TWO FOR THE PRICE OF ONE?: FMLA LEAVE REQUESTS AS REQUESTS FOR ADA ACCOMMODATIONS

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I. INTRODUCTION

Louis Cordova was diagnosed with post-traumatic stress disorder, obsessive-compulsive disorder, and depression.[1] His employer, a New Mexico hospital, was fully aware of his medical condition, as it granted several of his previous Family and Medical Leave Act (FMLA) leave requests.[2] Cordova experienced severe symptoms from several of his ailments, and rather than approving his request to leave work for that day, Cordova's supervisor required him to stay at work.[3] Cordova eventually left work and was seen and treated at an urgent care clinic because his symptoms were so severe.[4] Cordova's doctor recommended he not return to work for several days, and during that time off Cordova received a letter from the hospital indicating his employment was terminated because of his ostensible voluntary resignation on the day his supervisor refused to let him leave work.[5] At trial, the district court denied the employer's motion to dismiss Cordova's FMLA retaliation claim because his allegations were adequate enough to support a violation of his clearly established FMLA rights.[6]

A search on any of the legal databases immediately returns hundreds of recent federal court decisions regarding the FMLA or Americans with Disabilities Act (ADA). According to a 2012 survey report issued by the United States Department of Labor, almost two-thirds of the surveyed employees were aware of the FMLA and sixteen percent of the surveyed employees had requested FMLA leave.[7] Not surprisingly, FMLA leave

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[1] Cordova v. New Mexico, 283 F. Supp. 3d 1028, 1033 (D.N.M. 2017).

[2] *Id.* at 1033–34.

[3] *Id.* at 1034. Cordova was also confronted by his supervisor about the decreased productivity that naturally occurred due to his symptoms. *Id.*

[4] *Id.*

[5] *Id.* at 1035.

[6] *Id.* at 1042.

[7] U.S. DEP'T OF LABOR, FAMILY AND MEDICAL LEAVE IN 2012: TECHNICAL REPORT

requests—like Cordova's—and ADA claims are on the rise as employees learn more about the legal actions they can take when they fall ill or get hurt.[8] Despite this increased knowledge about the two statutes, employees often have to resort to the courts to exercise their rights, as in Cordova's situation. Thus, the FMLA and ADA are extremely important for employers and employees alike, especially as the line between the two slowly starts to blur.

In a recent Third Circuit case, *Capps v. Mondelez Global, LLC*, the court briefly considered whether a request for FMLA leave could qualify as a request for a reasonable accommodation under the ADA.[9] Ultimately, the court answered yes, "under certain circumstances," but did not elaborate any further because the argument had not been properly preserved for appeal in the district court.[10] While not the dispositive issue in the case, the Third Circuit stated that the district court erred in holding that FMLA leave requests can never qualify as requests for reasonable accommodations under the ADA.[11] This could be groundbreaking if it causes every FMLA leave request to also be an ADA accommodation request, effectively doubling the work that employers must do. Labor and employment practitioners already recognize a blurred line between the FMLA and the ADA,[12] and *Capps* only serves to make the distinction less clear.

Generally speaking, to qualify for FMLA leave, the employee must, among other things, give the employer at least thirty days' written or verbal notice (or as soon as practicable if thirty days is not possible).[13] The employee must also provide some sort of explanation of the need for leave.[14] The FMLA accords rights to leave including, but not limited to: the birth of a newborn or adopted child or a serious health condition rendering the employee unable to perform essential job functions.[15] If the leave request is

(2012), https://www.dol.gov/asp/evaluation/fmla/FMLA-2012-Technical-Report.pdf.

[8] Obermayer Rebmann Maxwell & Hippel LLP, *Tips to Help Stem the Rising Tide of FMLA Claims*, OBERMAYER: HR LEGALIST (Jan. 5, 2015), http://www.hrlegalist.com/2015/01/tips-to-help-stem-the-rising-tide-of-fmla-claims/; *see also Americans with Disabilities Act Lawsuits Up 28 Percent in FY 2016*, TRAC REPORTS (Oct. 27, 2016), http://trac.syr.edu/tracreports/civil/444/.

[9] 847 F.3d 144, 156–57 (3d Cir. 2017).

[10] *Id.*

[11] *Id.*

[12] *See* Mindy Chapman, *Employee Leave: When Does FMLA Stop, and ADA Begin?*, BUS. MGMT. DAILY (Feb. 16, 2012), https://www.businessmanagementdaily.com/30168/employee-leave-when-does-fmla-stop-and-ada-begin.

[13] *Frequently Asked Questions and Answers About the Revisions to the Family and Medical Leave Act*, U.S. DEP'T OF LAB., https://www.dol.gov/whd/fmla/finalrule/NonMilitaryFAQs.htm (last visited Nov. 1, 2017).

[14] *Id.*

[15] *Fact Sheet #28F: Qualifying Reasons for Leave Under the Family and Medical Leave Act*, U.S. DEP'T OF LAB., https://www.dol.gov/whd/regs/compliance/whdfs28f.htm (last visited Nov. 21, 2017).

granted, the employee may take up to twelve weeks of FMLA leave during any twelve-month period.[16] Further, upon returning to work after the FMLA leave is complete, the FMLA requires the employer to return the employee to the same job that the employee left, or one that is nearly identical.[17]

Title I of the ADA prohibits private employers and state governments from discriminating against qualified employees with disabilities.[18] Employers are required to offer reasonable accommodations to such employees, including the following: modifying work schedules, offering additional training, and job reassignment.[19] To notify an employer that a request for an ADA reasonable accommodation has been made, the employee must, *inter alia*, link the need for the employee's accommodation to a medical condition that qualifies as a disability.[20]

This Comment will provide an overview of the FMLA and the ADA and the statutory notice requirements of each. Part II will provide a brief overview of the FMLA. Part III will include case analysis to help determine what courts consider sufficient notice when an employee requests accommodation under the ADA. Part IV will apply the notice requirements to a hypothetical to explain the "certain circumstances"[21] that must exist for notice of FMLA leave to serve as notice of a request for a reasonable accommodation under the ADA. Part V will give a recommendation describing how Congress should amend the two acts to adopt the Third Circuit's approach, as well as discuss the potential benefits to employees and burdens to employers.

