No. 13-3070

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

GRACE HWANG,

Plaintiff-Appellant,

v.

KANSAS STATE UNIVERSITY,

Defendant-Appellee.

On Appeal from the United States District Court
for the District of Kansas
The Honorable Eric F. Melgren
Case No. 11-4185-EFM

AMICUS CURIAE BRIEF OF AMERICAN CIVIL LIBERTIES UNION, JUDGE DAVID L. BAZELON CENTER FOR MENTAL HEALTH LAW, CIVIL RIGHTS EDUCATION AND ENFORCEMENT CENTER, AND LEGAL AID SOCIETY – EMPLOYMENT LAW CENTER IN SUPPORT OF PLAINTIFF'S PETITION FOR REHEARING OR REHEARING *EN BANC*

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STATEMENTS OF INTEREST[1]

As set forth in greater detail in the accompanying Motion for Leave to File Brief of *Amici Curiae* in Support of Plaintiff's Petition for Rehearing or Rehearing *En Banc*, *Amici* are non-profit civil rights organizations with an interest in preventing and remedying disability discrimination in employment.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. Rule 26.1(a), none of the proposed amici has a parent corporation, nor is there any publicly held corporation that owns 10% or more of the stock of any of the proposed amici.

INTRODUCTION

Amici submit this brief in support of rehearing or rehearing *en banc*. By imposing a bright-line, six-month maximum on leaves of absence as a reasonable accommodation, the panel opinion conflicts with appellate precedents construing the Americans with Disabilities Act (ADA) and the Rehabilitation Act. The opinion is inconsistent with the Supreme Court's reasoning in *U.S. Airways v. Barnett* and contrary to regulations and guidance issued by the Equal Employment Opportunity Commission (EEOC). Finally, the panel opinion is fundamentally unfair because Petitioner's claim was dismissed on the pleadings.

[1] Pursuant to Fed. R. App. Proc. 29(c)(5), counsel certifies that neither party's counsel authored this brief in whole or in part; neither party nor their counsel contributed money that was intended to fund preparing or submitting the brief; and no one other than amici, their members, or counsel contributed money that was intended to fund preparing or submitting the brief.

ARGUMENT

Petitioner Grace Hwang, a well-respected professor at Kansas State University (KSU), sought and received a six-month leave of absence for the Fall 2009 semester while she recovered from a bone marrow transplant. First Amended Complaint (FAC), ¶¶ 23-27, 33. She then sought a further short leave to avoid an on-campus flu epidemic that would threaten her compromised immune system. *Id.* at ¶¶ 34-35. During this period, Petitioner could have been accommodated by working remotely until the flu epidemic ended. *See id.* at ¶ 43. By Summer 2010, she was able to return to full duty. *Id.* at ¶ 55. Instead, she was denied further leave and terminated in February 2010.

Petitioner was a successful employee with 15 years' seniority. *Id.* at ¶¶ 11-16. Her employer was a large public institution receiving federal funds. Substitute instructors covered her classes. FAC, ¶¶ 28-31; Order (Feb. 28, 2013), at 3. Her prognosis was good, and she had a date certain for return. FAC, ¶¶ 33, 42, 55. Petitioner knew of university policies or practices permitting unpaid leave of up to one year, and that other faculty were routinely granted year-long sabbaticals. *Id.* at ¶¶ 37, 100-101.[2] She had sufficient accrued leave and sick-leave-pool hours to

[2] *See Hwang*, 2014 WL 2212071 at *4 (stating that Hwang failed to allege how she was similarly situated to individuals granted sabbaticals). But the scope of leaves commonly granted by KSU is relevant to the question of whether her accommodation was reasonable, which does not depend upon whether Petitioner was "similarly situated." *U.S. Airways v. Barnett*, 535 U.S. 391, 397 (2002).

cover the requested leave. *Id.* at ¶¶ 24-27, 37. And, during summers, Hwang worked remotely. *Id.* at ¶ 36. These factors support Petitioner's assertion that the proposed accommodation – a finite leave extension during which telecommuting would be possible – was reasonable.

In affirming dismissal, the panel opinion disregarded Petitioner's allegations, and instead framed the issue as whether a leave longer than six months can ever be reasonable. Rejecting Petitioner's accommodation as a matter of law, the panel disregarded the individualized inquiry mandated by the Supreme Court. Moreover, affirming dismissal prior to discovery, the panel unfairly denied Petitioner her right to gather and present evidence. Rehearing or rehearing *en banc* should be granted.

