The Americans with Disabilities Act Protects Individuals with a History of Cancer from Employment Discrimination: Myth or Reality?

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NOTES

THE AMERICANS WITH DISABILITIES ACT PROTECTS INDIVIDUALS WITH A HISTORY OF CANCER FROM EMPLOYMENT DISCRIMINATION: MYTH OR REALITY?

I. INTRODUCTION

The cancer patient is faced with two daunting prospects: the fight for life and the fight for meaningful employment. Unfortunately, the difficulties these individuals encounter do not end when their medical treatments do. Often these problems follow them into the workplace through loss of promotions, demotions and even loss of employment. The focus of this Note is on those with a cancer history and the problems these individuals face in the employment arena, often without statutory protection.

The Americans with Disabilities Act of 1990 ("ADA") was designed to protect people with a history of a disability from employment discrimination.\(^1\) Congressional intent behind the ADA was two-fold. The Act was not only designed to protect those with a current disability,\(^2\) including cancer,\(^3\) it was designed to protect those who have a record of a disability,\(^4\) even though they currently do not have such a disability, such as the cancer survivor.\(^5\) Congress found that people faced discrimination based upon the myths, fears, or stereotypes relating to

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their disability and that these “stereotypic assumptions [were] not truly indicative of the individual ability of such individuals to participate in, and contribute to, society.” This Note argues that judicial interpretation of the ADA has not provided the desired protection the Act was intended to afford the cancer survivor.

Cancer is not the death sentence it once was, because with the medical advancements available today, many Americans diagnosed with the disease will recover. In the early 1900’s, few cancer patients had any hope of long-term survival; today, four out of ten people diagnosed with cancer are expected to be alive five years after diagnosis. As time passes, cancer survivors will encompass a larger and larger portion of the population. The common types of job discrimination these people face include: “(1) exclusion from health insurance and other benefits; (2) demotions and denials of promotions; (3) refusals to hire; (4) undesirable transfers; and (5) hostility in the workplace; and (6) requirement of medical exams that are unrelated to job performance.”

Before the ADA was enacted, the employment picture for people with disabilities was dismal. Despite the existence of the Rehabilitation Act of 1973, both employment and income levels among the disabled dropped between 1981 and 1988. The need for more definitive

8. See generally AMERICAN CANCER SOCIETY: 1997 CANCER FACTS & FIGURES [hereinafter CANCER FACTS & FIGURES] (discussing the cancer survival rates in 1997 for various forms of cancer, the new treatments and the extensive research the American Cancer society sponsors).
9. See id. at 2.
11. See THE NATIONAL COUNCIL ON THE HANDICAPPED, TOWARD INDEPENDENCE (1986) (citing 1980 Census figures that reported that there were six million unemployed persons with work disabilities in the United States).
federal legislation to assist this segment of the population led Congress to pass the ADA in an effort to provide protection for some 43,000,000 Americans that suffered from one or more physical or mental disabilities.  

II. THE NEED FOR COMPREHENSIVE LEGISLATION

Many people who have cancer, or who have recovered from it, suffer from job discrimination based upon their health history. 15 "The National Cancer Institute estimates that approximately 7.4 million Americans alive today have a history of cancer. Some of these individuals can be considered cured, while others still have evidence of cancer." 16 Federal legislation did not provide adequate protection against employment discrimination to a sufficient percentage of the disabled population so it was deemed necessary to enact more comprehensive legislation. 17 The ADA was heralded by many as the answer to this population's prayers and is considered to be the "most significant labor and employment statute signed into law in almost two decades." 18 At the ADA's signing ceremony on the White House lawn, President Bush hailed it as an "historic new civil rights act...the world's first comprehensive declaration of equality for people with disabilities." 19

Senator Tom Harkin has stated that:

The ADA is based on a single premise—that disability is a natural part of the human experience. Disability in no way diminishes the right of

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16. CANCER FACTS & FIGURES, supra note 8, at 1.
18. Wayne L. Anderson & Mary Elizabeth Roth, Deciphering the Americans with Disabilities Act, 51 J. Mo. B. 142 (1995); see also Robert L. Burgdorf, The Americans with Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Statute, 26 HARV. C.R.-C.L. L. REV. 413-14 (1991) (stating that the Executive Director of the Leadership Conference on Civil Rights described the ADA as "the most comprehensive civil rights measure in the past two decades" and Senator Edward M. Kennedy termed the ADA a ""bill of rights" and an 'emancipation proclamation' for people with disabilities, and declared that it is 'difficult to believe that this Congress will enact a more far-reaching or more important bill'”).
19. President Bush's Remarks on Signing the Americans with Disabilities Act of 1990, 26 WEEKLY COMP. PRES. DOC. 1162, 1163 (July 2, 1990). The President added that "[w]ith today's signing of the landmark Americans for Disabilities Act, every man, woman, and child with a disability can now pass through once-closed doors into a bright new era of equality, independence and freedom." Id.
individuals to live independently, enjoy self-determination, make choices, pursue meaningful careers, and enjoy full inclusion and integration in the economic, political, social, cultural, and educational mainstream of American society.\textsuperscript{20}