II. AN OVERVIEW OF THE FMLA AS IT RELATES TO LEAVE REQUESTS

The FMLA allows eligible employees working for covered employers to take paid or unpaid leave for up to a total of twelve weeks in any twelve-month period, without fear of losing their jobs.[22] The leave can be taken for reasons such as parental leave, caring for a family member (child, spouse, or parent) with a serious health condition, or because the employee is unable to perform necessary job functions due to a serious health condition.[23] An

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16 U.S. DEP'T OF LABOR, THE EMPLOYEE'S GUIDE TO THE FAMILY AND MEDICAL LEAVE ACT 6 (2015), https://www.dol.gov/whd/fmla/employeeguide.pdf.

17 *Id.* at 14.

18 42 U.S.C. § 12112(a) (2012); *Facts About the Americans with Disabilities Act*, EEOC (Sept. 9, 2008), https://www.eeoc.gov/facts/fs-ada.html.

19 *Facts About the Americans with Disabilities Act*, *supra* note 18.

20 *Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act*, EEOC, https://www.eeoc.gov/policy/docs/accommodation.html (last visited Feb. 2, 2018) [hereinafter *EEOC Enforcement Guidance*].

21 *See* Capps v. Mondelez Global, LLC, 847 F.3d 144, 156–57 (3d Cir. 2017).

22 29 C.F.R. § 825.100(a) (2017).

23 *Id.* Employees may also split up their FMLA leave, which is known as intermittent

eligible employer is one that has fifty or more employees.[24] A covered employee must have worked at least 1,250 hours within the last twelve-month period before requesting FMLA leave.[25] The regulations define a serious health condition as one that requires an overnight stay in a hospital (or similar facility) or requires continuing treatment by a healthcare provider.[26] Eligible employees can maintain their health benefits while on leave.[27] At the conclusion of the leave period, they also have the right to return to the same position (or equivalent position) with equal benefits, pay, and working conditions.[28] When the leave is foreseeable, the employee must give thirty days' advance notice and should specify, orally or in writing, what the FMLA-qualifying leave is and the expected timing and duration of the leave.[29] When the need for leave is not foreseeable, or when it is, but thirty days' advance notice cannot be given, employees may provide less advance notice as long as it is given as soon as practicable[30] based on the individual facts and circumstances.[31] In any scenario, if the employee fails to give appropriate notice for FMLA qualified leave, the employer may delay FMLA coverage by the difference between when notice would have been practicable and when the employee actually gave notice.[32]

III. A BRIEF OVERVIEW OF TITLE I OF THE ADA AND WHAT IT MEANS FOR A DISABILITY TO BE "KNOWN"

Prior to the ADA's enactment, disabled people had little protection under federal law and often faced extreme forms of discrimination.[33] The

FMLA leave. *Id.*

[24] 29 U.S.C. § 2611(2), (2)(B)(ii), (4) (2012).

[25] *Id.* § 2611(2)(A).

[26] 29 C.F.R. §§ 825.114–15. The regulations help clarify what "serious health condition" means, but the phrase remains vague. *See id.*

[27] *Id.*

[28] *Id.*

[29] *Id.* § 825.302(a)–(c). Examples of foreseeable leave include planned treatment for a serious health condition or expected child birth. *Id.* Further, the employer may ask for additional documentation after the employee gives notice in order to determine if the leave is FMLA-qualified. *Id.*

[30] *Id.* § 825.302(b).

[31] *Id.* "Calling in sick without providing more information will not be considered sufficient notice to trigger an employer's obligations under the [FMLA]." *Id.* § 825.303(a)–(b) (internal quotation marks omitted).

[32] 29 C.F.R § 825.304(a)–(d).

[33] For example, restaurants could refuse service to people with disabilities and people using wheelchairs had no way of bringing the wheelchair onto a bus or train. Samantha Lombard, *8 Ways in Which the Americans with Disabilities Act Changed Everyone's Lives*, SMITHSONIAN (July 13, 2015), http://americanhistory.si.edu/blog/8-ways-which-americans-disabilities-act-changed-everyones-lives.

discrimination was widespread, systemic, and inhumane.[34] Many public buildings were effectively inaccessible for disabled people and treatment facilities were in sub-human condition.[35] Further, disabled people were often denied driver's licenses, as well as the right to marry.[36] Change was sorely needed, and this was recognized at the federal level when the National Council on Disability (NCD) was established in 1984.[37] Eventually, NCD appointees proposed the ADA and it received extraordinary bipartisan support in Congress.[38] As former President George H. W. Bush signed the ADA into law, he announced, "every man, woman and child with a disability can now pass through once-closed doors into a bright new era of equality, freedom and independence."[39]

A. *Substantive Requirements*

The ADA was signed into law in July of 1990.[40] It was a significant and comprehensive addition to America's civil rights legislation.[41] The ADA is divided into five titles and Title I encompasses employment.[42] It was designed to help give people with disabilities access to the same employment opportunities available to people without disabilities.[43] The Equal Employment Opportunity Commission (EEOC) regulates and enforces Title I.[44] The statute and its regulations state that Title I applies to employers with fifteen employees or more.[45]

To be protected, the employee must be both a qualified individual, that is, one who, with or without reasonable accommodation, is able to perform essential functions of the job sought or held, and have a disability.[46] A disability requires: (1) a physical or mental impairment that substantially

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[34] Robert L. Burgdorf Jr., *Why I Wrote the Americans with Disabilities Act*, WASH. POST (July 24, 2015), https://www.washingtonpost.com/posteverything/wp/2015/07/24/why-the-americans-with-disabilities-act-mattered/?utm_term=.538a5abcedda.

[35] *Id.*

[36] *Id.*

[37] *Id.*

[38] *Id.*

[39] Greg Fehribach, *Disability Act Changed America*, INDYSTAR (July 25, 2015), https://www.indystar.com/story/opinion/readers/2015/07/25/disability-act-changed-america/30685545/.

[40] *Introduction to the ADA*, ADA.GOV, https://www.ada.gov/ada_intro.htm (last visited Sept. 12, 2017).

[41] *Id.*

[42] *What Is the Americans with Disabilities Act (ADA)?*, ADA NAT'L NETWORK, https://adata.org/learn-about-ada (last visited Sept. 12, 2017).

[43] *Id.*

[44] *An Overview of the Americans with Disabilities Act*, ADA NAT'L NETWORK, https://adata.org/factsheet/ADA-overview (last visited Sept. 12, 2017).

[45] 42 U.S.C. § 12111 (2012); 29 C.F.R. § 16030.2(e) (2017).