I. The Panel Opinion Creates a Circuit Split

The panel upheld dismissal on the pleadings, ruling that the "leave policy here granted all employees a full six months' sick leave," and that such leave was "more than sufficient to comply with the Act in nearly any case." *Hwang*, 2014 WL 2212071 at *4. Stated the Court:

> By her own admission, she couldn't work at any point or in any manner for a period spanning more than six months. It perhaps goes without saying that an employee who isn't capable of working for so long isn't an employee capable of performing a job's essential functions – and that requiring an employer to keep a job open for so long doesn't qualify as a reasonable accommodation.

Id. at *1; *see id.* ("Must an employer allow employees more than six months' sick leave or face liability under the Rehabilitation Act? Unsurprisingly, the answer is almost always no.").[3]

This reasoning has been rejected by other Circuits that have considered it. In *Garcia-Ayala v. Lederle Parenterals, Inc.*, 212 F.3d 638 (1st Cir. 2000), the plaintiff sought a five-month leave extension for cancer treatment after the one-year leave provided by her employer expired. The First Circuit reversed summary judgment for the defendant and entered judgment for the plaintiff:

> It appears from the court's statements that it was applying *per se* rules, and not giving the type of individual assessment of the facts that the Act and the case law requires. The Supreme Court has deemed "essential" individualized attention to disability claims. *See School Bd. v. Arline*, 480 U.S. 273, 287 (1987). As we said in *Criado* [*v. IBM Corp.*, 145 F.3d 437 (1st Cir. 1998)], "[w]hether [a] leave request is reasonable turns on the facts of the case." *Criado*, 145 F.3d at 443 …. It is simply not the case, under our precedent that an employee's request for an extended medical leave will necessarily mean … that the employee is unable to perform the essential functions of her job. …
>
> This court and others have held that a medical leave of absence – García's proposed accommodation – is a reasonable accommodation under the Act in some circumstances. … [W]e see no reason to adopt a rule on these facts that the additional medical leave sought would be *per se* an unreasonable accommodation. … In *Ralph v. Lucent Technologies, Inc.*, 135 F.3d 166, 171-72 (1st Cir.1998), the court held that a four-week additional accommodation, beyond a fifty-two week leave period for mental breakdown, was reasonable for purpose of a preliminary injunction. …

[3] The Rehabilitation Act is construed consistently with the ADA. 29 U.S.C. § 791(g).

Garcia-Ayala, 212 F.3d at 647-50. In *U.S. Airways v. Barnett*, 535 U.S. 391 (2002), the Supreme Court cited to *Garcia-Ayala* in support of its holding that accommodations required under the ADA may compel the modification of neutral employer rules.[4]

Other circuits have reached similar conclusions. In *Cehrs v. Northeast Ohio Alzheimer's Research Ctr*., 155 F.3d 775 (6th Cir.1998), the Sixth Circuit reversed summary judgment, stating: "We therefore conclude that no presumption should exist that uninterrupted attendance is an essential job requirement, and find that a medical leave of absence can constitute a reasonable accommodation under appropriate circumstances." 155 F.3d at 783; *see also id.* at 782 ("Upon reflection, we are not sure that there should be a *per se* rule that an unpaid leave of indefinite duration (or a very lengthy period, such as one year) could never constitute a 'reasonable accommodation' under the ADA.") (quoting *Norris v. Allied-Sysco Food Services, Inc*., 948 F. Supp. 1418, 1439 (N.D. Cal. 1996)); *accord Cleveland v. Federal Express Corp*., 83 Fed. Appx. 74, 79 (6th Cir. 2003) (reversing summary judgment where proposed leave was about six months).

[4] *Barnett*, 535 U.S. at 398 ("Many employers will have neutral rules governing the kinds of actions most needed to reasonably accommodate a worker with a disability. *See* 42 U.S.C. § 12111(9)(b) (setting forth examples ...). Yet Congress, while providing such examples, said nothing suggesting that the presence of such neutral rules would create an automatic exemption. Nor have the lower courts made any such suggestion. *Cf. Garcia-Ayala v. Lederle Parenterals, Inc*., 212 F.3d 638, 648 (C.A.1 2000) (requiring leave beyond that allowed under the company's own leave policy) … .").

In *Nunes*, the Ninth Circuit reversed summary judgment for the employer, finding triable issues where the needed leave was about eight or nine months:

> The ADA requires that Nunes be able to perform the essential functions of her job "with or without reasonable accommodation." 42 U.S.C. § 12111(8). Unpaid medical leave may be a reasonable accommodation under the ADA. See 29 C.F.R. Part 1630, Appendix (discussing § 1630.2(o)). Even an extended medical leave, or an extension of an existing leave period, may be a reasonable accommodation if it does not pose an undue hardship on the employer.

