No. 16-1026

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

KRISTIN PUNT,

Plaintiff-Appellant,

v.

KELLY SERVICES, and GE CONTROLS SOLUTIONS,

Defendants-Appellees.

ON APPEAL FROM THE ORDERS ENTERED JULY 9, 2015, JANUARY 6, 2016, AND THE FINAL JUDGMENT WHICH WAS ENTERED ON JANUARY 6, 2016, BY THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO, CIVIL ACTION NO. 14-CV-02560-CMA-MJW

BRIEF OF THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION AND THE NATIONAL DISABILITY RIGHTS NETWORK AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFF-APPELLANT KRISTIN PUNT AND REVERSAL

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Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *Amici* the National Employment Lawyers Association (NELA) and the National Disability Rights Network (NDRN) make the following disclosure:

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IDENTITY ANDINTEREST OF AMICI CURIAE[1]

Founded in 1985, the **National Employment Lawyers Association** (NELA) is a national non-profit membership organization which advances employee rights and serves lawyers who advocate for equality and justice in the American workplace. NELA, with its 69 state and local affiliates, has more than 4,000 members and is the country's largest professional organization of lawyers who represent individuals in employment cases in every circuit, affording a unique perspective on how the principles announced by the courts in employment cases impact American workers in their everyday lives.

The **National Disability Rights Network** ("NDRN"), is the non-profit membership association of Protection and Advocacy ("P&A") agencies that are located in all 50 states, the District of Columbia, Puerto Rico, and the United States Territories. There is also a federally mandated Native American P&A System. The P&A System is the nation's largest provider of legally-based advocacy services for persons with disabilities across a wide spectrum of settings. NDRN supports its members through the provision of training and technical assistance, legal support, and legislative advocacy, all aimed at creating a society in which people with

[1]Pursuant to Fed. R. App. P. 29(c)(5), *Amici* submit that no party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person—other than *amici curiae*, its members, or its counsel—contributed money that was intended to support preparing or submitting the brief.

disabilities are afforded the opportunity to secure and maintain competitive, integrated employment.

Amici believe that the "duration of impairment" standard applied by the district court in this case misconstrues governing Tenth Circuit case law in a manner that undermines the ADA's protections for people with cancer and other chronic illnesses. *Amici* were instrumental in negotiating the language of the ADA Amendments Act of 2008 (ADAAA), which among other things clarified that people with cancer and other chronic illnesses were "individuals with disabilities" under the ADA and entitled to its protections. Since then, *amici* have supported and/or represented numerous individuals with cancer and other chronic illnesses in an effort to keep them in the workforce as Congress intended. Many of those clients, like the Plaintiff here, require periods of medical leave as a reasonable accommodation.

SUMMARY OF ARGUMENT

The number of people diagnosed with cancer continues to increase, but survival rates are rising dramatically. As a result, the American workforce contains millions of cancer survivors and those living with cancer.*See generally*, Ann C. Hodges, *Working with Cancer: How the Law Can Help Survivors Maintain Employment*, 90 Wash. L. Rev. 1039, 1043–44 (2015). Most of them will need medical leave at some point. The availability of such leave will determine whether

they remain employed, or whether they will be forced onto public assistance. *Id*. at 1061–62.

But as the U.S. Equal Employment Opportunity Commission (EEOC) has noted, even when the prognosis is excellent, employees with cancer "often . . . face discrimination because of . . . misperceptions about their ability to work during and after cancer treatment."EEOC, *Questions & Answers about Cancer in the Workplace and the Americans with Disabilities Act (ADA)*(hereinafter *"Cancer in the Workplace"*),*available at* http://www.eeoc.gov/laws/types/cancer.cfm (last visited Apr. 3, 2016). As a practical matter, this case will determine whether employees with a cancer diagnosis will be entitled to workplace accommodation in this circuit.

Immediately after being diagnosed with breast cancer, Plaintiff Kristen Punt disclosed her condition, and very soon thereafter, she requested a reasonable accommodation. By email on December 5, 2011, she informed her employer what she knew, that: 1) it looked like she had an "early stage" breast cancer; 2) she could not come to work "tomorrow" and the rest of the week; and 3) she could return to work thereafter but would need some time off for five radiation treatments. Later that day, without requesting any further information, and without seeking any medical information or documentation, her employer fired her.