[46] *An Overview of the Americans with Disabilities Act*, *supra* note 44.

limits an employee's major life activities; (2) a record of the impairment; or (3) the employee is regarded as having such an impairment.[47] Major life activities include activities that involve any of the five human senses.[48]

Under the ADA's third prong, an employee may be protected if the employee can demonstrate that the employer regarded the impairment as one that substantially limits one or more major life activities, and the impairment is not transitory and minor.[49] Even though a disability includes an employee regarded as having an impairment, the ADA regulations specify that employers are not required to provide accommodations to employees who are merely regarded as having a disability.[50]

B. *The ADA Amendments Act of 2008*

The ADA Amendments Act of 2008 (ADAAA) became effective at the start of 2009.[51] It was a Congressional response to several Supreme Court decisions that Congress believed were improper because they narrowed the definition of a disability and, consequently, the scope of the statute's protections.[52] The ADA regulations were amended to implement the ADAAA.[53] The ADAAA makes it easier for employees seeking protection under the ADA to establish that they have a disability within the meaning of the ADA.[54] The ADAAA also requires the definitions of "disability" and "substantially limits" to be interpreted broadly.[55] The ADAAA significantly increased the number of ADA-related cases brought between 2008 and 2012.[56] It seems clear that an employee's path toward obtaining a reasonable

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[47] 29 C.F.R. § 1630.2(g)(1)(i–iii).

[48] *Id.* § 1630.2(i)(1)(i). "Caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, sitting, reaching, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, interacting with others, and working." *Id.* This life activity list was expanded by the ADA Amendments Act. Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, as Amended, 76 Fed. Reg. 16,978, 16,980 (Mar. 25, 2011) (to be codified at 29 C.F.R. pt. 1630).

[49] 42 U.S.C. § 12102.

[50] 29 C.F.R. § 1630.9(e).

[51] *Fact Sheet on the EEOC's Final Regulations Implementing the ADAAA*, EEOC, https://www.eeoc.gov/laws/regulations/adaaa_fact_sheet.cfm (last visited Nov. 1, 2017).

[52] *Id.*

[53] 29 C.F.R. § 1630.1(a).

[54] Regulations to Implement the Equal Employment Provision of the Americans with Disabilities Act, as Amended, 76 Fed. Reg. 16,978 (Mar. 25, 2011) (to be codified at 29 C.F.R. pt. 1630).

[55] *Id.*: s*ee also Fact Sheet on the EEOC's Final Regulations Implementing the ADAAA*, *supra* note 51.

[56] Tom Starner, *FMLA and ADA Intersection Dangerous For Employers*, HUM. RESOURCES EXECUTIVE (Apr. 24, 2013), http://www.hreonline.com/HRE/view/story.jhtml?id=534355276. There was an increase of 8,000 claims brought by the EEOC from 2008 to 2012, twenty-five percent of which were ADA-specific claims. *Id.*

accommodation for an actual disability became easier once the ADAAA was passed.[57] Further, lawyers in the field claim that it became more difficult for courts to dismiss ADA lawsuits and settlement values increased.[58]

C. *The Interactive Process*

Before examining employee notice requirements, it is important to understand how a reasonable accommodation request plays out in the workplace and where an employer or employee can make mistakes. The ADA requires an interactive process where employers and employees work together to determine whether an employee's disability can be reasonably accommodated.[59] The interactive process begins when the employee requests an accommodation[60] or when the employer recognizes an employee's need for such an accommodation.[61] The employee is obligated to participate and assist the employer in identifying any potential reasonable accommodations that can help overcome any limitations caused by the employee's disability.[62] The employee does not have to identify the precise accommodation needed,[63] but the employee must link the work-related issue to the alleged disability.[64] If the employee fails to participate in the process, the employer is unlikely to incur liability for failure to reasonably accommodate.[65] Employers are also obligated to engage in the interactive process, but failure to engage is not an independent basis for liability.[66] The employee must also show that a reasonable accommodation would have

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[57] *Id.*

[58] *Id.*

[59] Monterroso v. Sullivan & Cromwell, LLP, 591 F. Supp. 2d 567, 579 (S.D.N.Y. 2008) (internal quotation marks omitted).

[60] *Procedures for Providing Reasonable Accommodation for Individuals with Disabilities*, EEOC, https://www.eeoc.gov/eeoc/internal/reasonable_accommodation.cfm#C (last visited Oct. 10, 2017).

[61] Barnett v. U.S. Air, Inc., 228 F.3d 1105, 1112 (9th Cir. 2000), *rev'd on other grounds*, 535 U.S. 391 (2002).

[62] *Id.* (internal quotation marks omitted).

[63] Layla G. Taylor, *An Introduction to the Reasonable Accommodation Process Under the ADA and the Rehabilitation Act*, A.B.A (Feb. 28, 2013), https://www.americanbar.org/groups/young_lawyers/publications/the_101_201_practice_series/an_introduction_to_the_reasonable_accommodation_process_under_the_ada_and_the_rehabilitation_act.html.

[64] *Id.*

[65] *See id*; *see also* Stewart v. Happy Herman's Cheshire Bridge, 117 F.3d 1278, 1287 (11th Cir. 1997) ("Liability simply cannot arise under the ADA when an employer does not obstruct an informal interactive process; makes reasonable efforts to communicate with the employee and provide accommodations based on the information it possesses; and the employee's [failure to cooperate] cause[s] a breakdown in the interactive process.").

[66] Spurling v. C&M Fine Pack, Inc., 739 F.3d 1055, 1062 (7th Cir. 2014) (internal quotation marks omitted).

allowed the employee to perform the essential functions of the job.[67] The employer may ask relevant questions in order to make an informed decision about the employee's request.[68] The employer may also ask for medical documentation in order to ensure the existence of a qualifying disability, to show that an accommodation is needed, or to help determine what options may be effective.[69]

As it relates to the intersection of the FMLA and ADA, the obvious stumbling block for employers is the beginning of the interactive process: what constitutes an accommodation request? When the employee formally asks for an accommodation under the ADA, the employer should know the interactive process is triggered. But, when the employee simply requests FMLA leave, the employer's responsibilities are less obvious. The implications can be enormous; failing to engage in the interactive process can lead to financial liability for an employer.[70]

D. *Notice Requirements*

The EEOC also imposes a notice requirement for accommodation requests.[71] The employee must let the employer know that an accommodation is needed for a reason related to a medical condition.[72] The employee may use plain English and does not need to mention the ADA or the phrase "reasonable accommodation."[73] The request can also be given orally.[74] The request does not even need to be in the form of a question and can take the form of a statement made by the employee.[75] And a family member, friend, or doctor may request an accommodation on behalf of an employee with a disability.[76] Courts have also weighed in on the notice requirement.

