EMPLOYMENT LAW — EXTENDED LEAVE AND THE ADA — SEVENTH CIRCUIT RULES THAT A MULTIMONTH LEAVE OF ABSENCE CANNOT BE A REASONABLE ACCOMMODATION. — *Severson v. Heartland Woodcraft, Inc.*, 872 F.3d 476 (7th Cir. 2017), *cert. denied*, No. 17-1001, 2018 WL 489210 (U.S. Apr. 2, 2018).

If the Americans with Disabilities Act[1] (ADA) is a "swamp of imprecise language,"[2] then leave-of-absence disputes are fought in its murkiest waters.[3] The uncertainty centers on Title I of the ADA, which — although it does not mention leaves of absence[4] — requires covered employers to provide "reasonable accommodations" to any "qualified individual with a disability," unless doing so would place an "undue hardship" on the employer.[5] While courts have unanimously recognized that *some* amount of leave may be a "reasonable accommodation" under this provision of the ADA,[6] they have generally hesitated to draw any broadly applicable limits in leave-of-absence litigation,[7] relying instead on case-specific considerations.[8] Recently, in *Severson v. Heartland Woodcraft, Inc.*,[9] the Seventh Circuit broke rank with its sister circuits when it held that a leave of absence spanning multiple months is per se unreasonable under the ADA.[10] The *Severson* court's categorical approach pushes leave-of-absence jurisprudence in a promising direction. But it pushes too far. While the court was right to establish a more

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1 Pub. L. No. 101-335, 104 Stat. 327 (1990) (codified as amended in scattered sections of 42 and 47 U.S.C.).

2 135 CONG. REC. 20,707 (1989) (statement of Rep. Shumway) (quoting Editorial, *The Lawyers' Employment Act*, WALL ST. J., Sept. 11, 1989, at A18).

3 *See* Stacy A. Hickox & Joseph M. Guzman, *Leave as an Accommodation: When is Enough, Enough?*, 62 CLEV. ST. L. REV. 437, 452 (2014) ("Neither the Supreme Court nor the appellate courts have provided a formula for determining what accommodations are reasonable. [This] lead[s] to significantly different outcomes for employees seeking leave as an accommodation.").

4 Stephen F. Befort, *The Most Difficult ADA Reasonable Accommodation Issues: Reassignment and Leave of Absence*, 37 WAKE FOREST L. REV. 439, 459 (2002) ("The ADA does not expressly include a leave of absence among its exemplary list of reasonable accommodations.").

5 42 U.S.C. § 12112(b)(5)(A) (2012).

6 *See, e.g.*, Echevarría v. AstraZeneca Pharm. LP, 856 F.3d 119, 128 (1st Cir. 2017) ("All agree that a leave of absence . . . can constitute a reasonable accommodation under the ADA 'in some circumstances.'" (quoting García-Ayala v. Lederle Parenterals, Inc., 212 F.3d 638, 647 (1st Cir. 2000))).

7 *See* Audrey E. Smith, Comment, *The "Presence Is an Essential Function" Myth: The ADA's Trapdoor for the Chronically Ill*, 19 SEATTLE U. L. REV. 163, 184–85 (1995) ("At the very least, there are no clear guidelines for predicting the outcome of litigation on [the issue of leave of absence].").

8 *See, e.g.*, *García-Ayala*, 212 F.3d at 647 (noting that "[w]hether [a] leave request is reasonable turns on the facts of the case" (alterations in original) (quoting Criado v. IBM Corp., 145 F.3d 437, 443 (1st Cir. 1998))). *But see, e.g.*, Dockery v. N. Shore Med. Ctr., 909 F. Supp. 1550, 1560 (S.D. Fla. 1995) ("[A]s a matter of law, an employer is not required to grant a one-year leave of absence, and such an accommodation is, on its face, unreasonable.").

9 872 F.3d 476 (7th Cir. 2017), *cert denied*, No. 17-1001, 2018 WL 489210 (U.S. Apr. 2, 2018).

10 *Id.* at 481.

predictable standard for evaluating leave-of-absence claims under the ADA, it should not have foreclosed consideration of the plaintiff's individual circumstances. Instead, the court should have relied on the Supreme Court's "reasonable accommodation" precedent to stake out a middle ground between predictability and particularity.