The district court acknowledged that Ms. Punt's cancer constituted a "disability" under the ADAAA, *Punt v. Kelly Servs*., 2016 WL 67654, at *7–8 (D. Colo. Jan. 6, 2016), but it entered summary judgment against her by construing her request for a week off and "5 times of radiation" as a request for "indefinite" leave. According to the court below, the request was unreasonable as a matter of law because she did not state her cancer's duration, relying on *Cisneros v. Wilson*, 226 F.3d 1113 (10th Cir. 2000).

The district court misunderstood Tenth Circuit precedent. It focused on "duration of impairment" language in *Cisneros* without appreciating its context. Because of the nature of the plaintiff's condition in *Cisneros*, her leave was co-extensive with the duration of her impairment. More importantly, her own doctors had said that her need for leave was indefinite. In addition, *Cisneros* involved an extension of leave, that is, the leave she had requested and been granted in the past did not allow her to recover enough to return. Moreover, the employer in *Cisneros* placed her on leave for a time while it considered the letters she had submitted from two different doctors. Thus, there was no suggestion that the employer failed to engage in the interactive process. Nor did the employer indulge in stereotypical reaction; rather, it simply accepted the opinions of the plaintiff's own medical experts.

None of the above facts are present in this case. Not only did the district court err, its holding will significantly undermine the ADA's goals and effectiveness for people with cancer.

The impact of the district court's error is not just on individuals with cancer, however. It will bar anyone with a chronic illness or permanent condition from seeking medical leave for treatment, just because the duration of their condition is long, and even if the need for leave is both short and finite. Moreover, approving the Defendant's 'fire first and ask questions later' approach insulates employer's from any obligation to engage in the interactive process. The opinion below sends exactly the wrong message to employers, inviting disability discrimination based on the same myths, fears, and stereotypes that the ADA was intended to prevent.

ARGUMENT

I. THE DISTRICT COURT'S MISAPPLICATION OF THE *CISNEROS* "DURATION OF IMPAIRMENT" ANALYSIS VIOLATES THE ADA

A. *Cisneros* Should Be Understood As Flowing From the Unique Factual Context In Which It Arose

In *Cisneros*, a state worker had a "mental breakdown," and she took a series of medical leaves over the course of more than seven months. In addition, she sought other paid and unpaid leave, but would not comply with the employer's policies for requesting them. She submitted medical records from two different doctors, and

both described her need for leave as indefinite. 226 F.3d at 1130.[2] The only suggestion that the plaintiff might be able to return was her own unsupported belief that another two months of leave would have allowed her to return if she were not harassed. *Id*. This Court held that this was not sufficient to contradict the opinion of the plaintiff's experts, and because she failed to prove the "expected duration of her illness," she also failed to establish the "reasonableness" of her leave request. *Id*. at 1130–31.

Cisneros relied on previous cases in this Circuit rejecting indefinite periods of medical leave. For example, in *Hudson v. MCI Telecommunications Corp.*, 87 F.3d 1167 (10th Cir. 1996), the employee submitted a series of worker's compensation forms, each one asking for a two-week leave, but none of them suggesting when the employee could return to her job. In addition, this Court found that the medical records "through the date of her termination underscore[d] the uncertainty of her prognosis." *Id*. at 1169. Likewise, in *Taylor v. Pepsi Cola Co.*, 196 F.3d 1106 (10th Cir. 1999), the plaintiff had already taken a year of medical leave, requested additional leave of unknown duration, and advised the employer that he would

[2] As this Court stated in *Cisneros*, "[t]he first letter, from Dr. Ray, stated that Plaintiff "remains unable to return to work. It is uncertain when she may be capable of returning to work." The second letter, from Dr. Maestas, states that "[m]edically, [Plaintiff] is to be considered unable to maintain any type of job duties and should be considered temporarily disabled. The duration of the above illnesses are unknown . . ."

*never*be able to return to his former position, and could not say when and under what conditions he could return to work at all.*Id*. at 1110.

But *Cisneros* also recognized that a reasonable period of medical leave *can* be a reasonable accommodation, citing *Rascon v. U.S. West Communications, Inc*., 143 F.3d 1324 (10th Cir. 1998). In *Rascon* this Court upheld a jury verdict for the plaintiff because the doctor testified to a good prognosis for recovery after a four-month leave. *Rascon* distinguished *Hudson* because the latter had no evidence "of the expected duration of her impairment, a course of treatment, or a prognosis." *Id*. at 1334. In *Rascon*, by contrast, the employer was aware of the approximate duration of the plaintiff's treatment, why he was undergoing the treatment, and the positive prognosis that the treatment would allow him to return to work at its conclusion. *Id*. at 1334.