The ADA provides “clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities.”\textsuperscript{21} One of its purposes is to “provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.”\textsuperscript{22} Additionally, the ADA is designed “to bring persons with disabilities into the economic and social mainstream of American life; to provide enforceable standards addressing discrimination against individuals with disabilities, and to ensure that the Federal government plays a central role in enforcing these standards on behalf of individuals with disabilities.”\textsuperscript{23}

The Committee on Labor and Human Resources in its report to the Senate in 1989, concluded that there was a compelling need to establish a federal prohibition on discrimination against people with disabilities in America.\textsuperscript{24} The committee came to the fundamental conclusion that federal and state laws in existence in 1989 were inadequate to address the discrimination faced by people with disabilities in such a critical area as employment in the private sector.\textsuperscript{25} The fifty State Governors’ Committees reported that existing state laws did not adequately counter acts of discrimination either.\textsuperscript{26}

Before the ADA was enacted, the disabled could turn to the Rehabilitation Act of 1973 ("Rehabilitation Act")\textsuperscript{27} or the Fair Housing Act.\textsuperscript{28} However, the Rehabilitation Act only addresses discrimination by federal agencies and recipients of federal assistance,\textsuperscript{29} and the Fair Housing Act, as amended in 1988, prohibits discrimination against people with disabilities in the housing arena.\textsuperscript{30} Employers in the private sector, places of public accommodation, or state and local government

\textsuperscript{22} 42 U.S.C. § 12101(b)(1).
\textsuperscript{24} See \textit{id.} at 5.
\textsuperscript{25} See \textit{id.}
\textsuperscript{26} See \textit{id.} at 18.
\textsuperscript{27} 29 U.S.C. §§ 701-796 (1994).
\textsuperscript{28} 42 U.S.C. §§ 3601-3631 (1994).
\textsuperscript{29} See 29 U.S.C. § 794(a) (1994).
agencies that did not accept federal assistance could discriminate under federal law until the advent of the ADA.31

A. The Rehabilitation Act---Section 504

Many of the provisions of the ADA were lifted directly from section 504 of the Rehabilitation Act.32 Therefore, an understanding of the Rehabilitation Act is helpful when evaluating the ADA.

The Rehabilitation Act was designed to increase and expand employment opportunities for the handicapped in programs or activities receiving federal funding.33 Its purpose is “to empower individuals with disabilities to maximize employment, economic self-sufficiency, independence, and inclusion and integration into society . . . .”34 The legislation was passed in congressional recognition that “millions of Americans have one or more physical or mental disabilities and the number of Americans with such disabilities is increasing.”35 Further, “individuals with disabilities continually encounter various forms of discrimination in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and public services.”36 Section 504 of the Rehabilitation Act prohibits discrimination based on handicap in programs receiving federal financial assistance.37 The Act requires that an individual be handicapped, otherwise qualified, denied employment solely on the basis of the individual’s handicap and that such discrimination be in a program or activity receiving federal funding.38

31.  See S. REP. NO. 101-116, at 12 (1989) (citing testimony from Neil Hartigan, the Attorney General from Illinois who stated that under current federal law, [Rehabilitation Act] there is total confusion and inconsistent treatment because two programs that are exactly alike, except for funding sources, can treat people with disabilities completely differently).
37.  See 29 U.S.C. § 794(a); see also Demming v. Housing & Redevelopment Auth., of Duluth, Minn., 66 F.3d 950, 955 (8th Cir. 1995) (holding that plaintiff, a Housing and Redevelopment Authority employee, failed to demonstrate that her thyroid cancer limited her major life activities).
38.  See 29 U.S.C. § 794(a); see also Southeastern Community College v. Davis, 442 U.S. 397, 405 (1979) (interpreting section 504 of the Rehabilitation Act for the first time).
The Act defines an individual with a handicap as “any person who (i) has a physical or mental impairment which substantially limits one or more of such person’s major life activities, (ii) has a record of such impairment, or (iii) is regarded as having such impairment.”

An “otherwise qualified” handicapped person with respect to employment, is a “handicapped person who, with reasonable accommodation, can perform the essential functions of the job in question.” Stated differently, “[a]n otherwise qualified person is one who is able to meet all of a program’s requirements in spite of his handicap.”

Both the legislative history of the Rehabilitation Act and regulations interpreting its provisions indicate that Congress intended the Act to extend to cancer survivors. The definition of “handicapped individual” reflected congressional concern for the need to protect the disabled from prejudice, from “archaic attitudes and laws” and from “the fact that the American people are simply unfamiliar with and insensitive to the difficulties confronting individuals with handicaps.” Those with cancer history were intended to be included in the second and third parts of the definition if they have a record of an impairment which substantially limits life activities or are regarded as having such an impairment.