Nunes v. Wal-Mart Stores, Inc., 164 F.3d 1243 (9th Cir. 1999). The Seventh Circuit is in accord. *Haschmann v. Time Warner Entertainment 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. The reasonableness of a requested accommodation is a question of fact.").[5]

[5] *See also Powers v. Polygram Holding, Inc.*, 40 F.Supp.2d 195, 197–201 (S.D.N.Y. 1999) (denying summary judgment and noting that cases granting summary judgment based on length of leave usually involved plaintiffs "seeking more than one year of leave," but refusing to hold that such length is "the 'red line' that demarcates the reasonable from the unreasonable"); *White v. Honda of America Mfg., Inc*., 191 F. Supp. 2d 933, 951 (S.D. Ohio 2002) (jury question whether employer had to provide leave in excess of 12-month leave policy); *Durrant v. Chemical/Chase Bank/Manhattan, N.A.*, 81 F. Supp. 2d 518, 521-522 (S.D.N.Y. 2000) (denying summary judgment), 1999 WL 1328001, at *4 (S.D.N.Y. 1999) ("The reasonableness of leave depends on the attendant circumstances. Six months could be unreasonable in one case while one year might not be unreasonable in another."); *Gibson v. Lafayette Manor, Inc*., 2007 WL 951473, at *7, 9 (W.D. Pa. Mar. 27, 2007) (finding that employer's fixed-leave policy violated EEOC guidance and created triable issue); *E.E.O.C. v. Journal Disposition Corp*., 2011 WL 5118735, at *3 (W.D. Mich. Oct. 27, 2011) (jury issue whether six-month leave, followed by five months part-time status, was reasonable) ("Leave requests are not generally found to be unreasonable as a matter of law unless they are of indefinite duration, or are in excess of one year.").

The Tenth Circuit has previously ruled that a leave of absence may be a reasonable accommodation. *Rascon v. US West Communications, Inc.*, 143 F.3d 1324, 1333 (10th Cir. 1998) ("US West frames the issue as whether *attendance* is an essential function of Mr. Rascon's job. … That simply is not the relevant inquiry when a reasonable accommodation of disability *leave* is at issue.") (upholding verdict for employee and finding that five-month leave permitted by company policy was reasonable); *Cisneros v. Wilson*, 226 F.3d 1113, 1129-30 (10th Cir. 2000) ("It is well-settled that a request for leave … may allow an employee sufficient time to recover from an injury or illness such that the employee can perform the essential functions of the job (*i.e.*, attend work) in the future.") (affirming summary judgment where employee failed to establish if and when she could return); *cf. Robert v. Board of County Com'rs of Brown County, Kans.*, 691 F.3d 1211, 1218 (10th Cir. 2012) (same where plaintiff could not provide an estimated date for resuming duties, but declining to adopt rule on duration);[6] *see also Mason v. Avaya Communications, Inc.*, 357 F.3d 1114, 1124 (10th Cir. 2004) ("The Supreme Court has generally eschewed *per se* rules …

[6] The *Roberts* court describes *Epps v. City of Pine Lawn*, 353 F.3d 588 (8th Cir. 2003) as an "analogous case" in which the Eighth Circuit ruled "that a six-month leave request was too long to be a reasonable accommodation." Decided before the ADA Amendments Act, *Epps* held that the plaintiff, an injured police officer, was not "disabled." *Id.* at 592-93. In a footnote, the court noted that Epps was not qualified due to excessive absenteeism: "Epps asserts that the six-month leave of absence was reasonable; however, Pine Lawn, a small municipality, could not reallocate Epps's job duties among its small staff of fifteen to twenty-two police officers." *Id.* at 593 n.5. As such, the result in *Epps* is inapposite here.

[and] the determination of whether a request for an at-home accommodation is reasonable must likewise be made on a case-by-case basis.").

As these cases make clear, a bright-line rule regarding the maximum duration of leave as an accommodation, without an assessment of the factual circumstances, is contrary to the individualized review that the Supreme Court has described as "essential." *Arline*, 480 U.S. at 287 ("To answer [the question of whether the employee is otherwise qualified] in most cases, the district court will need to conduct an individualized inquiry and make appropriate findings of fact. Such an inquiry is essential if § 504 is to achieve its goal of protecting handicapped individuals …"); *Cehrs,* 155 F.3d at 782-83 ("The presumption that uninterrupted attendance is an essential job requirement … eviscerates the individualized attention that the Supreme Court has deemed "essential" in each disability claim.")