The court below focused on the language in *Cisneros* that the employee must "provide an expected duration of the impairment (not the duration of the leave request)." That language in *Cisneros* (and similar language in *Hudson)*only makes sense in its own, narrowcontext: a series of purportedly finite leave requests with no corresponding evidence that the employee is getting any closer to returning to work, and medical evidence giving no prognosis, thereby suggesting that the need for leave in actuality is indefinite. In such cases, the plaintiff cannot avoid a finding of indefiniteness by simply asking for another period of "finite" leave. Rather, the

employer can go behind the latest leave request to learn something about the duration of the underlying condition and its likely impact on the workplace.

Unfortunately, some district courts, including the court below, have divorced the *Cisneros* language from its context and from the principles supporting the ADA. They have held, in effect, that leave is *never* reasonable if the duration of the underlying medical condition is uncertain. But that forecloses leave in the case of every chronic or permanent condition—e.g., cancer, HIV, MS, lupus, or rheumatoid arthritis. The fact is that there are many situations in which the condition or diagnosis is open-ended, but the prognosis for a timely return is good. That distinction is key.

It is important to note that this Court has not insisted on information about the duration of the underlying impairment in the diagnostic stage of an illness, and before any interactive process whatsoever has taken place. Likewise, none of the Tenth Circuit cases upon which *Cisneros* was based relied on a diagnosis alone, or speculation about a diagnosis, to construe the definiteness of the leave request. Rather, in each case in which medical leave was deemed indefinite, and therefore unreasonable, the plaintiff made more than one request for leave over an extended duration, and the employer engaged in some form of fact-finding process with the employee and his or her doctors to determine how long the employee would realistically be unable to work.

The district court failed to appreciate that the *Cisneros*"duration of impairment" analysis was bound up inextricably with the peculiar circumstances of that case. This Court could not have intended that someone like Ms. Punt, in the diagnostic stage of her illness, would be deprived of her job and the ADA's protection simply by virtue of her cancer diagnosis and her employer's uninformed speculation as to the prospect of future treatment. This is an implausible, untenable reading of *Cisneros*, and is inconsistent with the statute and the great weight of case law.

This case presents an opportunity for this Court to clarify its precedent. Employers still must request medical information before assuming that a requested period of leave will not be adequate. In many cases, the initial request for leave may be reasonable on its face, and not require further proof. If there is reason to doubt it, the question the employer should be seeking to answer in most cases will be the prognosis for a successful return to work, and by when, regardless of whether the diagnosis is permanent or long term, based on the best available medical evidence.

B. The District Court's Interpretation of the "Duration of Impairment" Rule Underminesthe Statutory Text and the Underlying Policies of the ADA

The district court's application of the "duration of impairment" rule turns the statutory structure of the ADA on its head, and virtually guarantees that people with cancer and other chronic illnesses will be deprived of ADA protection based on their

diagnosis alone. When first given a diagnosis of cancer, employees cannot know the expected duration of their condition. Yet under the analysis by the court below, such individuals can be terminated from their jobs based on their employer's uninformed speculation as to what the course of the disease might be, and without any obligation to seek input from a treating professional or other medical expert. This analysis encourages employers to rush and fire the employee before the extent of the illness and the need for treatment can be medically determined, and before a meaningful interactive process can take place.

This clearly is inconsistent with the ADA's requirement to provide reasonable accommodations. Congress passed the ADA in 1990 "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1). It intended the scope of the ADA's protection to be broadly construed, and clearly anticipated that people with cancer and other chronic impairments would be protected.

Congress recognized that people with disabilities may sometimes need different treatment in order to receive equal employment opportunity. *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 397 (2002).[3] Accordingly, the ADA defines

[3]*See also* Hickox & Guzman, *Leave as an Accommodation: When Is Enough, Enough?*,62 Clev. St. L. Rev. 437, 442 (2014); *and* Mark C. Weber, *Unreasonable Accommodation and Due Hardship*, 62 Fla. L. Rev. 1119, 1121–22 (2010) (describing the accommodation requirement as the "defining characteristic" of modern disability discrimination statutes, and the main thing that

the term "discrimination" to include, among other things, "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability." 42 U.S.C. § 12112(b)(5)(A). It also defines reasonable accommodation to include, *inter alia*, part-time or modified work schedules. 42 U.S.C. § 12111(9)(B). Similarly, it prohibits employers from denying job opportunities because the individual needs an accommodation. 42 U.S.C. § 12112(b)(5)(B).