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67 *Id.*

68 Taylor, *supra* note 63.

69 *Id.*

70 Barnett v. U.S. Air, Inc., 228 F.3d 1105, 1116 (9th Cir. 2000), *rev'd on other grounds*, 535 U.S. 391 (2002) ("[E]mployers[] who fail to engage in the interactive process in good faith[] face liability for the remedies imposed by the statute if a reasonable accommodation would have been possible.").

71 *EEOC Enforcement Guidance*, *supra* note 20.

72 *Id.*

73 *Id.*

74 *Id.*

75 *Id.* "A[n employee] informs the employer that her wheelchair cannot fit under the desk in her office. This is a request for reasonable accommodation." *Id.*

76 *Id.*

1. Hedberg v. Indiana Bell Telephone Co.

Donald Hedberg worked for Indiana Bell Telephone Company ("Bell") for thirty-two years, most recently in the position of distributor manager.[77] In 1992, Bell underwent a restructuring during which managers were rated by their superiors to determine who would be fired, with some, including Hedberg, being labeled "at risk," but not yet fired.[78] The same month he was labeled "at risk," Bell's company physician informed Hedberg that he might have a serious medical condition.[79] Hedberg informed his supervisor, but wanted the potential diagnosis kept confidential while he took paid leave for more testing.[80] In November 1992, Hedberg was eventually diagnosed with primary amyloidosis,[81] but was fired for performance and attendance issues before he could inform Bell of the diagnosis.[82] Hedberg sued for damages under the ADA, claiming he was fired because of his diagnosis, which both parties agreed was a disability as the ADA defines the term.[83] The court ruled in Bell's favor; it stated that nothing in the record could support the claim that Bell had notice of Hedberg's disability before the decision to fire him was made.[84] The decision turned not on whether there was a reasonable accommodation available, but whether the employer had the requisite knowledge of a disability to be found responsible for disparate treatment discrimination.[85] In dicta, the court discussed what could be considered adequate notice under the ADA, stating that some symptoms that are obvious manifestations of an underlying disability may create an inference that the employer actually knew of the disability.[86]

The court did not specifically mention FMLA leave,[87] but there could be a scenario where the physical symptoms (or the name of the diagnosis) accompanying the leave request could be considered obvious manifestations of an underlying disability.

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77 Hedberg v. Ind. Bell Tel. Co., 47 F.3d 928, 929 (7th Cir. 1995).

78 *Id.* at 930.

79 *Id.*

80 *Id.*

81 *Amyloidosis*, MAYO CLINIC (July 7, 2017), https://www.mayoclinic.org/diseases-conditions/amyloidosis/symptoms-causes/syc-20353178. Primary amyloidosis is "a rare disease that occurs when a substance called amyloid builds up in your organs." *Id.*

82 *Hedberg*, 47 F.3d at 930. The decision to fire Hedberg was made in October of 1992. *Id.*

83 *Id.* at 931.

84 *Id.* at 931–32.

85 *Id.* at 932.

86 *Id.* at 934. "For example, it would appear to most observers that an employee who suffers frequent seizures at work likely has some disability." *Id.*

87 *See id.* at 929–34.

2. Miller v. National Casualty Co.

Linda Miller was an employee of National Casualty ("National") and suffered from, and received treatment for, manic depression for three of the nearly nine years she was employed.[88] Despite this fact, the record indicated that Miller did not notify her employer of her mental impairment or that she needed an accommodation to perform her job.[89] Less than one month before being terminated in 1992, Miller requested sick leave due to stress generated by her job and family problems, and this was granted by one of her superiors.[90] Eventually, as requested by National, Miller obtained a medical excuse from a nurse practitioner diagnosing Miller with situational stress reaction.[91] Miller's condition worsened and she failed to return to work or provide an additional medical excuse by the dates National specified in two separate letters sent to Miller, which led National to terminate her on November 3, 1992.[92]

Miller's complaint alleged that National failed to offer a reasonable accommodation for her mental impairment because National should have allowed her more time to obtain a medical excuse.[93] National argued that it was not required by the ADA to provide a reasonable accommodation because it was not aware that Miller had a mental impairment.[94] Despite Miller requesting time off, receiving a diagnosis for situational stress reaction, providing that diagnosis to National, and Miller's sister informing National that Miller had "lost it" before checking into a hospital, the court held that Miller did not provide proper notice to National of the fact that she suffered from a mental disability.[95]

The court so held for several reasons: (1) Miller did not disclose that she suffered from manic depression to National until November 11, 1992, eight days after she was terminated; (2) she never exhibited any symptoms of manic depression while on the job; (3) her sister's statements could not reasonably be found to establish that Miller suffered from a disability as defined in the ADA; and (4) Miller's symptoms prior to her termination were not obvious manifestations of an underlying disability, so it could not be reasonably inferred that National actually knew that a disability existed.[96] It

88 Miller v. Nat'l Cas. Co., 61 F.3d 627, 628 (8th Cir. 1995).

89 *Id.* at 628–29.

90 *Id.* at 629.

91 *Id.*

92 *Id.* Miller's sister spoke to National personnel and informed them that Miller had "lost it" and was hospital bound. *Id.*

93 *Id*.

94 *Miller*, 61 F.3d at 629.

95 *Id.* at 630.

96 *Id.* at 631. And because Miller's symptoms were not obvious, National was within its right to ask her for reasonable documentation about her disability. *EEOC Enforcement*

is unclear why the court did not consider National to be on notice after learning that Miller had "lost it."[97] Coupled with the fact that Miller was admitted to a hospital after her sister made the statement to National,[98] it seems obvious that National knew or should have known Miller suffered from a psychological problem, and the court was incorrect in determining that Miller's sister's statement did not suffice as notice. Regardless of how the court held, its reasoning left open the possibility that, had Miller's sister's statements mentioned a specific disability even without a specific request for a reasonable accommodation, Miller would have been successful in her suit.

3. Brady v. Wal-Mart Stores

Patrick Brady had cerebral palsy which manifested itself in noticeably slower walking, a limp in his gait, and slower speech.[99] In 2002, he was hired by Wal-Mart Stores ("Walmart") as a part-time sales floor associate in the pharmacy.[100] On Brady's first day, his boss, Chin, showed signs of unhappiness with his performance, and Chin testified that she thought Brady was very slow and that Walmart's coaching policy was not going to help Brady perform better.[101] After not receiving a phone call from Chin regarding Brady's upcoming schedule, Brady spoke with Chin at the store.[102] Chin informed Brady that she would like to transfer him because the pharmacy needed a pharmacy technician rather than the assistant position Brady held.[103] After denying the transfer and working two more shifts, Chin again failed to call Brady with a schedule, and he was eventually transferred to the parking lot, where he gathered shopping carts and collected garbage.[104] Brady's father complained to store management and James Bowen, the store manager, criticized Chin's unfair treatment of Brady and transferred Brady to the food department.[105] After receiving no training for his new position, however, and receiving a work schedule that conflicted with his college schedule, Brady quit the next day.[106]

Guidance, *supra* note 20.