June 5, 2013, was a tough day for Raymond Severson. Before leaving for work that morning, Severson "wrenched his back" and aggravated his chronic back myelopathy — a condition caused by "degenerative changes in [the] back, neck, and spinal cord."[11] Then, when Severson arrived for his shift at Heartland Woodcraft, Inc., the company's president informed him that he was being demoted due to poor performance.[12] A short time later, Severson went home early because of his severe back pain.[13] That workday would turn out to be his last at Heartland.

When Severson's back pain did not improve, he asked to take a leave of absence under the Family and Medical Leave Act of 1993[14] (FMLA).[15] Heartland did not object.[16] Near the end of his twelve weeks of FMLA leave, however, Severson informed Heartland that he was scheduled to undergo back surgery on August 27, 2013 — the same day on which his FMLA leave was set to expire — and requested that Heartland provide him with two months of additional leave following his surgery.[17] Heartland declined Severson's request and informed him that his employment would terminate after the final day of his FMLA leave, but invited Severson to reapply for a job once his doctor cleared him to return to work.[18] Although Severson made a full recovery three months later, he never accepted Heartland's invitation to reapply.[19]

Instead, Severson filed a lawsuit against his former employer, alleging that Heartland failed to reasonably accommodate his back myelopathy in violation of the ADA.[20] Severson argued that Heartland could have provided him any of three "reasonable accommodations": Heartland could have (1) allowed him to take a multimonth leave of absence, (2) temporarily assigned him light-duty tasks, or (3) transferred him to a vacant position.[21] The district court rejected each of Severson's

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11 *Id.* at 479.

12 Severson v. Heartland Woodcraft, Inc., No. 14-C-1141, 2015 WL 7113390, at *1 (E.D. Wis. Nov. 12, 2015).

13 *Id.*

14 Pub. L. No. 103-3, 107 Stat. 6 (codified as amended in scattered sections of 5 and 29 U.S.C.).

15 *Severson*, 2015 WL 7113390, at *1.

16 *Id.*

17 *Id.* at *2.

18 *Id.*

19 *Severson*, 872 F.3d at 480.

20 *Id.*

21 *Severson*, 2015 WL 7113390, at *4, *7, *9.

claims and granted Heartland's motion for summary judgment.[22] According to the district court, Severson's extended-leave-of-absence claim failed because it exceeded the "brief periods of leave" that earlier cases recognized as "reasonable accommodation[s]" under the ADA.[23] The court also ruled that because "the ADA does not require an employer to create 'new' positions for disabled employees," Heartland was not required to provide Severson with temporary, light-duty work.[24] Finally, the court rejected Severson's claim that Heartland should have transferred him to a vacant position, ruling that Severson would have been unable to perform the essential functions of the available positions.[25]

The Seventh Circuit affirmed.[26] Writing for the panel, Judge Sykes[27] held that Heartland did not violate the ADA when it terminated Severson's employment.[28] The court's opinion focused primarily on a single question: whether a multimonth extension of Severson's leave of absence qualified as a "reasonable accommodation" under the ADA.[29]

In answering that question with a resounding "no," the *Severson* court relied on the reasoning of a prior Seventh Circuit decision: *Byrne v. Avon Products, Inc*.[30] The *Byrne* court, which considered whether an extended leave of absence of indefinite duration was a "reasonable accommodation," created a distinction between short- and long-term leaves of absence.[31] While the former might be a reasonable accommodation in some situations, the *Byrne* court held, the latter is categorically unreasonable.[32] Severson and the Equal Employment Opportunity

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[22] *Id.* at *11. Severson also claimed that Heartland violated the ADA's requirement that employers engage in an "interactive accommodation-exploration process." *Id.* However, the district court rejected this claim as well, holding that the ADA's interactive accommodation process requirement "is not an independent basis for liability." *Id.* (quoting Basden v. Prof'l Transp., Inc., 714 F.3d 1034, 1039 (7th Cir. 2013)).