The ADA also creates a defense for the employer if it can establish that providing the accommodation would create an undue hardship, 42 U.S.C. §12112 (b)(5)(A), meaning "an action requiring significant difficulty or expense." 42 U.S.C. §12111(10)(A). The burden is on the employer to prove that a requested accommodation would constitute an undue burden under the particular circumstances presented, including the extent and cost of the accommodation, as well as the nature, size, and operational needs of the business. 42 U.S.C. §12111(10)(B); *see also Barnett*, 535 U.S. at 402. Accordingly, the same request for accommodation might be reasonable in some cases but not others.*Garcia-Ayala v. LederleParenterals, Inc*., 212 F. 3d 638, 649 (1st Cir. 2000).This Court has stated that if the employer has "failed to carry its burden of demonstrating that any of the

sets them apart from laws that forbid discrimination on the basis of other immutable characteristics).

alternative accommodations would have caused it undue hardship . . . we conclude that leave . . . was a reasonable accommodation." *Rascon*, 143 F.3d at 1335.

The key to the ADA's accommodation provision is the interactive process. "The obligation to engage in an interactive process is inherent in the statutory obligation to offer a reasonable accommodation to an otherwise qualified disabled employee. The interactive process is typically an essential component of the process by which a reasonable accommodation can be determined." *Smith v. Midland Brake, Inc*., 180 F.3d 1154, 1172 (10th Cir. 1999) (en banc). It is designed to "identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations." 29 C.F.R. § 1630.2(o)(3). This process is triggered when the employee places the employer on notice that he or she needs some assistance in the workplace due to a disability, *Midland Brake*,180 F.3d at 1171–72,[4] and it obligates the employer to engage with the employee in an "interactive dialogue" involving "good-faith communications," in order to identify reasonable accommodations.*Id*. at 1172–73.An employer who does not engage in the interactive process in good faith will be liable if a court concludes that it could have provided a reasonable accommodation but failed to do so. *Id.* at 1174.

As the courtbelow acknowledged, medical leave is a well- recognized form of

[4] This is not a heavy burden, and the employee need not use any "magic words." *Midland Brake*, 80 F.3d at 1172 (and cases cited).

reasonable accommodation. *Sanchez v. Vilsack*, 695 F.3d 1174, 1182 (10th Cir. 2012); *Rascon*, 143 F.3d at 1333–34 ("An allowance of time for medical care or treatment may constitute a reasonable accommodation.");*see also Barnett*, 535 U.S. at 397–98 (observing that the intended objectives of the reasonable-accommodation provision includes "breaks from work, perhaps to permit medical visits"). As *Cisneros* itself recognized, "such a request 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." 226 F.3d at 1129 (*citing* 29 C.F.R. § 1630.2(o)). Thus, the need for a period of leave does not, by itself, render the employee unqualified.[5]

Although the ADA does not require employers to keep an employee on medical leave indefinitely, there is a difference between a request for a leave of an approximate duration and one for indefinite leave. *Graves v. Finch Pruyn& Co., Inc.*, 457 F.3d 181, 185–86 (2d Cir. 2006); *Haschmann v. Time Warner Entertainment Co., LP*, 151 F. 3d 591, 601 (7th Cir. 1998). The ADA does not define how long or short a leave request must be to qualify as "reasonable," precisely because the inquiry is individualized by definition, and depends on the circumstances of each case at the time the request is made. Likewise, the question of

[5]*See also Criado v. IBM Corp.*, 145 F. 3d 437, 443 (1st Cir. 1998) (one- year leave was reasonable as it fell within employer's leave policy and would allow time to design effective treatment program); *Kimbro v. Atlantic Richfield Co.*, 889 F.2d 869, 879 (9th Cir. 1989) (leave was justified to allow doctor to formulate an effective treatment for migraines).

undue hardship requires a case-specific analysis. *Barnett*, 535 U.S. at 402 ("Once the plaintiff has made this showing [of facial reasonableness], the defendant/employer then must show special (typically case–specific) circumstances that demonstrate undue hardship in the particular circumstances.")

Like any other request for accommodation, a request for medical leave triggers the interactive process, which will involve a variety of factors including, e.g., the nature of the illness, the amount of time requested, whether the employer has already granted leave, the employer's leave policies, how many employees it has, and any impact the leave would have on its operations. *SeeRascon,* 143 F.3d at 1334.