97 *Miller*, 61 F.3d at 629.

98 *Id.*

99 Brady v. Wal-Mart Stores, Inc., 531 F.3d 127, 130 (2d Cir. 2008).

100 *Id.* Brady certified on the application that he could complete the listed job functions "with or without a reasonable accommodation." *Id.*

101 *Id.* at 130–31.

102 *Id.* at 131.

103 *Id.* Brady did not believe this because no one at the pharmacy mentioned the need for another pharmacy technician during his first shift. *Id.*

104 *Id.* Brady believed this was a demotion. He also stated his disability made the new task more difficult to perform. *Id.*

105 *Brady*, 531 F.3d at 131–32.

106 *Id.* at 132.

Brady alleged several issues in his suit, including Walmart's failure to reasonably accommodate his disability under the ADA, and the jury returned a verdict in his favor regarding this allegation.[107] On appeal, Walmart argued that, because Brady never requested an accommodation and testified that he did not need one, there was no violation of the ADA.[108] The court disagreed with Walmart and held that, despite it being Brady's responsibility to inform Walmart that he needed an accommodation, an exception existed because the disability was obvious and Walmart knew or reasonably should have known that Brady was disabled.[109] The court opined that requiring employees who do not realize their own disabilities to ask for accommodations would essentially nullify the statutory mandate of accommodation for an entire class of disabled employees.[110] The court also reemphasized an employer's obligation to engage in the interactive process with its employees and determine whether employees' disabilities can be reasonably accommodated.[111]

This holding gives the most support to the argument that a request for FMLA leave could serve as a request for a reasonable accommodation. For example, if Brady had taken FMLA leave for his cerebral palsy, but still did not believe he needed an accommodation under the ADA, or simply failed to ask for it, this opinion seems to indicate that, because it was so obvious that Brady was disabled, the employer should have initiated the interactive process, and failing to do so would violate the ADA.

4. Taylor v. Phoenixville School District

Before being terminated in October of 1994, Katherine Taylor worked for the East Pikeland Elementary School for twenty years and received many positive performance reviews.[112] In August of 1993, Taylor exhibited symptoms of bipolar disorder and began displaying disturbing behavior that led her boss, Christine Menzel, to doubt Taylor's mental stability.[113] Taylor was eventually diagnosed with bipolar disorder and missed several weeks of work, during which her son was in frequent contact with Menzel and

107 *Id.*

108 *Id.* at 134.

109 *Id.* at 135.

110 *Id.* None of the ADA statutes or regulations explicitly state that an employer may be required to provide an accommodation even if the employee states that one is not needed, so this case is on the more liberal or extreme end of the notice spectrum. *See* 42 U.S.C. §§ 12111–12117 (2012); 29 C.F.R. § 1630.1–1630.16 (2017).

111 *Brady*, 531 F.3d at 135–36 (internal quotation marks omitted). *See, e.g.*, Jackan v. N.Y. State Dep't of Labor, 205 F.3d 562, 566 (2d Cir. 2000); 29 C.F.R. § 1630.2(o)(3).

112 Taylor v. Phoenixville Sch. Dist., 184 F.3d 296, 302 (3d Cir. 1999). The school was located within the Phoenixville school district, the named defendant. *Id.*

113 *Id.*

informed Menzel that Taylor would need accommodations when she returned to work.[114] The school's administration was aware of Taylor's condition and treatment, and knew that Taylor should be slowly eased back into work, but Menzel denied ever knowing the full extent of Taylor's condition until reading about the lawsuit in the local newspaper.[115] Within one month of returning to work on October 15, 1993, the school gave Taylor a disciplinary notice for poor performance, and, for similar reasons, another eight disciplinary notices were given over the next year before Taylor was eventually fired in October 1994.[116]

Taylor brought suit against the school district alleging that it did not provide her with reasonable accommodations for her disability.[117] The court stressed the importance of the interactive process, in which a qualified employee requests an accommodation and the employer works with the employee to find suitable accommodations to help overcome any limitations caused by the disability.[118] The court addressed what notice must be given to trigger the school's obligations under the interactive process and stated that the EEOC allows for requests for accommodations to come verbally from family members; the words "reasonable accommodation" need not be used and the notice simply must make clear that there is a disability and that assistance is needed.[119] Thus, the court believed that the school district was put on notice because Taylor's son made the request verbally to a school administrator.[120] The court's notice discussion did not directly suggest that a request for a reasonable accommodation could be made through other means (such as through conduct or obvious physical manifestations of a disability), but the court did mention that, because of Taylor's obvious illness and decrease in performance, it should not have been surprising that Taylor would want an accommodation.[121]

IV. DEFINING "CERTAIN CIRCUMSTANCES" WHERE AN FMLA LEAVE REQUEST SERVES AS AN ACCOMMODATION REQUEST UNDER THE ADA

Consider this hypothetical scenario, where a request for FMLA should be a request for a reasonable accommodation: Hasan works on the assembly line at a local factory. Every employee, including Hasan, stands up to

114 *Id.* at 303.
115 *Id.* at 303–04.
116 *Id.* at 304–05.
117 *Id.* at 301.
118 *Taylor*, 184 F.3d at 311–12.
119 *Id.* at 312–13.
120 *Id.* at 314.
121 *Id.* "[I]t hardly should have come as a surprise that Taylor would want some accommodations." *Id.*

perform this job, but it would not affect productivity for an employee to perform the work while sitting on a chair or stool. At a routine checkup with his doctor, Hasan is diagnosed with a degenerative tissue disease in his leg, and the doctor tells him he will no longer be able to stand up for more than one hour at a time. Hasan needs to begin treatment immediately to save his leg from amputation.

Hasan's employer is FMLA eligible, Hasan is a covered employee, and his diagnosis qualifies as a serious health condition. Hasan submits his request for FMLA leave the next day, providing his employer with an official diagnosis from his doctor, notice of his inevitable loss of standing ability, and notice of the required treatment plan to save his leg. The request is granted, and Hasan is out of work for six weeks, but is eventually able to return. He now walks with a limp and uses a cane for support. Hasan has not formally requested an accommodation under the ADA, even considering the EEOC's loose standard.