[23] *Id.* at *7 (first citing Byrne v. Avon Prods., Inc., 328 F.3d 379, 380–81 (7th Cir. 2003); and then citing Haschmann v. Time Warner Entm't Co., 151 F.3d 591, 599–601 (7th Cir. 1998)).

[24] *Id.* at *8 (citing Stern v. St. Anthony's Health Ctr., 788 F.3d 276, 291 (7th Cir. 2015)).

[25] *Id.* at *9–11.

[26] *Severson*, 872 F.3d at 483.

[27] Judge Sykes was joined by Chief Judge Wood and Judge Easterbrook.

[28] *Severson*, 872 F.3d at 479.

[29] *Id.* at 480 ("The parties focus most of their attention on whether a long-term leave of absence is a reasonable accommodation within the meaning of the ADA. We do the same."). The court gave only "brief discussion" to Severson's remaining claims. *Id.* at 482. The court rejected Severson's claim that Heartland should have temporarily assigned him light-duty work, ruling that because Heartland did not have a policy of providing light-duty positions to employees with work-related injuries, it was not obligated to do so for Severson. *Id.* at 482–83. The court also rejected Severson's claim that Heartland should have transferred him to a vacant position, ruling that Severson had not proven vacant positions were available at the time of his termination. *Id.* at 482.

[30] 328 F.3d 379 (7th Cir. 2003).

[31] *See id.* at 381.

[32] *See id.*

Commission[33] (EEOC) had argued that the court should disregard *Byrne*,[34] citing subsequent decisions that appeared to limit *Byrne*'s reasoning.[35] Unconvinced, the *Severson* court doubled down on the *Byrne* court's approach to leave-of-absence disputes.

Stating that "*Byrne* is sound and we reaffirm it,"[36] the *Severson* court held that although a short period of leave — "say, a couple of days or even a couple of weeks"[37] — might be reasonable, "[a] multimonth leave of absence is beyond the scope of a reasonable accommodation under the ADA."[38] In reasoning similar to *Byrne*'s, the *Severson* court held that the ADA's definition of "qualified individual" should inform the court's "reasonable accommodation" analysis.[39] Under the ADA, an individual is "qualified" only if he is able to perform the "essential functions" of the employment position at issue "*with or without reasonable accommodation*."[40] This definition, the court reasoned, provides "the baseline requirement" for what qualifies as a "reasonable accommodation": a "reasonable accommodation" must "make it possible for the employee to perform his job."[41] Since, therefore, a multimonth leave of absence "does not give a disabled individual the means to work," but rather "excuses his not working," a multimonth leave of absence cannot be a reasonable accommodation.[42] Because Severson sought a two-month extension of his leave, the court held that his requested accommodation was not reasonable.[43]

Reaction to the *Severson* decision has been mixed. Some have praised the decision as the "holy grail" of ADA jurisprudence, lauding

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[33] The EEOC filed a brief as amicus curiae in support of Severson. *See* Brief of the Equal Employment Opportunity Commission as *Amicus Curiae* in Support of Plaintiff-Appellant and Reversal, *Severson*, 872 F.3d 476 (7th Cir. 2017) (No. 15-3754) [hereinafter Brief of the EEOC].

[34] The EEOC proposed that a leave of absence "should qualify as a reasonable accommodation when the leave is: (1) of a definite, time-limited duration; (2) requested in advance; and (3) likely to enable the employee to perform the essential job functions when he returns [to work]." *Severson*, 872 F.3d at 482. The *Severson* court dismissed this argument, holding that its adoption would "transform[]" the ADA into "an open-ended extension of the FMLA" — an interpretation the court called "untenable." *Id.*

[35] *See* Brief of the EEOC, *supra* note 33, at 23 n.4 (citing Sluga v. Metamora Tel. Co., No. 13-1553, 2015 WL 1811823, at *4 (C.D. Ill. Apr. 17, 2015) ("[Decisions following *Byrne*] have walked back any categorical rule — if one existed — and concluded that context matters.")).

[36] *Severson*, 872 F.3d at 479.

[37] *Id.* at 481.

[38] *Id.* at 479.

[39] *Id.* at 481.

[40] *Id.* (emphasis added) (quoting 42 U.S.C. § 12111(8) (2012)).

[41] *Id.* at 481.