The definition of disability in the Rehabilitation Act does not adequately cover the cancer survivor, however, because most people with a

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39. 29 U.S.C. § 706(8)(B) (1994); 45 C.F.R. § 84.3(j) (1989); see also School Board of Nassau County v. Arline, 480 U.S. 273, 281 (1986) (interpreting term “handicapped” broadly in that plaintiff’s hospitalization sufficed to establish that she had a “record of impairment” within the meaning of 29 U.S.C. § 706(7)(B)(i) and was thus handicapped).

40. 45 C.F.R. § 84.3(k)(1) (1997); see also Bentivegna v. United States Dep’t of Labor, 694 F.2d 619, 626 (9th Cir. 1982) (finding that under the Rehabilitation Act, plaintiff was an “otherwise qualified” handicapped person and that the job qualifications set up by plaintiff’s employer discriminated against handicapped individuals); Mantolete v. Bolger, 767 F.2d 1416, 1425 (9th Cir. 1985) (remanding to determine if plaintiff is a qualified handicapped individual).

41. Southeastern, 442 U.S. at 406.

42. See S. Rep. No. 93-1297, at 38-39 (1974) (reporting on the Rehabilitation Act’s 1974 Amendments, which added the definition of “handicapped individual” currently used; further the report explained that the phrase, “has a record of such an impairment,” “is intended to make clearer that the coverage of sections 503 and 504 [29 U.S.C. §§ 793, 794] extends to persons who have recovered—in whole or in part—from a handicapping condition, such as... cancer”).


44. Arline, 480 U.S. at 279 (citing S. Rep. No. 93-1297, at 50 (1974)).

45. Id.

46. See S. Rep. No. 93-1297, at 38-39; 41 C.F.R. app. A § 60-741 (1985) (stating “[h]as a record of such an impairment” means that an individual may be completely recovered from a previous impairment, but is still experiencing difficulties in securing, retaining or advancing employment due to the attitudes of employers and co-workers toward that previous impairment).
cancer history do not have an impairment that substantially limits a major life activity. In 1985, this inadequacy prompted Congressman Mario Biaggi to propose the Cancer Patients Employment Rights Act which sought to amend section 701 of Title VII of the Civil Rights Act of 1964. This Act would have afforded victims of discrimination based upon cancer history the same private right of action afforded to victims of race or sex discrimination. The Congressional Record is replete with statements from Congressmen and testimony from cancer survivors addressing the need for legislation to address this segment of the population because existing legislation was inadequate. This proposed bill died in committee in 1985 after hearings held by the House Subcommittee on Employment.

B. Cancer Myths

Both the Rehabilitation Act and the ADA are congressional attempts to counteract employer prejudices and inaccurate perceptions associated with disabilities that are often more debilitating than the disabilities themselves. People with a history of cancer face this obstacle because of a series of myths that go hand in hand with the disease.

47. See Hoffman, supra note 10, at 10.
48. See id. at 21 n.152. The purposes of the proposed Act [H.R. 1294] were stated as: (1) to discourage employment discrimination based upon cancer history; (2) encourage employers to make reasonable accommodations which assist in the employment of an individual with a cancer history; (3) increase public recognition of the employability of individuals having a cancer history; and (4) encourage further legislation designed to prohibit discrimination against individuals with cancer histories in other areas.
49. See id. at 21.
50. See S. REP. No. 101-116, at 9 (1989) (discussing the testimony of United States Attorney General, Dick Thornburgh, on behalf of President George Bush, whereby he said, "[d]espite the best efforts of all levels of government and the private sector and the tireless efforts of concerned citizens and advocates everywhere, many persons with disabilities in this Nation still lead their lives in an intolerable state of isolation and dependence"); see also Employment Discrimination Against Cancer Victims and the Handicapped: Hearing on H.R. 370 and H.R. 1294, The Cancer Patients Employment Rights Act, Before the Subcomm. on Employment Opportunities of the House Comm. on Education and Labor, 99th Cong., 5 (1985) (statement of Congressman Mario Biaggi) (discussing the idea that legislation to outlaw employment discrimination against people with cancer history is long overdue).
53. See Barbara Hoffman, Employment Discrimination Based on Cancer History: The Need
Discrimination by both employers and fellow workers against people with cancer history center on common misconceptions about the disease such as: all people with cancer are going to die; cancer is contagious; and the cancer victim will be unproductive as well as an economic drain on the employer. Sociologists have identified employer concerns that frequently result in discriminatory practices, including those regarding productivity, safety, insurance, liability, attendance, cost of accommodation and accessibility, and acceptance by co-workers and customers.

"Employers frequently refuse to hire persons who have cancer." The California Division of the American Cancer Society did a study in 1972 and concluded that most corporations and governmental agencies in that state discriminated in hiring against people with a history of cancer for an average period of five years after treatment. A major reason for employment discrimination in cancer patients was the fear that applicants with such history might not survive long enough to justify training.