Finally, the question of qualification should not be based on speculation that the employee may require accommodation in the future or be unable to work at all.[6]Were it otherwise, the fact that someone is diagnosed with a progressive illness that might someday require additional accommodation would allow the company to deprive the individual of a job he or she is perfectly capable of performing at the present time, with or without accommodation, based on speculation. Allowing uninformed concerns to legitimize discrimination against specific classes of people based on their diagnoses would vitiate the effectiveness of the ADA, and would

[6]*See* H.R. REP. No. 101-485(II), 1990 WL 125563 ("The term 'qualified' refers to whether the individual is qualified at the time of the job action in question; the possibility of future incapacity does not by itself render the person not qualified.")

undermine Congress's intent that stereotypes and generalizations not deprive people with disabilities of equal employment opportunities. *Sch. Bd. of Nassau Cty., Fla. v. Arline*, 480 U.S. 273, 287 (1987) (To determine whether an employee is 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 from deprivations based on prejudice, stereotypes, or unfounded fear . . ."). As the U.S. Supreme Court has stated further under the ADA's predecessor statute, "mere possession of a handicap is not a permissible ground for assuming an inability to function in a particular context." *Southeastern Cmty.Coll. v. Davis*, 442 U.S. 397, 405 (1979).

C. The ADAAA Was Enacted In Part to Restore the Full Protections of the Law for Employees Diagnosed With Cancer

The impact of the district court's analysis on individuals with cancer is clear. Many employees are diagnosed with cancer and most of them will need leave for treatment, yet a great number are still able to work. Regardless, if at the time of initial diagnosis the employee does not know the exact duration of the cancer, he or she can be fired. Not only is such a rule inconsistent with the ADA's accommodation analysis (as shown above), it is in stark opposition to clear Congressional intent to protect workers with cancer.

To Congressional consternation, the expansive promise of the ADA was for

many years significantly compromised, or denied altogether, for thousands of individuals subjected to inappropriately restrictive judicial interpretations of what constituted a "disability" under the Act. People with cancer fared particularly badly, even when discrimination was clear, because the courts found their conditions were not ADA disabilities.[7]

Congress amended the ADA in 2008 "to carry out the ADA's objectives . . . by reinstating a broad scope of protection to be available under the ADA." ADA Amendments Act of 2008, Pub. L. 110-325 § 2(b)(1), 122 Stat. 3553, 3554 (2008). One purpose of the ADAAA was to convey "that the primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations,"*Id*. at § 2(b)(5). It also re-emphasized that as a remedial statute, the definition of disability was to be broadly construed "to the maximum extent permitted by its terms." 42 U.S.C. §12102(4)(A); *see also*

[7]*See, e.g., Garrett v. Univ. of Alabama at Birmingham Bd. of Trustees*, 507 F.3d 1306, 1315 (11th Cir. 2007) (nurse who returned to work following cancer treatment failed to show a disability); *Burnette v. LFW, Inc*., 472 F.3d 471, 483–84 (7th Cir. 2006) (plaintiff fired during process of prostate-cancer diagnosis not protected because he was not yet substantially limited in working); *Ellison v. Software Spectrum*, 85 F.3d 187 (5th Cir. 1996) (plaintiff's breast cancer, which required radiation treatment, six weeks of modified work schedule, and four months of significant side effects, was not a disability); *Alderdice v. Am. Health Holding, Inc*., 118 F. Supp. 2d 856, 863–65 (S.D. Ohio 2000), *aff'd*, 37 F. App'x 185 (6th Cir. 2002); *Hirsch for Estate of Hirsch v. Nat'l Mall & Serv., Inc*., 989 F. Supp. 977, 981–82 (N.D. Ill. 1997) (even life-threatening or fatal diseases are not necessarily disabilities); *Madjlessi v. Macy's West, Inc*., 993 F. Supp. 736, 738 (N.D. Cal. 1997) (despite direct evidence that plaintiff lost her job because employer "did not want someone with breast cancer in management," the court concluded that she did not have a disability, even though she worked during ten months of cancer treatment). *See alsoWorking with Cancer*, *supra*, at n. 176 (collecting cases).

Statement of Sen. Hatch, 154 Cong. Rec. S8342, S8354 (Sept. 11, 2008) ("This reflects what courts have held about civil rights statutes in general and what courts held about the ADA in particular before the Toyota decision; namely, that they should be broadly construed to effect their remedial purpose.")