[42] *Id.*

[43] *Id.* In January 2018, Severson filed a petition for a writ of certiorari to the Supreme Court. Petition for a Writ of Certiorari, Severson v. Heartland Woodcraft, Inc., No. 17-1001, 2018 WL 489210 (U.S. Apr. 2, 2018). In April 2018, the petition was denied. *Id.*

its imposition of clear boundaries in an area of law marked by unpredictability.[44] Others, including Seventh Circuit Judge Rovner, have denounced the decision as "nonsensical," arguing that its bright-line rule ignores the ADA's call for individualized assessments.[45] The truth is that both sides have it right. And wrong. The *Severson* court correctly identified the inherent inconsistency between extended leaves of absence and the ADA's "reasonable accommodation" requirement, and it was right to draw out the implications of that inconsistency more fully than other circuits. But the court went too far. Instead of ruling that a multimonth leave of absence is *categorically* unreasonable, the court should have held that a multimonth leave of absence is *presumptively* unreasonable, allowing the plaintiff the opportunity to prove special circumstances that justify overcoming the presumption. This approach would not only align leave-of-absence adjudication with Supreme Court precedent; it would also strike a delicate balance between the desire for predictability and the need for individualized assessment in ADA litigation.

When courts resolve leave-of-absence disputes under the ADA, they do not write on a blank slate. The Supreme Court clarified the ADA's Title I "reasonable accommodation" requirement in 2002,[46] when it decided *US Airways, Inc. v. Barnett*.[47] *Barnett* considered whether the ADA's "reasonable accommodation" provision requires an employer to reassign a disabled employee to a different position, even though another, nondisabled employee is entitled to that position under the employer's established seniority system.[48] In holding that it ordinarily does not,[49] the Court laid down a burden-shifting framework for evaluating "reasonable accommodation" claims.[50]

Barnett held that, at the summary judgment stage, courts should first determine whether the plaintiff has met his burden of showing that the accommodation sought "seems reasonable *on its face*."[51] This is a general inquiry, not a fact-intensive one. It requires courts to examine

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[44] *See, e.g.*, Braden Campbell, *7th Circ. Ruling on ADA Leave Limits Touted as "Holy Grail*," LAW360 (Sept. 27, 2017, 9:08 PM), https://www.law360.com/articles/968647 [https://perma.cc/5VDS-R8CD].

[45] *See, e.g.*, Golden v. Indianapolis Hous. Agency, 698 F. App'x 835, 837 (7th Cir. 2017) (Rovner, J., concurring).

[46] A year earlier, the Supreme Court considered the "reasonable accommodation" requirement of Title III (which governs public accommodations provided by private entities) when it decided *PGA Tour, Inc. v. Martin*, 532 U.S. 661 (2001). *See* Stephen F. Befort, *Reasonable Accommodation and Reassignment Under the Americans with Disabilities Act: Answers, Questions and Suggested Solutions After* U.S. Airways, Inc. v. Barnett, 45 ARIZ. L. REV. 931, 933 n.12 (2003).

[47] 535 U.S. 391 (2002).

[48] *Id.* at 393–94.

[49] *Id.* at 406.

[50] *Id.* at 401–02.

[51] *Id.* at 401 (emphasis added).

whether the plaintiff is seeking a "*method of accommodation*" that is reasonable ordinarily or "in the run of cases."[52] If the plaintiff cannot make this generalized showing, then the accommodation he seeks is presumptively unreasonable — a presumption that can be overcome only if the plaintiff shows that there are "special circumstances" that justify treating his case differently.[53] A plaintiff unable to show *general* reasonableness, therefore, must overcome a more difficult, *particularized* burden of proof.[54] Under this burden, the plaintiff must "explain why, in the particular case" the accommodation "can constitute a 'reasonable accommodation' even though in the ordinary case it cannot."[55] If the plaintiff does not meet either of these burdens — the general, "on its face" burden or the particularized, "special circumstances" burden — then the court must grant summary judgment for the defendant.[56] If — and *only if* — the plaintiff meets either burden, then the burden shifts to the defendant,[57] who must show "case-specific" circumstances that "demonstrate undue hardship."[58]

The *Barnett* Court's "reasonable accommodation" framework provides a logical (not to mention, precedential) method for adjudicating leave-of-absence claims; yet courts have been reluctant to fully adopt it.[59] The first step in *Barnett's* "reasonable accommodation" analysis — the generalized inquiry — has been largely sidestepped in the leave-of-absence context. Most lower courts have given only passing reference to whether a leave of absence is reasonable "in the run of cases."[60] Others have ignored the generalized inquiry entirely, focusing only on

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[52] *Id.* at 402 (emphasis in original) (citing Barth v. Gelb, 2 F.3d 1180, 1187 (D.C. Cir. 1993)).