The fear that the cancer victim is definitely not going to survive is often unfounded, as evidenced by the number of cancer survivors living in America today. The "observed" survival rate of all cancer victims in America is forty percent, and when adjusted for normal life expectancy, taking into account such factors as dying of heart disease, accidents, and diseases of old age, a "relative" five-year survival rate of fifty-six percent is seen for all cancers. New treatments and advancements in research have greatly increased both the quality of life and the life expectancy of people who have had cancer. Death rates for many

For Federal Legislation, 59 TEMP. L.Q. 4, 4; see also SEN. REP. NO. 101-116, at 7 (1989); School Board of Nassau County v. Arline, 480 U.S. 273, 284 (1986).
56. Id. at 1619.
57. See id.
58. See id. (adding that this discrimination also stemmed from the fact that those with cancer, or a history of cancer, might need extended periods of sick leave, and would cause increases in the cost of health insurance, workmen's compensation, and life insurance).
59. See CANCER FACTS & FIGURES, at 1.
60. See id. at 2 (stating that four out of ten patients who get cancer in 1997 are expected to be alive five years after diagnosis and this four in ten, or forty percent, is called the "observed" survival rate).
61. See id. at 2.
62. See generally CANCER FACTS & FIGURES (discussing the cancer survival rates in 1997
major cancers have leveled off or declined over the past sixty years, and when lung cancer deaths are excluded, cancer mortality showed a decline of sixteen percent between 1950 and 1993.63

The fear that cancer is contagious is unfounded, as well.64 Cancer is a group of diseases characterized by uncontrolled growth and spread of abnormal cells and is caused by external factors such as chemicals, radiation and viruses, and internal factors such as hormones, immune conditions, and inherited mutations.65 A fact clearly established and accepted by the medical profession is that cancer is not contagious.66

As previously stated, employers can be reluctant to hire persons who have had cancer because of fears of absenteeism and low productivity.67 However, several studies of employees with cancer histories prove that these fears are unfounded.68 As early as 1950, government studies concluded that disabled workers perform as well as, or better than, their non-disabled co-workers.69

III. THE AMERICANS WITH DISABILITIES ACT OF 1990

Congressional concern for the series of myths and prejudices that plague the disabled individual in the search for employment was one of the guiding forces behind the ADA.70 The Rehabilitation Act provided

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63. See id. at 2. Lung cancer death rates have increased from five percent in 1930 to almost eighty percent in 1993. See id. However, stomach and liver cancer deaths have decreased considerably and deaths from colorectal and pancreatic cancers have leveled off. See id. Prostate cancer death rates have leveled off as well, with a slight increase since 1990. See id.


65. See CANCER FACTS & FIGURES, at 1.

66. See Hoffman, supra note 53, at 5.

67. See supra notes 55 and 56.


relief to only a small percentage of people with a history of cancer; namely those who could prove they were handicapped under the Act’s definition and whose employers received federal assistance. Congress enacted the ADA because fears, myths, prejudices, and misperceptions about cancer, and disabilities in general, were problematic in organizations that did not receive federal assistance as well as in those that did.

In order to ascertain whether a particular individual is covered by the employment provisions of the ADA, an understanding of the Act’s very specific definitions is necessary. The ADA relies heavily on the Rehabilitation Act’s legal theories and “[a] key rationale used to support the ADA was that it essentially extended into the private sector an existing federal statute [the Rehabilitation Act].” The ADA provides that, “[e]xcept as otherwise provided in this chapter, nothing in this chapter shall be construed to apply a lesser standard than those applied under Title V of the Rehabilitation Act . . . or the regulations issued by Federal agencies pursuant to such title.”

Title I of the ADA prohibits employers from discriminating “against a qualified individual with a disability because of the disability of such individual” in regard to the terms and conditions of employment, including hiring, termination or promotion.

The term “disability” is unique to the ADA and is used in the place of the term “handicapped” in the Rehabilitation Act. Substantively, the terms are equivalent. Under the ADA, the definition of the term “disability” is divided into three parts and an individual must satisfy at least one of these parts to qualify as disabled. An “individual with a

71. See Hoffman, supra note 53, at 13; see also 29 U.S.C. § 706(8)(B) (1994) (stating that an individual with a disability is any person with a physical or mental impairment that substantially limits major life activities, with a record of such an impairment, or is regarded as having such an impairment).
73. See 42 U.S.C. § 12001 (1994); see also LEGISLATIVE HISTORY OF THE ADA, VOL. I, at 470 (Comm. Print 1990) (stating that a person who is rejected from a job because of the myths, fears and stereotypes associated with a disability is covered under the ADA).
75. 42 U.S.C. § 12201(a).
77. See id.
78. See 29 C.F.R. app. § 1630.1(a) (1997) (stating that the House Committee on the Judiciary noted that “the use of the term ‘disabilities’ instead of ‘handicaps’ reflects the desire of the Committee to use the most current terminology, further it reflects the preference of persons with disabilities to use that term rather than ‘handicapped’ as used in previous laws . . . ”).
79. See id.
80. See 29 C.F.R. app. § 1630.2(g) (1997).
disability” is an individual who has: “a physical or mental impairment that substantially limits one or more of the major life activities of such individual;”81 “a record of such an impairment;”82 or is “being regarded as having such an impairment.”83 To understand this definition, it is necessary to explain the terms used.