> Cancer, of course, was front and center in this Congressional effort:
>
> [W]e could not have fathomed that people with . . . cancer . . . would have their ADA claims denied because they would be considered too functional to meet the definition of disabled.

H.R. Rep. 110-730, Pt. II, 110th Cong., 2d Sess., at p. 10 (June 23, 2008) (quoting Majority Leader Hoyer).Congress intended that the ADA apply to people with cancer. And cancer treatment is a growing success story; many people with a cancer diagnosis can (and do) work, as a result of cures, remission, control, or simply the slow-growing nature of certain cancers. Yet the lower court's misunderstanding of *Cisneros* resurrects barriers to ADA protection that once more Congress "could not have fathomed." This Court should correct that misunderstanding.

II. THE "DEFINITE DURATION" RULE SHOULD BE CLARIFIED OR ELIMINATED

The district court construed the "duration of impairment" standard to allow the employers here to terminate Ms. Punt based on nothing more than her diagnosis, and an assumption that she would need future leave. This elevated the court-created "duration of impairment" standard in *Cisneros* above the clear statutory requirement

that reasonable accommodation, including medical leave, be provided unless it creates an undue hardship. 42 U.S.C. §12112 (b)(5)(A).

The ADA cannot credibly be interpreted to allow self-imposed ignorance to replace an employer's statutory duty to both engage in the interactive process and demonstrate that the leave request would constitute an undue burden. This type of uninformed, knee-jerk employment action divorced from an individualized factual inquiry leads to the very type of blanket exclusion neither the text of the ADA or its underlying policies permit. *See Arline,* 480 U.S. at 284 (Congress sought "to ensure that handicapped individuals are not denied jobs or other benefits because of the prejudiced attitudes or the ignorance of others.")

There is no statutory basis for treating a request for medical leave any differently from any other accommodation request, and certainly no authority for doing so based on diagnostic labels and uneducated assumptions.[8] Such a construction would preclude people with cancer or other chronic conditions from ever being eligible for medical leave under the ADA. *See Cehrs v. Northeast Ohio Alzheimer's Research Ctr.*,155 F.3d 775, 782 (6th Cir. 1998) ("The presumption that uninterrupted attendance is an essential job requirement improperly dispenses with

[8] As the First Circuit Court of Appeals discussed in *Garcia-Ayala*, formulaic and unvarying requirements for definiteness do not meet the requirement of individualized inquiry the ADA demands. This is problematic enough by itself, but it is compounded when the employee makes a reasonable request for medical leave and the employer fails to show that granting it would create any form of hardship. 212 F. 3d at 654–55.

the burden-shifting analysis set forth in *Monette*. Under such a presumption, the employer never bears the burden of proving that the accommodation proposed by an employee is unreasonable and imposes an undue burden upon it.").[9]This reading of *Cisneros* is inconsistent with the ADA and it amendments. It is also undercut by post-*Cisneros* Supreme Court precedent.

Two years after *Cisneros*, the Supreme Court decided *U.S. Airways v. Barnett*. The *Barnett* majority began by confirming the reason for, and breadth of, the ADA's accommodation obligation.535 U.S. at 397–98. But it also reflected the Court's resistance to *per se* accommodation requirements in a variety of ways.

First, *Barnett* rejected the argument that accommodations could be denied simply because they are inconsistent with neutral employer policies.*Id*. at 397 ("While linguistically logical, this argument fails to recognize what the Act specifies, namely, that preferences will sometimes prove necessary to achieve the Act's basic equal opportunity goal."). Second, the majority confirmed that the employee's only obligation is to point to a type or method of accommodation that is *facially reasonable*, i.e., one that appears reasonable in the run of cases.*Id.* at

[9]*See Leave as an Accommodation* at 476 (describing how allowing employers to discharge with impunity when the need for leave cannot be predicted with "total certainty" gives them a strong incentive to do so as soon as possible, especially during the diagnostic period before employees are able to obtain the medical information they need to predict when they can return to work. This also averts the statutory obligation of the courts to consider whether a medical leave would constitute an undue hardship on the employer).

401–02;*see also Id*. at 410 (O'Connor, J., concurring) ("In other words, the plaintiff must show that the method of accommodation the employee seeks is reasonable in the run of cases."). Third, *Barnett* recognized that leave for medical treatment is a type of reasonable accommodation.*Id*. at 398.Fourth, it held that even if an accommodation might be contrary to a policy that is otherwise favored because it is non-discriminatory (in *Barnett*, a seniority policy applicable to transfers), there might still be special fact-specific circumstances that require such a policy to be flexed.*Id*. at 406.