[53] *Id.* at 405–06. While the *Barnett* Court discussed this "special circumstances" inquiry in the context of seniority policies, commentators have recognized that the inquiry is applicable to reasonable accommodation disputes generally. *See, e.g.*, Befort, *supra* note 46, at 959.

[54] *Barnett*, 535 U.S. at 405–06.

[55] *Id.* at 406.

[56] *See id.* at 401, 406.

[57] *Id.* at 402; *see also* Befort, *supra* note 46, at 959 ("If the employee bears the burden of proof on the issue of reasonable accommodation, but does not establish that a desired accommodation is reasonable . . . the employee will not prevail even if the accommodation does not impose an undue hardship.").

[58] *Barnett*, 535 U.S. at 402.

[59] Part of this reluctance likely stems from the fact that leave-of-absence disputes bring to a convoluted head the "interlocking" nature of the ADA's "qualified individual" and "reasonable accommodation" provisions. *Severson*, 872 F.3d at 481. Because of the considerations typically at issue in leave-of-absence litigation, the "qualified individual" and "reasonable accommodation" analyses frequently "run together," EEOC v. Ford Motor Co., 782 F.3d 753, 763 (6th Cir. 2015) (quoting Samper v. Providence St. Vincent Med. Ctr., 675 F.3d 1233, 1240 (9th Cir. 2012)), resulting in muddled decisions that (despite determining whether a particular leave request qualifies as a "reasonable accommodation") do not follow *Barnett*'s "reasonable accommodation" framework.

[60] *See, e.g.*, *Ford Motor Co.*, 782 F.3d at 761 (noting that, generally, "an employee who does not come to work cannot perform any of his job functions," but failing to explain what that means for "the run of cases" involving leaves of absence (quoting EEOC v. Yellow Freight Sys., Inc., 253 F.3d 943, 948 (7th Cir. 2001) (en banc))). *But see* Echevarría v. AstraZeneca Pharm. LP, 856 F.3d 119,

whether the plaintiff has shown that the accommodation is reasonable in his particular case.[61]

Severson is different. Although the *Severson* court did not explicitly purport to apply the generalized inquiry from *Barnett*'s "reasonable accommodation" framework, the court's reasoning maps neatly onto that inquiry's central question: How should courts typically handle this type of claim? The heart of *Severson*'s reasoning depends upon two *general* considerations, which together demonstrate that — "ordinarily" — there is a logical inconsistency between a multimonth leave of absence and the requirements of a reasonable accommodation: (1) a "reasonable accommodation" is one that allows the employee to perform the "essential functions" of his employment position;[62] and (2) an employee who takes an extended leave of absence cannot perform the essential functions of his employment position.[63] While the Seventh Circuit is not the only court to have identified this inconsistency,[64] it went further than any other court in drawing out what the inconsistency means for extended leave-of-absence requests "in the run of cases." The *Severson* court held that, because of this inconsistency, a long-term leave of absence will *never* be a reasonable accommodation.[65]

But that holding goes too far. *Barnett*'s "reasonable accommodation" framework, properly understood, encourages courts to draw *presumptive* lines, not categorical ones. Although the *Severson* court cogently demonstrated that "ordinarily" a multimonth leave of absence will not be reasonable (*Barnett*'s generalized inquiry), the court made no attempt to determine whether Severson showed that there are facts that make his case different (*Barnett*'s particularized inquiry). To fully conform with *Barnett*, the *Severson* court should have held that a multimonth leave of absence is *presumptively* unreasonable, but that if the plaintiff can show special circumstances that justify overcoming the presumption, then the defendant's motion for summary judgment will fail, absent a showing of undue hardship.