II. The Panel Opinion Conflicts With. *Barnett*

The panel opinion purports to rely upon the Supreme Court's ruling in *Barnett*, but is contrary to that opinion. In *U.S. Airways v. Barnett*, the Supreme Court considered the reasonableness of a transfer that conflicted with the employer's seniority policy. Rejecting the argument that the requested accommodation was unreasonable because it would grant Barnett a preference, the Court stated:

> The Act requires preferences in the form of "reasonable accommodations" that are needed for those with disabilities to obtain

> the *same* workplace opportunities that those without disabilities automatically enjoy. …
>
> The simple fact that an accommodation would provide a "preference" – in the sense that it would permit the worker with a disability to violate a rule that others must obey – cannot, *in and of itself*, automatically show that the accommodation is not "reasonable."

U.S. Airways v. Barnett, 535 U.S. 391, 397-398 (2002). Here, Hwang's request for a finite leave extension beyond the employer's purported six-month limit cannot be deemed unreasonable simply because it violates the policy.

The *Barnett* Court instead described a "reasonable accommodation" as a modification that is reasonable on its face, ordinarily reasonable, or reasonable in the run of cases. *Id.* at 401-02. "Once the plaintiff has made this showing, the defendant/employer then must show special (typically case-specific) circumstances that demonstrate undue hardship in the particular circumstances." *Id.* at 402. Applying this standard, the Supreme Court concluded that alterations to seniority systems are not ordinarily "reasonable," citing the importance of seniority systems to labor relations, and the expectations of other employees regarding job security,. *id.* at 403-05, considerations not relevant here.

Here, there is no basis for the panel's conclusion that Hwang's requested accommodation was unreasonable (either "on its face" or given "special circumstances," *see id.* at 405). The ADA references "modified work schedules" and "modification of … policies" as possible reasonable accommodations. 42

U.S.C. § 12111(9)(B). The EEOC and many courts have long held that leaves of absence and leave extensions are reasonable accommodations. In the context of large employers, unpaid leaves of absence of up to one year in length are a form of accommodation that is commonly requested and granted. *See, e.g., Criado,* 145 F.3d at 443; *Nunes,* 164 F.3d at 1247. Petitioner asserted facts supporting reasonableness. This is sufficient to survive a motion to dismiss.

III. The Panel Opinion Conflicts with EEOC Regulations and Guidance

The panel opinion conflicts with EEOC regulations and guidance. Like the ADA, EEOC regulations reference "modified work schedules," "modification of … policies," and "other similar accommodations" as possible reasonable accommodations available under the Act. 42 U.S.C. § 12111(9)(B); 29 C.F.R. § 1630.2(o)(2)(ii); *see also* 29 C.F.R. § 1630.2(k)(3) ("leave" as possible accommodation). Agency guidance describes leave as a possible accommodation, including leave that requires modification of an employer's policy:

> [The] listing [in Part 1630] is not intended to be exhaustive of accommodation possibilities. For example, other accommodations could include permitting the use of accrued paid leave or providing additional unpaid leave for necessary treatment ….
>
> [A]n 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.

29 C.F.R. Part 1630 App., at §§ 1630.2(o), 1630.15.

Further, EEOC enforcement guidance documents endorse leaves of absence as a reasonable accommodation, including leaves that exceed the maximum permitted under an employer's policies. Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act (Oct. 17, 2002), at questions 17-19; Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities (Mar. 25, 1997), at questions 23 and 25. In the context of employees recovering from cancer, the EEOC has recognized the possibility of leave in excess of six months, as well as such leave followed by an additional period of alternate accommodations. Questions & Answers about Cancer in the Workplace and the Americans with Disabilities Act (ADA), Examples 6, 13.

These authorities provide further support for Petitioner's request.

IV. The Panel Opinion is Unprecedented and Fundamentally Unfair

Grace Hwang was a long-term qualified employee who required a finite extension of leave following a bone marrow transplant for cancer. There was no evidence – the case was dismissed before discovery – that the requested leave extension would have imposed any hardship on KSU, a large federally funded public employer. Petitioner alleged facts supporting the reasonableness of the accommodation. Under federal law, Petitioner had the right to pursue remedies for

her claim that her termination violated the requirement that employers provide reasonable accommodation.

Instead, the district court dismissed her case on the papers, and the appellate panel affirmed. No discovery was permitted. Petitioner could not collect, evaluate, and present her evidence to the court or jury. This outcome is unprecedented. No other published opinion has dismissed an ADA or Rehabilitation Act complaint on the pleadings – prior to discovery – because the needed leave of absence described in the complaint was longer than some set amount (here, six months). It is the obligation of appellate courts to correct errors that undermine the fair administration of justice. The petition should be granted.

CONCLUSION

The petition for rehearing or rehearing *en banc* should be granted.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 31(a)(7)(B) and 10th Cir. R. 29.1 because it contains 2,999 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Times New Roman.

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CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that with respect to the foregoing:

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/s/ Sophie P. Breene
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on July 3, 2014 the foregoing document was filed electronically using the court's CM/ECF system which will send notification of such filing to the following:

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