Applying the ADA requirements to this hypothetical, Hasan clearly has a disability because he has lost the ability to walk without a cane, he can stand for no longer than one hour at a time, and he has provided documentation of the impairment.[122] The EEOC states that a request for a reasonable accommodation must be made,[123] but here, no such request was made at this point in the hypothetical. But an analysis of the case law can demonstrate whether Hasan made a request, or the employer should have known Hasan needed an accommodation, or both.

In *Miller*, the court did not think a request was made for an accommodation because Miller's sister made a statement that was not specific enough to establish a disability, and Miller's symptoms prior to termination were not obvious manifestations of an underlying disability.[124] The *Miller* court, however, would likely find that a request for an accommodation was made in Hasan's situation because he clearly articulated that he would be losing the ability to stand for long periods of time, something that any reasonable person (and the ADA) would consider a disability that would need (and qualify for) a reasonable accommodation. Moreover, despite not seeing Hasan until he returned to work, his inability to stand for longer than an hour at a time would be an obvious manifestation of an underlying disability that should put his employer on notice. The appendix to the ADA regulations specifies how employers and employees should interact regarding a request for an accommodation and describes a problem-solving approach that focuses on the limitations the disability has on the employee performing the specific job, the potential accommodations

122 29 C.F.R. § 1630.2(g)(1)(i)–(iii) (2017).

123 *EEOC Enforcement Guidance*, *supra* note 20.

124 Miller v. Nat'l Cas. Co., 61 F.3d 627, 631 (8th Cir. 1995).

that may be given, and the preference of the employee.[125] So, even if Hasan made a request for accommodation based on the *Miller* court's reasoning, he would still need to work with his employer to identify what accommodation(s) would be reasonable or appropriate,[126] but the employer might have the obligation to begin the process.

Hasan's situation would also qualify as a request for accommodation under *Brady*, where the court recognized an exception to the ADA notice obligation placed on employees when the disability is so obvious that the employer knows or reasonably should know that the employee is disabled.[127] Because Hasan's FMLA leave request specified that he would be disabled upon finishing treatment (either with an inability to stand or a missing leg), it should also be treated as a request for reasonable accommodation, triggering his employer's duty to engage in the interactive process because the employer had to know based on the obviousness of his disability.

In *Taylor*, the court held that the employer had notice because of a verbal request for accommodation, and the court mentioned that, because of Taylor's decrease in performance due to her mental impairment, it should not have been a surprise that Taylor would need an accommodation.[128] Hasan's situation is no different; not only did he provide verbal notice to his employer about his future medical care needs, he also provided a specific diagnosis and informed his employer of his impending standing problems. His employer should have expected that Hasan would need an accommodation because his employer knew or should have known that standing is an integral part of the job (even though it is not the only way to perform the job's essential functions).

Hasan's hypothetical seems to illustrate the exact situation the Third Circuit envisioned when it stated that an FMLA leave request can serve as a request for a reasonable accommodation under the ADA.[129] The court cited an FMLA regulation in support of this statement, which states that an employer may treat granted FMLA leave also as a reasonable accommodation under the ADA.[130]

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125 29 C.F.R. pt. 1630 app. § 1630.9.

126 *See id*; *see also* Taylor v. Principal Fin. Grp., 93 F.3d 155, 165 (5th Cir. 1996) ("[O]nce an accommodation is properly requested, the responsibility for fashioning a reasonable accommodation is shared between the employee and employer.").

127 Brady v. Wal-Mart Stores, Inc., 531 F.3d 127, 135 (2d Cir. 2008).

128 Taylor v. Phoenixville Sch. Dist., 184 F.3d 296, 314 (3d Cir. 1999).

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

130 29 C.F.R § 825.702(c)(2) (2017).

V. FMLA LEAVE REQUESTS SHOULD SERVE AS NOTICE FOR REQUESTS FOR ADA ACCOMMODATIONS: IMPLICATIONS OF ADOPTING THIS INTERPRETATION

The Third Circuit's approach should become the effective standard for the FMLA and ADA. Congress should amend the Acts such that if an employee requests FMLA leave and the reason for leave is one that would qualify as a disability under the ADA, the interactive process should automatically be triggered. Employers should be barred from arguing that their employees did not request an accommodation in ADA failure-to-accommodate lawsuits. This will be extremely beneficial to employees and create additional burdens on employers. But there will be some limitations on the apparent intersection between the two Acts, mainly because of the language in the statutes and what is covered under the respective Acts. In any event, employers can be proactive and protect themselves by exercising their rights under each Act to ensure that they are satisfying their obligations.

A. *Benefits to Employees*

The clear benefit to employees is that they may be able to exercise two rights at once; an employee who qualifies for FMLA leave can request that leave while simultaneously requesting a reasonable accommodation under the ADA (assuming the employee meets the ADA requirements). Unlike attorneys and those who have studied employment law extensively, most employees are likely unaware of the nuances and intricacies of the FMLA and ADA, so providing notice for both with a single act (i.e. requesting FMLA leave) helps to simplify an otherwise complicated procedure. Further, this amendment to the Acts would protect employees who have obvious disabilities and request FMLA leave, but do not *believe* they have disabilities or need accommodations, like in *Brady*. Regardless of what the employee thinks, the employer would still have to engage in the interactive process and offer the accommodation, or to be safer, ask if the employee wants one. This would be a significant safeguard for the employees who are ignorant of their own limitations.

If employers fail to satisfy their obligations, increased litigation can be expected.[131] This is an issue for employers because increased litigation naturally leads to increased costs.[132] This often leads employers to settle even dubious claims as quickly as possible to avoid large discovery costs and negative publicity.[133] For honest employees who have legitimate FMLA or

131 *See* Starner, *supra* note 56.

131 *Id.*

132 *See id.*

133 *See* Lee Bantle, *How Not to Settle Employment Discrimination Suits*, BANTLE & LEVY LLP, http://www.civilrightsfirm.com/how-not-to-settle/ (last visited Oct. 30, 2017).

ADA claims, this is an enormous benefit because they may have quicker access to legitimate settlement dollars that would otherwise take years to obtain through a trial.