Barnett also provides further support for the importance of the interactive process. *Id*. at 410 (Stevens, J., concurring) ("The Court of Appeals also correctly held that there was a triable issue of fact precluding the entry of summary judgment with respect to whether petitioner violated the statute by failing to engage in an interactive process concerning respondent's three proposed accommodations. This latter holding is untouched by the Court's opinion today.") (citations omitted).

To the extent that *Cisneros* could have been read as suggesting what the district court below concluded—that an employee can be denied medical leave by virtue of a cancer diagnosis, without an interactive process and without an individualized inquiry, based solely on the employer's speculation as to an employee's potential need for future accommodation—it should be clarified,

modified, or overruled.[10] Such a construction is inconsistent with the ADA's statutory framework, and as shown above, it directly undermines the ADAAA, which was enacted in part to ensure that people with cancer and other chronic illnesses would be protected from employment discrimination based on those conditions.

This Court should provide guidance to district courts presented with requests for medical leave under the accommodation provisions of the ADA in accordance with the following principles:

*First,*the ADA's protection is not limited to persons with disabilities of finite duration. The relevant inquiry is whether the person is objectively qualified at the time they make their accommodation requestand whether that request is reasonable.

*Second,*an employee's request for medical leave, as opposed to some other form of accommodation, does not allow employers to bypass the interactive process. *Barnett* precludes such aninterpretation,and even before *Barnett,* circuit courts rejected such a notion, because it would exclude preemptively from the ADA's

[10] The need for clarification is particularly evident given non-precedential post-*Cisneros* decisions characterizing *Cisneros* as more broadly concluding that a diagnosis of an illness without a clear end-point is automatically disqualifying and precludes relief. *E.g.,Valdez v. McGill*, 462 Fed. Appx.814, 818 (10th Cir. 2012); *Murphy v. Samson Resources, Inc*., No. 12-5084 (10th Cir. 2013). A course correction is needed to avoid further departures from the ADA's statutory requirements.

protection any employee with a chronic condition who requires some form of medical leave.[11]

Third, the ADA specifically precludes denying job opportunities because the individual needs an accommodation. 42 U.S.C. §12112(b)(5)(B). Just as employers cannot discriminate on the basis of perceived disabilities, they cannot discriminate on the basis of perceived need for future accommodation. *Cain v. Hyatt Legal Servs.*, 734 F. Supp. 671, 682–83 (E.D. Pa. 1990). This is particularly true during the diagnostic phase of an illness.[12]Under the district court's analysis, by contrast, employees can be terminated before they know how long they will be sick, much less how much time they will need for recovery, solely based on their diagnosis and the employer's unfounded speculation about how the illness will impact their productivity, reliability, and longevity in the job over time. This is exactly what happened in this case and it is the type of stereotype-driven discrimination the ADA was intended to prevent. *Arline*, 480 U.S. at 285–86. "The statute seeks to diminish or eliminate the stereotypical thought processes, the thoughtless actions, and the hostile reactions that far too often bar those with disabilities from participating fully

[11]*See, e.g., Haschmann v. Time Warner Entertainment Co., LP*, 151 F. 3d 591 (7th Cir. 1998) (upholding jury verdict for plaintiff because the employer's only response to plaintiff's request for a short medical leave was a termination notice).

[12]*See Shepherd v. Honda of America Mfg., Inc.*, 160 F. Supp. 2d 860, 868–69 (S.D. Ohio 2001) (sufficient evidence to support a jury verdict in favor of the plaintiff where the employer terminated the plaintiff the day she made her leave request, before she could have her condition assessed).

in the . . . workplace." *Barnett,* 535 U.S. at 401. Moreover, it contravenes what Congress intended to accomplish by way of the ADA amendments, i.e., to rectify the exclusion of employees with cancer from the Act's protection.

Fourth, the interactive process is not optional; it is the bedrock of the ADA's structure and central to its mission. It provides the basis for a reasoned and informed decision as to whether the accommodation can be provided without undue hardship. Thus, the ADA does not permit an employer to bypass the interactive process, fire the employee before she can obtain medical information as to her condition or the extent of her treatment, and then claim that the leave request was "indefinite" and the "duration of impairment" unclear. The burden of uncertainty should not fall on the employee, especially, as in this case, when the employer makes no effort to ascertain what it wants or needs to know.