The term “physical impairment” has the same meaning as it does in section 504 of the Rehabilitation Act:

[a]ny physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: Neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genitourinary; hemic and lymphatic; skin; and endocrine.84

A “mental impairment” is defined as “any mental or physiological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.”85 These two lists are not exhaustive as it would be impossible to provide a comprehensive list of all the conditions or diseases that constitute “physical or mental impairments.”86

To qualify as a disability covered by the ADA, an impairment must substantially limit one or more major life activities.87 Stated differently, the individual must be unable to perform, or be significantly limited in the ability to perform, an activity that commands little or no difficulty from an average person in the general population.88 Major life activities are activities such as walking, speaking, seeing, hearing, breathing, learning, performing manual tasks, caring for oneself, and working.89

There are three factors to consider in determining whether an impairment substantially limits a major life activity: (1) the nature and se-

84. 28 C.F.R. § 41.31(b)(1)(I) (1997).
85. 28 C.F.R. § 41.31(b)(1)(ii) (adding that “[t]he term physical and mental impairment includes, but is not limited to, such diseases and conditions as orthopedic, visual, speech, and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, and drug addiction and alcoholism”).
86. 1992 EQUAL EMPLOYMENT OPPORTUNITY COMMISSION TECHNICAL ASSISTANCE MANUAL ON THE EMPLOYMENT PROVISIONS (TITLE I) OF THE AMERICANS WITH DISABILITIES ACT II-2 [hereinafter E.E.O.C. TECHNICAL ASSISTANCE MANUAL].
89. See 29 C.F.R. § 1630.2(i) (1997).
verity of the impairment; (2) the duration or expected duration of the impairment; and (3) the permanent or long term impact of, or resulting from, the impairment.90

It is not the name of an impairment or condition that is of importance in determining ADA protection, but rather the effect of the impairment or condition on the life of a particular person.91 "The determination as to whether an individual is substantially limited must always be based on the effect of an impairment on [that] individual’s life activities."92

The ADA defines "substantially limited with respect to the major activity of working" as being "significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities."93 If an individual qualifies as substantially limited in a major life activity, it is not necessary to consider whether or not the individual is substantially limited in "working."94 However, if the individual is not substantially limited with respect to a major life activity, the individual’s ability to perform the major activity of working should be considered.95

Thus far, the first part of the ADA definition of an "individual with a disability" which protects people who currently have an impairment which substantially limits a major life activity, has been discussed. The second and third parts of the definition protect people who may or may not actually have such an impairment, but are subject to discrimination because they "have a record of" or are "regarded as" having such an impairment.96

Having a "record of a such impairment" means that the individual "[h]as a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities."97 This part of the definition protects individuals with a history of a disability whether or not they are currently substantially limited in a

92. Id.
93. 29 C.F.R. § 1630.2(j)(3).
94. See 1992 E.E.O.C. TECHNICAL ASSISTANCE MANUAL, at II-6 (stating as an example, "[i]f a person is substantially limited in seeing, hearing, or walking, there is no need to consider whether the person is also substantially limited in working").
95. See id.
96. See id.
97. 29 C.F.R. § 1630.2(k).
major life activity. However, the person must have a record of an impairment that substantially limited a major life activity. According to the Equal Employment Opportunity Commission ("EEOC") Technical Assistance Manual for the ADA, this part of the definition "protects people with a history of cancer ..." The EEOC regulations clearly state that this provision protects former cancer patients from discrimination even when their illnesses are either cured, controlled or in remission. The legislative history of the ADA clearly enunciates this position as well: "Examples [of individuals with a record of such an impairment] include a person who had, but no longer has, cancer ..." In its report to the Senate, the Committee on Labor and Human Resources stated that, "discrimination on the basis of such a past impairment [which substantially limited the individual in a major life activity] would be prohibited under this legislation." This category also covers the individual if the employer relies on such a record to make an adverse employment decision.

The third part of the definition of disability protects individuals who are "regarded as having such an impairment." This protects people in three categories: (1) those who have an impairment that does not substantially limit major life activities but are treated by an employer as having such limitation; (2) those who have such an impairment only because of attitudes of others toward the condition; and (3) those who have no impairment at all, but are treated as though they have a substantially limiting impairment.