B. *Burdens on Employers*

Generally, after an employee mentions a health condition to the employer, the first step the employer should take is to ask if it is a request for an accommodation. If the employee's answer is no, theoretically, that should be the end of the matter. But the court suggested in *Brady* that employers may need to offer accommodations even when the employee is mistaken about whether one is needed.[134] Accommodations cannot be forced on employees, [135] so the *Brady* decision may have been overreaching. Nonetheless, it should concern employers that at least one court held an employer liable for failing to take more affirmative action during the interactive process. If the employee rejects an accommodation altogether, but that employee works in the circuit where *Brady* is controlling, is the employer allowed more leeway to determine if an accommodation is needed? This question remains unanswered, but the cases above seem to suggest, either explicitly or implicitly, that the employer ought to consider the degree of the health condition before agreeing to not provide an accommodation.[136] Employers would be wise to take a cautious approach and avoid framing the question as an inquiry into disability and instead frame the question neutrally by asking, "is there anything we can help you with to do your job on your return?"

Further, the other three circuit decisions discussed above also suggest that some physical or mental conditions—including the names of the conditions or associated symptoms—can put an employer on notice that an employee needs an accommodation.[137] And now, with recent decisions finding that notice of a disability can be provided through an FMLA request,[138] every time an employee requests FMLA leave, employers will

134 Brady v. Wal-Mart Stores, Inc., 531 F.3d 127, 135 (2d Cir. 2008).

135 *Disability Accommodations: Refusal of Accommodation: What Are an Employer's Options If an Employee with an ADA-Covered Medical Condition Refuses to Ask For/Accept Accommodation?*, SHRM, https://www.shrm.org/resourcesandtools/tools-and-samples/hr-qa/pages/employeewithanadacoveragerefusestoaskoracceptaccommodation.aspx (last visited Apr. 17, 2018).

136 *See Brady*, 531 F.3d 127; Taylor v. Phoenixville Sch. Dist., 184 F.3d 296 (3d Cir. 1999); Miller v. Nat'l Cas. Co., 61 F.3d 627 (8th Cir. 1995); Hedberg v. Ind. Bell Tel. Co., 47 F.3d 928 (7th Cir. 1995).

137 *Taylor*, 184 F.3d 296; *Miller*, 61 F.3d 627; *Hedberg*, 47 F.3d 928.

138 Capps v. Mondelez Global, LLC, 847 F.3d 144, 156–57 (3d Cir. 2017); Ryan v. Shulkin, No. 1:15-CV-02384, 2017 U.S. Dist. LEXIS 202467, at *25 (N.D. Ohio Dec. 8, 2017) (stating that the employer had knowledge of the employee's disability when the employee applied for FMLA leave).

now have to take what they know and determine if the employee also qualifies for an accommodation and if the interactive process has begun. The potential liability here is significant. The EEOC prohibits employers from using an employee's leave request as a justification for making overreaching disability-related inquiries.[139] Serious tension will be created if all FMLA leave requests can trigger the interactive process because the ADA allows employers to inquire into disabilities only when the reason for the leave request may affect job performance.[140]

For example, if a secretary files for FMLA leave due to a fractured wrist, the employer will probably not violate the ADA by inquiring about the need for an accommodation due to a disability because secretaries use their wrists to type on keyboards. But if the leave request is for toe surgery, the employer likely cannot make disability inquiries because an injured toe presumably has no effect on a secretary's job performance.

In practice, employers would need to analyze every FMLA leave request and determine if: (1) the injury or illness meets (or potentially could meet) the ADA disability criteria; and (2) the potential disability is one that would affect job performance. If both answers are yes, the interactive process has begun, and the employer can inquire into the need for an accommodation. If the answer to question one is yes but question two is no, the employer is in a difficult spot because the employer knows there may be a disability it may need to accommodate, but it is prohibited from asking the employee about the disability. The employer could claim that the interactive process has begun at this point and it is complying with its duty, but as this Comment has discussed, it is unclear if and at what point the interactive process begins after an FMLA leave request is made. The employer is essentially in a wait-and-see, Catch-22 situation.

If the answer to question one is no, the employer is theoretically safe from the ADA implications and need not address question two. All of this illustrates how burdensome, time-consuming, and potentially costly an FMLA leave request will become if the Third Circuit approach is adopted.[141] One wrong misstep in answering the two questions above and the employer may violate the ADA by asking for too much information or violate the Act by failing to provide an accommodation it should have known about.

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[139] *Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act (ADA)*, EEOC (July 27, 2000), https://www.eeoc.gov/policy/docs/guidance-inquiries.html. But, "[i]f an employer has a reasonable belief that an employee's present ability to perform essential job functions will be impaired by a medical condition . . . the employer may make disability-related inquiries or require the employee to submit to a medical examination." *Id.*

[140] *Id.*

[141] Starner, *supra* note 56.

C. *Limitations on Allowing FMLA Leave to Serve as Notice of an ADA Accommodation*

Complying with the Third Circuit's interpretation of the FMLA and ADA intersection in *Capps* can be tricky. The good news for employers is that, while the Third Circuit's interpretation may indicate the FMLA and ADA have been fused, they most certainly have not. The FMLA still has its own requirements for employees and employers—notice, benefits, and violations—and the same goes for the ADA.[142] Some employers may be covered under only one of the Acts and this interpretation may never affect them (although, a part-time employee may ask for FMLA leave and be legally denied it, but the leave request may raise the ADA duty). But even for the employers covered by both Acts, the implications of this interpretation are not as far-reaching as they may seem.

A serious health condition under the FMLA is not the same as a disability under the ADA.[143] While the administrative burden may increase on employers, the number of FMLA leave requests that also constitute an accommodation request will likely be small because there is a very large number of "serious health conditions" under the FMLA that do not rise to the level of disabilities under the ADA.[144] Every hospital stay will not result in a disability; an employee may be hospitalized with a broken arm, but it will heal in one or two months and the employee will never, as it relates to the broken arm, qualify as disabled. As the courts in *Brady* and *Taylor* suggested, an FMLA leave request that also serves as an accommodation request will likely be so obvious that the employer should be expected to be aware of it.[145]

Additionally, *Capps* may not be as groundbreaking as one might think at first glance because there is already one instance where the FMLA and ADA intersect: when employees exhaust their approved FMLA leave and request extended leave.[146] Courts consider the extended leave request by the employee to be a request for reasonable accommodation under the ADA.[147] That type of accommodation request is not the same as what was described

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142 *See* discussion *supra* Parts II–III.

143 29 C.F.R. § 825.702(b) (2017).

144 *The Family and Medical Leave Act, the Americans with Disabilities Act, and Title VII of the Civil Rights Act of 1964*, EEOC (July 6, 2000), https://www.eeoc.gov/policy/docs/fmlaada.html.

145 Brady v. Wal-Mart Stores, Inc., 531 F.3d 127, 135 (2d Cir. 2008); Taylor v. Phoenixville Sch. Dist., 184 F.3d 296, 314 (3d Cir. 1999).