Fifth,the EEOChas affirmed that employers are not excused from the interactive process when an employee with cancer makes a leave request.[13] This is particularly true during the diagnostic phase of his or her illness, even without an exact return to work date. "Although many types of cancer can be successfully treated—and often cured—the treatment and severity of side effects often are

[13]EEOC Enforcement Guidance: *Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act*915.002, "Other Reasonable Accommodation Issues," Question No. 39 Example A (employer must grant two days of leave per week for six weeks, to allow for chemotherapy and the recovery from side effects), *available at* http://www.eeoc.gov/policy/docs/accommodation.html (last visited Apr. 3, 2016).

unpredictable and do not permit exact timetables. An employee requesting leave because of cancer, therefore, may be able to provide only an approximate date of return." *Cancer in the Workplace,* Question No. 15, *available at* http://www.eeoc.gov/laws/types/cancer.cfm(last visited Apr. 3, 2016).The EEOC goes on to explain that the interactive process in such a situation is both anticipated and expected: "Where a return date must be postponed because of unforeseen medical developments, or an extension of medical leave becomes necessary, the employer and employee should stay in touch and re-assess the reasonableness of the leave request as further information becomes available."[14]

Sixth,the ADA has never allowed employers to discriminate against an employee on the basis of a diagnosis without an individualized inquiry. *Arline,* 480 U.S. at 287.Based on *Arline,* the First Circuit in *Garcia-Ayala* reversed summary judgment for the employer, emphasizing that "[w]hether [a] leave request is reasonable turns on the facts of the case." There, the plaintiff had requested a medical leave five months in excess of the employer's established policy and her

[14]*See also* EEOC, *The Americans With Disabilities Act: Applying Performance And Conduct Standards To Employees With Disabilities*, at Question 21 ("Indefinite leave is different from leave requests that give an approximate date of return (e.g., a doctor's note says that the employee is expected to return around the beginning of March) or give a time period for return (e.g., a doctor's note says that the employee will return some time between March 1 and April 1). If the approximate date of return or the estimated time period turns out to be incorrect, the employer may seek medical documentation to determine whether it can continue providing leave without undue hardship or whether the request for leave has become one for leave of indefinite duration."), *available at* http://www.eeoc.gov/facts/performance-conduct.html (last visited Apr. 3, 2016).

doctor could not give absolute assurances that she would be able to return to work on the specified date. The Court admonished that "applying *per se* rules" and not giving "individual assessment of the facts" violates the ADA. It rejected the district court's conclusion that the plaintiff's leave request was indefinite, and entered summary judgment for the plaintiff. The Supreme Court in *Barnett* cited *Garcia-Ayala* with approval as an example of the individualized inquiry the ADA requires. 535 U.S. at 398.

This Court's decision in *Rascon* provides a similar analysis. Moreover, the individualized inquiry is essential "to achieve [the] goal of protecting handicapped individuals from deprivations based on prejudice, stereotypes, or unfounded fear."*Cehrs,* 155 F.3d at 782. The duration of impairment is just one of many factors to be considered in the overall analysis of reasonableness and undue hardship.

CONCLUSION

The ADA is a remedial statute and it is intended to be broadly construed in favor of employees. To facilitate the law's enforcement in a wide variety of employment contexts, Congress specifically left undefined the contours of what constitutes a reasonable accommodation to allow for wide flexibility depending on the specific circumstances. At the same time, it created a demanding standard for proving undue hardship, and placed the burden to prove such hardship on the

employer. The district court's analysis ignores both the statutory text and the underlying principles of the ADA. The district court's decision, therefore, must be reversed.

Respectfully submitted,

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DATE: April 5, 2016

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(d) and 32(a)(7)(B) because the brief contains 6,367words, excluding the portions of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements on Fed. R. App. P. 32(a)(5) and type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Century Schoolbook font.

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CERTIFICATE OF SERVICE AND FILING

I hereby certify that on April 5, 2016, the foregoing BRIEF OF *AMICI CURIAE* IN SUPPORT OF PLAINTIFF-APPELLANT KRISTIN PUNT AND REVERSAL was filed electronically with the Clerk of the Court for the United States Court of Appeals of the Tenth Circuit and on counsel using the CM/ECF system.

I further certify that on April 5, 2016, I caused the required copies of the Motion to be filed with the Clerk of the Court, via CM/ECF, and served upon counsel for the Appellant and Appellees, at the electronic addresses below.

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