This part of the definition protects people who are perceived as having disabilities from employment decisions based on fears, stereotypes and misconceptions about disability. In School Board of Nassau County v. Arline, 480 U.S. 273 (1987), the Supreme Court held that the ADA protects individuals with a history of cancer even if they are no longer affected by the disease.

99. Id. at II-9.
100. Id. at II-8 (emphasis added).
101. See id.
102. See LEGISLATIVE HISTORY OF THE ADA, VOL. I, at 469 (Comm. Print 1990); see also S. REP. No. 101-116, at 23 (1989) (stating that the second prong of the definition of disability includes an individual who has a history of a mental or physical impairment that substantially limits one or more major life activities and that this provision is included in the definition to protect individuals who have recovered from such impairments, including those who have had cancer).
103. SEN. REP. No. 101-116, at 23.
County v. Arline,\textsuperscript{108} the Supreme Court discussed the need for such protection because "society's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment."\textsuperscript{109}

To qualify for protection under the ADA, a person must not only be an individual with a disability, the person must also be qualified to perform the job.\textsuperscript{110} The ADA defines "qualified individual with disability" to mean "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such an individual holds or desires."\textsuperscript{111}

To be "qualified" under the ADA the person must meet the necessary prerequisites for the job.\textsuperscript{112} This is often referred to as "otherwise qualified," meaning that the individual meets all the job prerequisites except those that cannot be met because of the disability.\textsuperscript{113} Being "qualified" also means that the person can perform the essential functions of the job with or without reasonable accommodation.\textsuperscript{114} Essential functions are the fundamental job duties of the employment position the individual with a disability holds or desires and does not include the marginal functions of the position.\textsuperscript{115} In determining who is a "qualified" individual with a disability, courts will begin by identifying which functions of the job are essential.\textsuperscript{116}

Included in the ADA definition of employer discrimination is "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless . . . [the employer] can demonstrate that the accommodation would impose undue hardship on the operation

\textsuperscript{108} 480 U.S. 273 (1986).
\textsuperscript{109} Id. at 284 (discussing Congressional acknowledgment of the need to address this problem through this part of the definition of disability in the Rehabilitation Act).
\textsuperscript{110} See E.E.O.C. TECHNICAL ASSISTANCE MANUAL, at II-11.
\textsuperscript{111} 42 U.S.C. § 12111(8) (1994); see also 29 C.F.R. § 1630.2(m) (1997) (clarifying this definition in that the person must "satisf[y] the requisite skill, experience, education and other job-related requirements of the employment position . . . and who, with or without reasonable accommodation, can perform the essential functions of such position").
\textsuperscript{112} See E.E.O.C. TECHNICAL ASSISTANCE MANUAL, at II-11.
\textsuperscript{113} See id. at II-12.
\textsuperscript{114} See id.
\textsuperscript{115} See 29 C.F.R. § 1630.2(n)(1) (1997).
\textsuperscript{116} See id. (establishing three factors that must be used in determining whether a function is essential: (1) whether the position was created so that the particular function would be performed; (2) whether other employees may be available to perform that job function, or among whom certain job functions can be distributed; and (3) whether the function requires such a degree of expertise or skill that an employee is hired in part due to an ability to perform the specialized task).
of the... [employer’s] business.”117 “This balancing approach requires that an individual be able to perform the essential functions of the job with reasonable accommodation and without creating an undue burden on the employer.”118

“Accommodation” means “[t]he employer must be willing to consider making changes in its ordinary work rules, facilities, terms, and conditions in order to enable a disabled individual to work.”119 “Reasonable accommodation” may include:

making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modification of examinations, training materials or policies, and the provision of qualified readers or interpreters.120

Undue hardship is defined as “an action requiring significant difficulty or expense,” when considered in light of such factors as: (1) the nature and cost of the accommodation needed; (2) the overall financial resources of the facility; (3) the overall financial resources of the covered entity with respect to its size and the number, type and location of its facilities; and (4) the type of operation of the covered entity, including the composition, structure, and functions of the workforce, the geographic separateness, administrative, or fiscal relationship of the facility in question to the covered entity.121

The employee must show that the accommodation is reasonable in that it is both efficacious and proportional to costs.122 “Even if this prima facie showing is made, the employer has an opportunity to prove that upon more careful consideration the costs are excessive in relation either to the benefits of the accommodation or to the employer’s financial survival or health.”123 “An unrelated, inefficacious change would not be an accommodation of the disability at all.”124

117. 42 U.S.C. § 12112(b)(5)(A) (1994); Vande Sande v. Wisconsin Dep’t. of Admin., 44 F.3d 538, 543, 544 (7th Cir. 1995) (holding that Vande Sande’s pressure ulcers were part of her disability and therefore what the state had a duty to accommodate—reasonably).
119. Vande Sande, 44 F.3d at 542.
122. See Vande Sande, 44 F.3d at 543.
123. Id.
124. Id. at 542.
A. The Prima Facie Case Under the ADA

To establish a prima facie case under the ADA, the plaintiff must prove: (1) an actual disability; (2) that he/she is qualified for the job; and (3) that an adverse employment decision was made solely because of that disability. The ADA expressly contemplates that the voluminous precedent arising out of section 504 of the Rehabilitation Act can guide ADA determinations in establishing this prima facie case.