146 *See* Fleck v. WILMAC Corp., No. 10-05562, 2011 U.S. Dist. LEXIS 54039, at *24–25 (E.D. Pa. May 19, 2011) (stating that an employer offering extended unpaid leave after an employee's FMLA leave ends would be considered a reasonable accommodation under the ADA); *see also* Starner, *supra* note 56.

147 *See Fleck*, 2011 U.S. Dist. LEXIS 54039, at *24–25.

in *Capps*, because the accommodation request comes after the initial FMLA leave request, as indicated in *Fleck v. WILMAC Corp.*,[148] whereas in *Capps* the hypothetical FMLA leave request *is* the accommodation request.[149] Employers should already be aware of the intersection of the two Acts mentioned in *Fleck*, so an expansion of that in *Capps* should almost be expected.

Employers are also not required to comply with every accommodation request.[150] Some requests may not be reasonable, and even if the employee requests what would be found to be reasonable, it may be denied if the accommodation would impose an undue hardship on the employer's business.[151] The regulations list several factors courts must consider when performing an undue hardship analysis that focus mainly on the size of the employer and the burdens that providing accommodations may have on the employer's finances and operating efficiency.[152] Employers cannot rely on generalized conclusions to support a claim of undue hardship.[153] They must conduct an individualized assessment of the current circumstances to determine if undue hardship exists.[154] Employers must be able to point to specific evidence to support their claims of undue hardship.[155] For example, without supporting evidence in the record, courts have rejected an employer's argument that an indefinite leave of absence request will cause undue hardship.[156]

Even if an employer can prove undue hardship using these factors, the employer still has obligations to meet before denying the reasonable accommodation request.[157] The employer must attempt to identify other accommodations that will not create an undue hardship.[158] Additionally, an employee should be given the opportunity to pay the portion of the cost of an accommodation that creates an undue hardship on his or her employer.[159]

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148 *Id.*

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

150 42 U.S.C. § 12112 (a)(5)(A) (2012).

151 *Id.*

152 29 C.F.R. § 1630.2(p)(2)(i)–(v) (2017).

153 *EEOC Enforcement Guidance*, *supra* note 20.

154 *Id.*

155 *See* Gibson v. Lafayette Manor, Inc., Civ. A. 05-1082, 2007 U.S. Dist. LEXIS 99008, at *40 (W.D. Pa. Mar. 5, 2007).

156 *Id.* at *36–37. *But see* Corder v. Lucent Techs., 162 F.3d 924, 928 (7th Cir. 1998) ("[N]othing in the ADA requires an employer to give an employee indefinite leaves of absence."); Walton v. Mental Health Ass'n, 168 F.3d 661, 671 (3d Cir. 1999) (Indefinite "leave . . . would have created an undue burden on [the employer]").

157 *See Questions and Answers*, ADA.GOV (Dec. 29, 2005), https://www.ada.gov/employmt.htm.

158 *Id.*

159 *Id.*

Thus, even if certain FMLA leave requests can be construed as accommodation requests, the ADA provides employers with a way to escape liability for failing to provide the accommodation.

D. *The Opportunity to Gather Information to Help Prevent Liability*

When the FMLA leave request does not obviously relate to a disability, employers should start by using the plethora of information and rights made available to them. The FMLA allows the employer to request medical facts to certify that a serious health condition exists.[160] Furthermore, employers may require recertification of the serious health condition as the employees remain out of work on FMLA leave.[161] Thus, employers are able to gather plenty of medical information about their employees just by exercising the rights granted to them under the FMLA.

There may be instances where an employer truly cannot determine if an FMLA leave request is also a request for a reasonable accommodation. But that has been, and will continue to be, a concern for employers notwithstanding the decision in *Capps*. For the less extreme FMLA leave requests, a diligent employer should be able to legally acquire enough information to determine whether the serious health condition that satisfies the FMLA also qualifies as a disability under the ADA. *Brady* opens the door for employers to inquire into disabilities where they otherwise might not because the court essentially placed an affirmative duty on employers to do so, especially when the employees may be oblivious to their own respective disabilities.[162]

VI. CONCLUSION

While the Third Circuit in *Capps* seemingly interpreted FMLA leave requests in a groundbreaking way,[163] this Comment has shown that amending the Acts to reflect that holding may not have as large a ripple effect as one might think. There has already been an FMLA and ADA intersection that all employers should know about it,[164] so additional intersection should come as no surprise. FMLA leave requests must satisfy the FMLA requirements, and reasonable accommodation requests under the ADA must satisfy the ADA requirements. When the two intersect, it will likely be very apparent, as in *Brady* and *Taylor*, that the employer would not need to know about the

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160 *Frequently Asked Questions and Answers About the Revisions to the Family and Medical Leave Act*, U.S. DEP'T OF LAB., https://www.dol.gov/whd/fmla/finalrule/NonMilitaryFAQs.htm (last visited Nov. 1, 2017).

161 *See id.*

162 Brady v. Wal-Mart Stores, Inc., 531 F.3d 127, 135 (2d Cir. 2008).

163 *See* Capps v. Mondelez Global, LLC, 847 F.3d 144, 156–57 (3d Cir. 2017).

164 Taylor v. Phoenixville Sch. Dist., 184 F.3d 296, 314 (3d Cir. 1999).

Third Circuit's interpretation to know that the interactive process has been triggered.

There will likely be an increased burden on employers, with potentially more liability for inquiring into disabilities when they should not.[165] *Brady*, however, suggests that more inquiry may be acceptable in certain circumstances,[166] so employers may be given more leeway to inquire into disabilities. At the same time, employees are likely to benefit from the *Capps* decision. Under certain circumstances, a request for FMLA leave can trigger the interactive process and offer the employee more resources and options than the current statutory scheme provides for.

Courts have already recognized instances where an FMLA leave request can trigger the interactive process,[167] so Congress should go one step further and amend the Acts to codify this new development in the common law. Employers will adjust, as they always do, so the increased burdens will be more than offset by the benefits for employees. Congress cannot undo the discrimination that disabled persons have experienced in America; however, it can amend the Acts and set a new tone of acceptance moving forward.

165 Starner, *supra* note 56.

166 *Brady*, 531 F.3d at 135.

167 *Capps*, 847 F.3d at 156–57; Ryan v. Shulkin, No. 1:15-CV-02384, 2017 U.S. Dist. LEXIS 202467, at *25 (N.D. Ohio Dec. 8, 2017) (stating that the employer had knowledge of the employee's disability when the employee applied for FMLA leave).