

1. From your perspective, how does the 7th Circuit rulings (e.g., Severson) play into how much leave is reasonable?

EEOC's current position on evaluating leave as a reasonable accommodation continues to be set forth in the section on leave in the EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship, <https://www.eeoc.gov/policy/docs/accommodation.html#leave>, and in the technical assistance publication Employer-Provided Leave and the ADA, <https://www.eeoc.gov/eeoc/publications/ada-leave.cfm>, which provides a range of specific examples and explains that determination of whether providing leave would result in undue hardship may involve consideration of the following:

- the amount and/or length of leave required (for example, four months, three days per week, six days per month, four to six days of intermittent leave for one month, four to six days of intermittent leave each month for six months, leave required indefinitely, or leave without a specified or estimated end date);
- the frequency of the leave (for example, three days per week, three days per month, every Thursday);
- whether there is any flexibility with respect to the days on which leave is taken (for example, whether treatment normally provided on a Monday could be provided on some other day during the week);
- whether the need for intermittent leave on specific dates is predictable or unpredictable (for example, the specific day that an employee needs leave because of a seizure is unpredictable; intermittent leave to obtain chemotherapy is predictable);
- the impact of the employee's absence on coworkers and on whether specific job duties are being performed in an appropriate and timely manner (for example, only one coworker has the skills of the employee on leave and the job duties involved must be performed under a contract with a specific completion date, making it impossible for the employer to provide the amount of leave requested without over-burdening the coworker, failing to fulfill the contract, or incurring significant overtime costs); and
- the impact on the employer's operations and its ability to serve customers/clients appropriately and in a timely manner, which takes into account, for example, the size of the employer.

The case you asked about, Severson v. Heartland Woodcraft, Inc., 872 F.3d 476 (7th Cir. 2017), involved a situation in which an employer terminated an employee who asked for 2-3 months additional leave under ADA to recuperate due to surgery on the last day of his leave. The 7th Circuit ruled, consistent with its earlier precedent, that a multi-month leave of absence is never a "reasonable" accommodation under the ADA, rejecting EEOC's view advocated in a friend-of-the-court brief, <https://www.eeoc.gov/eeoc/litigation/briefs/severson.html>. As indicated by the case examples of Kessinger Hunter and Coca-Cola Refreshments in the presentation, the EEOC has continued to challenge employer "no fault" leave policies this year. This includes in the 7th Circuit, where cases have arisen involving employees who needed

even only days or weeks or leave as an ADA accommodation, which Severson held the ADA could require. Examples:

EEOC v. Stanley Black & Decker, Inc., Civil Action No. 1:18-cv-02525 (D. Md. consent decree entered March 2019), <https://www.eeoc.gov/eeoc/newsroom/release/03-05-19a.cfm>; Pre-litigation EEOC Settlement of Charge with Metropolitan Jewish Health System (Dec. 2018), <https://www.eeoc.gov/eeoc/newsroom/release/12-21-18c.cfm>; EEOC v. Senior Care Properties, Inc. d/b/a Harborview Rehabilitation and Healthcare, Civil Action No 4:17-cv-00136-FL (E.D.N.C. consent decree entered Dec. 2018), <https://www.eeoc.gov/eeoc/newsroom/release/12-17-18.cfm>; EEOC v. Family Healthcare Network, Case No. 1:18-cv-00893-DAD-BAM (E.D. Cal. consent decree entered Dec. 2018), <https://www.eeoc.gov/eeoc/newsroom/release/12-06-18.cfm>; EEOC v. Whole Foods Market Group, Inc., No. 5:17-cv-00494 (E.D.N.C. consent decree entered Nov. 2018), <https://www.eeoc.gov/eeoc/newsroom/release/11-5-18.cfm>; EEOC v. Triton, Inc., Case No.: 3:17-cv-02004-BAS-KSC (S.D. Cal. consent decree entered Oct. 2018), <https://www.eeoc.gov/eeoc/newsroom/release/10-10-18.cfm>; EEOC v. Mueller Industries, Inc., Case No. 2:18-cv-05729-FW-GJS (S.D. Cal. consent decree entered July 2018), <https://www.eeoc.gov/eeoc/newsroom/release/7-17-18a.cfm>; EEOC v. Greektown Casino LLC, Case No. 2:16-cv-13540 (E.D. Mich. consent decree entered Jan. 2018), <https://www.eeoc.gov/eeoc/newsroom/release/1-24-18a.cfm>; EEOC v. Regional International Corp., Civil Action No. 17-cv-06505 (W.D.N.Y. consent decree entered June 2018), <https://www.eeoc.gov/eeoc/newsroom/release/6-7-18a.cfm>; EEOC v. Heritage Home Group, LLC, Civil Action No. 5:18-CV-00018 (W.D.N.C. consent decree entered May 2018), <https://www.eeoc.gov/eeoc/newsroom/release/5-22-18.cfm>; EEOC v. Macy's, Inc/Macy's Retail Holdings, Inc.; Civil Action No. 17-cv-05959 (N.D. Ill. consent decree entered April 2018), <https://www.eeoc.gov/eeoc/newsroom/release/4-18-18a.cfm>; EEOC v. Pioneer Health Services, Inc., Civil Action No. 1:17-cv-00016-GHD-DAS (N.D. Miss. consent decree entered Jan. 2018), www.eeoc.gov/eeoc/newsroom/release/1-10-18a.cfm; EEOC Conciliation agreement with G4S Secure Solutions, <https://www.eeoc.gov/eeoc/newsroom/release/9-4-18.cfm>.

