[s]").

And, while the lower federal courts are largely aligned on concluding that employers must provide reasonable leaves as accommodations under the federal disability accommodation statutes so long as they impose no undue burden, such a conclusion is not *fait accompli* at the High Court. Indeed, the conventional analytic through which onlookers assess the federal disability accommodation statutes stands poised for textualist attack given my thesis. And it is right to attack atextual interpretations. But it is also right to redirect our course toward a more just balance of employee-employer rights before that can happen.

Congress and the President must take action to amend Title I of the ADA to redefine a "qualified individual" as one who "can or may be able to perform" the essential functions of the position, thereby permitting leave as an accommodation for employees with a disability even if those employees cannot, at present, do the job. In so doing, the internal, cross-referential nature of the Rehab Act will automatically kick in, giving employees who work for federal contractors and subcontractors the right to take leave as an accommodation under section 503 of the Rehab Act, too. As such, employees would no longer be required to demonstrate a present-tense ability to work, although the bounds of reasonableness imposed by the statutes would still require the reasonable possibility of their return to work eventually. Hence, while I contend that the present state of the law requires an employee's ability to work "now and again," the ideal future state of the law would require an ability to work "not now, but again." By redefining Title I of the ADA in this quantitatively minor but qualitatively major way, Congress can make a dramatic, positive change for employees with a disability before it's too late, thus ensuring a just balance between the rights of workers and their employers.