The ADA plaintiff can prove discrimination by either direct evidence or, in a circumstantial evidence case, by an indirect or inferential method of proof. If direct evidence is unavailable, courts have allowed plaintiffs to use the burden-shifting method originally established for Title VII cases in McDonnell Douglas Corp. v. Green. To establish a prima facie case in an ADA action under the McDonnell Douglas framework, the plaintiff must show: (1) that the individual is a qualified individual with a disability; (2) that the individual has suffered adverse employment action; and (3) that a causal connection exists between the adverse employment action and the disability.

125. See Rizzo v. Children's World Learning Ctrs. Inc., 84 F.3d 758, 765 (5th Cir. 1996) (finding that the plaintiff met her burden as to the first prong of the prima facie case and that a hearing impairment is a disability under the ADA, but that there were genuine issues of material fact as to the second and third prongs); see also Kocsis v. Multi-Care Management, Inc., 97 F.3d 876, 886-87 (6th Cir. 1996) (holding that plaintiff failed to establish the "disability" element of a prima facie case of disability discrimination where she admitted she did not have an impairment that limited her major life activities, and there was no evidence that record of such an impairment existed at the time of the challenged reassignment of her job); Aucutt v. Six Flags Over Mid-America, Inc., 85 F.3d 1311, 1318 (8th Cir. 1996) (holding plaintiff not "disabled" under the ADA because of his failure to establish that his heart disease caused him to be substantially limited in a major life activity).


127. See Rizzo, 84 F.3d at 762.

128. 411 U.S. 792, 802 (1972).

129. See Aucutt, 85 F.3d at 1318 (stating that plaintiff may use the burden-shifting framework of McDonnell Douglas to prove a claim of intentional disability discrimination); see also Daigle v. Liberty Life Ins. Co., 70 F.3d 394, 396 (5th Cir. 1995) (stating that plaintiff may establish a disability discrimination claim by using the indirect method of proof set for Title VII actions in McDonnell Douglas); De Luca v. Winer Industries, Inc., 53 F.3d 793, 797 (7th Cir. 1995) (allowing the ADA plaintiff to use the burden-shifting method in McDonnell Douglas to prove discrimination indirectly); Wilson v. Gayfers Montgomery Fair, Co., 953 F. Supp. 1415, 1420-21 (M.D. Ala. 1996) (holding that where plaintiff must rely on circumstantial evidence, plaintiff must establish a discrimination claim through the use of the McDonnell Douglas framework).
McDonnell Douglas requires that once the plaintiff has stated a prima facie case, the burden shifts to the defendant to prove some legitimate nondiscriminatory reason for its action that adversely affected the employee. This is because "[e]stablishment of the prima facie case in effect creates a presumption that the employer unlawfully discriminated against the employee." The defendant must then rebut the presumption of discrimination by producing evidence that the plaintiff was rejected for a legitimate, nondiscriminatory reason. It is important to note, however, that although the McDonnell Douglas presumption shifts the burden of production to the defendant, "[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff."

B. Cancer History and the Prima Facie Case Under the ADA

The EEOC's definition of "substantial limitation of a major life activity" is too narrow and contributes to the exclusion of a class of people Congress clearly intended to protect, namely, those with a cancer history. The requirements for making a prima facie case under the ADA pose problems for the person with a history of cancer in light of the fact that many people in this category have no overt symptoms. Cancer patients are often able to perform the essential functions of their job without interruption, even if they are undergoing radiation and chemotherapy. Many withstand cancer treatment with little interruption in

130. See McDonnell Douglas, 411 U.S. at 802.
132. See id.
134. See E.E.O.C. TECHNICAL ASSISTANCE MANUAL, at II-3-4 (defining an impairment as one that renders the individual incapable of performing, or significantly limits the individual's ability to perform, an activity such as walking, speaking, breathing, performing manual tasks, seeing, hearing, learning, caring for oneself, or working).
136. See Robert L. Burgdorf, Jr., The Americans with Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Issue, 26 HARV. C.R.-C.L. L. REV. 413, 448 (1991) (stating that a major life activity limitation may not be easy to show with conditions such as cancer, which have periods of remission, because there is no substantial impact on performance of major life activities).
137. See E.E.O.C. v. R. J. Gallagher Co., 959 F. Supp. 405, 409 (S.D. Tex. 1997) (holding employee critically ill with leukemia did not establish he was disabled under ADA where the only limitation identified was need to take time off for chemotherapy); see also Gordon v. Hamm & Assoc., Inc., 100 F.3d 907, 912 (11th Cir. 1996), cert. denied, 118 S. Ct. 630, 66 U.S.L.W. 3416
their lives and thus, even with a history of cancer, do not have an "impairment that substantially limits a major life activity," nor do they have "a record of an impairment that substantially limits a major life activity." This definition of "substantially limiting" also affects the third prong of the ADA definition of disability in that the employer must be seen to regard the employee as having a substantially limiting disability, not merely any disability.