2. After an employer has made a job offer to the applicant, the employer can ask if the applicant can perform the essential functions of the job with or without accommodation, right?

An employer is actually permitted to ask this question even prior to making a job offer, because it is not considered a disability-related inquiry. The Enforcement Guidance on Preemployment Disability-Related Questions and Medical Examinations, <https://www.eeoc.gov/policy/docs/preemp.html>, states:

** May an employer ask whether an applicant can perform the job? Yes. An employer may ask whether applicants can perform any or all job functions, including whether applicants can perform job functions "with or without reasonable accommodation."*¹¹

¹¹ However, an employer cannot ask a question in a manner that requires the individual to disclose the need for reasonable accommodation. For example, as described later in this guidance, an employer may not ask, "Can you do these functions with ___ without ___ reasonable accommodation? (Check One)"]

* May an employer ask applicants to describe or demonstrate how they would perform the job (including any needed reasonable accommodations)? Yes. An employer may ask applicants to describe how they would perform any or all job functions, as long as all applicants in the job category are asked to do this.

3. I have an employee with a current workers comp. case for repetitive motion. The employee does not want surgery, as suggested by the occ health provider. The employee asked me what other options she has because the occ health doctor is saying there's nothing else that they can do. Do I initiate the ADA process, (ask what accommodates she may need and request medical documentation from her personal provider)? Should I wait until the w/c case is complete?

You may need to clarify what the employee is requesting. Begin the interactive process if the employee is currently requesting accommodation under the ADA. For example, some employees seek to remain on workers' compensation leave for as long as it will extend, and only seek to return to work (with accommodation if needed) once the leave is no longer available and they have reached maximum medical improvement. Others may want additional leave under ADA after that point for further recuperation or treatment prior to returning to work or may request return-to-work accommodations prior to the expiration of workers' compensation leave.

Note that the communication does not have to come directly from the employee. The EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship, at question 2 Example B, states: "An employee has been out of work for six months with a workers' compensation injury. The employee's doctor sends the employer a letter, stating that the employee is released to return to work, but with certain work restrictions. (Alternatively, the letter may state that the employee is released to return to a light duty position.) The letter constitutes a request for reasonable accommodation."

Once you have determined that the employee is currently requesting accommodation, the EEOC Enforcement Guidance on Workers' Compensation and the ADA, <https://www.eeoc.gov/policy/docs/workcomp.html>, at question 9, confirms that the interactive process would be the same as any other:

If an employee with a disability-related occupational injury requests a reasonable accommodation, may the employer ask for documentation of his/her disability? Yes. If an employee with a disability-related occupational injury⁹ requests reasonable accommodation and the need for accommodation is not obvious, the employer may require reasonable documentation of the employee's entitlement to reasonable

accommodation. While the employer may require documentation showing that the employee has a covered disability and stating his/her functional limitations, it is not entitled to medical records that are unnecessary to the request for reasonable accommodation.

- 4. It's my understanding if an employee requests an accommodation if things go awry, it's the employee's responsibility to provide proof. It seems like HR is well versed in how to "play the game" to their advantage and take advantage of employee ignorance. Is the EEOC considering requiring employers provide a document on rights and responsibilities to employees that request an accommodation?**

All covered employers are required to post the "EEO is the Law" poster, <https://www1.eeoc.gov/employers/poster.cfm>, which does specifically reference the right to reasonable accommodation. However, there is no requirement for private sector or state/local government employers to provide any additional information specifically on reasonable accommodation. Federal agency employers are required under E.O. 13164 to have and post reasonable accommodation procedures that outline their request process and other useful information. Such procedures can be helpful even where they are not legally required, as they clarify the rights and responsibilities of employers and employees as part of the interactive process. EEOC also strives to make this information directly available to employees through publications on our website, an attorney-of-the-day call-in number for legal questions, etc.

- 5. How can you really support an undue hardship?**

The EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship, <https://www.eeoc.gov/policy/docs/accommodation.html>, explains:

"Generalized conclusions will not suffice to support a claim of undue hardship. Instead, undue hardship must be based on an individualized assessment of current circumstances that show that a specific reasonable accommodation would cause significant difficulty or expense. A determination of undue hardship should be based on several factors, including:

- the nature and cost of the accommodation needed;*
- the overall financial resources of the facility making the reasonable accommodation; the number of persons employed at this facility; the effect on expenses and resources of the facility;*
- the overall financial resources, size, number of employees, and type and location of facilities of the employer (if the facility involved in the reasonable accommodation is part of a larger entity);*
- the type of operation of the employer, including the structure and functions of the workforce, the geographic separateness, and the administrative or fiscal relationship of the facility involved in making the accommodation to the employer;*
- the impact of the accommodation on the operation of the facility*

An employer cannot claim undue hardship based on employees' (or customers') fears or prejudices toward the individual's disability. Nor can undue hardship be based on the fact that provision of a reasonable accommodation might have a negative impact on the morale of other employees. Employers, however, may be able to show undue hardship where provision of a reasonable accommodation would be unduly disruptive to other employees' ability to work.