This approach would not only align leave-of-absence litigation with *Barnett*'s "reasonable accommodation" framework; it would also strike a delicate balance between predictability and individualized assessment. Most courts — by ignoring *Barnett*'s generalized inquiry and focusing

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128 (1st Cir. 2017) (finding that the plaintiff "has not shown that additional leave . . . is a facially reasonable accommodation . . . 'in the run of cases.'" (internal citations omitted)).

61 *See* Cleveland v. Fed. Express Corp., 83 Fed. App'x 74, 79 (6th Cir. 2003).

62 *Severson*, 872 F.3d at 481.

63 *Id.*

64 *See* Graves v. Finch Pruyn & Co., Inc., 457 F.3d 181, 185 n.5 (2d Cir. 2006) ("[T]he idea of unpaid leave of absence as a reasonable accommodation presents a 'troublesome problem, partly because of the oxymoronic anomaly it harbors.'" (quoting García-Ayala v. Lederle Parenterals, Inc., 212 F.3d 638, 651 (1st Cir. 2000) (O'Toole, J., dissenting))).

65 *Severson*, 872 F.3d at 481.

on its particularized inquiry — have handed down leave-of-absence decisions that are highly case-specific, but give litigants insufficient guidance on how future leave-of-absence disputes will be decided. *Severson* turned this on its head. The *Severson* court — by relying on *Barnett*'s generalized inquiry and ignoring its particularized inquiry — made future leave-of-absence litigation highly predictable, but sacrificed any consideration of the plaintiff's individual circumstances.

Now, to be sure, a particularized inquiry was unlikely to have made a difference in Severson's case.[66] But it is not difficult to imagine a scenario where a particularized inquiry *would* make a difference. Consider, for example, a grade school teacher with minimal duties over the summer. Or "a tax preparer who's just survived April 15."[67] Or a "widget maker[]"[68] who must produce 500 widgets each year, but finishes them by September. In situations like these, an extended leave of absence may not necessarily prevent the employee from performing the "essential functions" of his position. *Severson*'s categorical holding, however, forecloses any consideration of the plaintiff's unique situation.

A presumptive approach — in line with *Barnett*'s "reasonable accommodation" framework — strikes a middle ground. Under this approach, results in leave-of-absence disputes would be neither completely ad hoc, nor strictly preordained. This approach would signal to litigants that an extended leave of absence is the exception — not the rule — but would still ensure that the plaintiff's particular circumstances are taken into consideration. It would cut out the typical nine-to-fiver, but leave room for the employee on a nontraditional schedule. It would, in short, provide predictability and particularity, stability and fairness.

The Supreme Court denied Severson's petition for certiorari in April,[69] so anyone hoping for a true "holy grail" decision — one that provides clear guidance for all the players in leave-of-absence litigation — should not hold their breath.[70] Nevertheless, there is hope. The Seventh Circuit's decision in *Severson* demonstrates (albeit imperfectly) that there is room for greater predictability in leave-of-absence litigation. When courts are inevitably faced with leave-of-absence disputes in the future, they should follow *Severson*'s lead, but temper its approach. They should return to the Supreme Court's "reasonable accommodation" roots and apply *Barnett*'s framework to ADA leave-of-absence litigation.

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[66] *See* Severson v. Heartland Woodcraft, Inc., No. 14-C-1141, 2015 WL 7113390, at *4 (E.D. Wisc. Nov. 12, 2015) ("Severson concedes that, as things looked prior to his surgery, he would not have been able to do much of the lifting associated with [his] position for some time . . . .").

[67] Hwang v. Kan. State Univ., 753 F.3d 1159, 1162 (10th Cir. 2014).

[68] Michael Ashley Stein, *The Law and Economics of Disability Accommodations*, 53 DUKE L.J. 79, 141 (2003).

[69] Severson v. Heartland Woodcraft, Inc., No. 17-1001, 2018 WL 489210 (U.S. Apr. 2, 2018).

[70] *See* DAN BROWN, THE DA VINCI CODE 444 (2003) ("I suspect the Holy Grail is simply a grand idea . . . a glorious unattainable treasure . . . .").