Example A: An employee with breast cancer is undergoing chemotherapy. As a consequence of the treatment, the employee is subject to fatigue and finds it difficult to keep up with her regular workload. So that she may focus her reduced energy on performing her essential functions, the employer transfers three of her marginal functions to another employee for the duration of the chemotherapy treatments. The second employee is unhappy at being given extra assignments, but the employer determines that the employee can absorb the new assignments with little effect on his ability to perform his own assignments in a timely manner. Since the employer cannot show significant disruption to its operation, there is no undue hardship.

Example B: A convenience store clerk with multiple sclerosis requests that he be allowed to go from working full-time to part-time as a reasonable accommodation because of his disability. The store assigns two clerks per shift, and if the first clerk's hours are reduced, the second clerk's workload will increase significantly beyond his ability to handle his responsibilities. The store determines that such an arrangement will result in inadequate coverage to serve customers in a timely manner, keep the shelves stocked, and maintain store security. Thus, the employer can show undue hardship based on the significant disruption to its operations and, therefore, can refuse to reduce the employee's hours. The employer, however, should explore whether any other reasonable accommodation will assist the store clerk without causing undue hardship."

(Footnotes omitted.) For undue hardship considerations with respect to leave as an accommodation, see answer to question #1 above and additional specific examples in Employer-Provided Leave and the ADA, <https://www.eeoc.gov/eeoc/publications/ada-leave.cfm>.

- 6. While on FMLA, an employer is limited in seeking additional information: According to the Code of Federal Regulations, an employer may only seek authentication and clarification as defined in CFR § 825.307. However, for an employee approved for FMLA on reduced work hours, may an employer seek more information to know if the reduced work schedule employee is medically necessary in order to assess reasonable accommodation that would enable the employee to work full time (5 days or 40 hours per week - which is an essential function of the job). The doctor's note only states that the employee is "under their professional care" and "has been advised to limit his work hours..." It does not necessarily restrict the employee and has only be "advised." Does this wording matter?**

You seem to be asking whether it would violate the FMLA rules on certification for an employer to ask for additional information to determine whether an employee who has

requested FMLA leave to enable a reduced schedule could instead work full-time with a reasonable accommodation. This is a question for the U.S. Department of Labor, which enforces the FMLA; their contact information and FMLA publications can be found at <https://www.dol.gov/whd/fmla/>.

7. What happens if an employer finds out a prescriber is on an enforcement database or the employee is complicit in doctor shopping?

See Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees Under the ADA at question 11, <https://www.eeoc.gov/policy/docs/guidance-inquiries.html>. In stating that the ADA does not prohibit an employer from requiring an employee to go to a health care professional of the employer's choice (at the employer's cost) because the medical information submitted from the employee's doctor in support of an accommodation request is insufficient, the guidance includes among the examples of insufficient documentation a situation where "factors indicate that the information provided is not credible or is fraudulent." The same would apply to fitness-for-duty medical information submitted by an employee's doctor.

8. Can accessible parking be an accommodation for a person with respiratory disorders?

Yes.

9. Can there be an exception to seniority in order to accommodate a worker with a disability? Consider an employee who can no longer perform present work and needs the vacant job as an accommodation.

It depends on how consistently the seniority system is applied, including the extent to which exceptions to the system exist or have been made. In US Airways, Inc. v. Barnett, 535 U.S. 391, 403-06 (2002), the U.S. Supreme Court held that a reassignment to a vacant position that would conflict with the terms of a seniority system is not a "reasonable" accommodation unless the plaintiff can show "special circumstances" exist. Examples provided by the Court of such circumstances include that (1) the employer retained the right to change the seniority system unilaterally and exercises that right fairly frequently, reducing employee expectations that the system will be followed -- to the point where one more departure, needed to accommodate an individual with a disability, will not likely make a difference, or (2) the system already contains exceptions such that, in the circumstances, one further exception is unlikely to matter.

10. In a residential care facility, we have a resident dog that we allow to roam the facility to visit residents periodically. An employee has told us she is allergic to the dog and wants us to remove it from the facility. Is this something we have to consider?

One of the factors in determining whether an accommodation poses an undue hardship is “[t]he impact of the accommodation upon the operation of the facility, including the impact on the ability of other employees to perform their duties and the impact on the facility’s ability to conduct business.” 29 C.F.R. section 1630.2(p)(2)(v). Assess the facts regarding impact to determine whether the accommodation would pose a significant difficulty or expense on the facility’s programming and so on. Also explore whether there is an alternative way to accommodate the employee, such as by having the dog and the employee in different areas. Again, whether or not this is practicable will depend on the facts regarding the employee’s duties, whether the dog needs to be in the same area as the employee in order to interact with residents, etc.