For example, the Fourth Circuit reviewed the asymptomatic person's dilemma in Runnebaum v. Nationsbank of Maryland. The court said that while it was true that the legislative history of the ADA established that Congress intended asymptomatic HIV infection to be an impairment, there was no need to resort to legislative history because the statutory meaning of impairment was plain and unambiguous. The court then added that "[t]he plain meaning of 'impairment' suggests that asymptomatic HIV infection exhibits no diminishing effects on the individual."

Despite the United States Supreme Court's recent ruling in Bragdon v. Abbott, it can be inferred from the above language that the Fourth Circuit would classify a person whose cancer is in remission to be asymptomatic as well and, hence, not "impaired." This would be a classic example of how the "substantially limits" language can be interpreted to deny those with a cancer history coverage under the ADA. Congressional intent was clear and unequivocal—it intended to protect those who are discriminated against because of a history of an impairment as well as those who suffer discrimination due to stereotypes about their disease. It can be argued that if those who are asymptomatic or are in remission exhibit no physical or mental manifestations of the dis-

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138. See Gallagher, 959 F. Supp. at 409; Gordon, 100 F.3d at 912; see also Ellison v. Software Spectrum, Inc., 85 F.3d 187, 190-93 (5th Cir. 1996) (holding that employee did not establish that her breast cancer was a disability within the meaning of the ADA in any of the three tests).
139. See E.E.O.C. TECHNICAL ASSISTANCE MANUAL, at II-10.
140. 123 F.3d. 156 (4th Cir. 1997).
141. See id. at 168.
142. Id. at 169. But see Bragdon v. Abbott, 118 S. Ct. 2196, 2207-09 (1998) (holding that HIV infection is a disability under the ADA, even when not progressed to the so-called symptomatic phase and that HIV infection substantially limits the major life activity of reproduction).
143. 118 S. Ct. 2196 (1998).
144. See infra note 248 and accompanying text for a discussion of the implications of Bragdon on the plaintiff with a cancer history.
ease, the courts can find them not impaired under all three prongs of the ADA definition a disability. Under this interpretation, these people, who very often are being denied positions because of their disease, have no recourse under the ADA.

The ADA places another huge hurdle in the way of the plaintiff with a history of cancer. Under the ADA, the plaintiff not only has to prove that he or she has, or is regarded as having, an impairment that makes it extremely hard to find gainful employment, the plaintiff then has to prove that the impairment does not actually limit his or her ability to do the job. If the impairment does not actually limit an individual's ability to do the job, why would the impairment make it difficult for the individual to find gainful employment? Once a plaintiff has made a prima facie case of an adverse employment action based upon an impairment, why should the onus be on the plaintiff to prove the unavailability of other employment opportunities?

Similarly, in Nave v. Wooldridge Construction, the plaintiff was diagnosed with stage IIA Hodgkin’s Disease and was treated with chemotherapy and radiation, during which he was unable to work. As a result of the treatments, he was later diagnosed with major depression and extreme fatigue. When he returned to work, he had no evidence of the disease and his depression and anxiety were improved. He again had to take some time off when he collapsed on the job and, upon his

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146. See, Robert L. Burgdorf, Jr., The Americans with Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Issue, 26 HARV. C.R.-C.L. L. REV. 413, 448 n.183 (1991) (citing THE NATIONAL COUNCIL ON THE HANDICAPPED, TOWARD INDEPENDENCE app. at A-24 (1986)). It further noted that conditions that do not inherently interfere with major life activities may become serious “handicaps” because of employers’ and agencies’ reactions to them. Individuals have been denied employment and excluded from participation in programs and activities because of such conditions as glaucoma in an arrested state, cancer of the uterus that has been successfully treated, minor degrees of back impairment, a missing kidney, absence of a part of a finger, or double vision. Many of these conditions do not of themselves entail a substantial limitation upon major life activities, so a person with such a condition has a hard time meeting the statutory definition for Section 504 protection. Yet they may have been excluded precisely because of discrimination against them on account of their disabilities.


148. Hodgkin’s Disease is a form of malignant lymphoma. See 16 AM. JUR. 3D Taber’s Cyclopedic Medical Dictionary 836 (1992). It is a disease of unknown etiology producing enlargement of lymphoid tissue, spleen and liver with invasion of other tissues. See id.

149. See Nave, 10 Nat’l Disability L. Rep. (LRP) at 608.

150. See id.

151. See id.
return the second time, he was informed of his termination. His cancer was in complete remission at the time. The court found that the plaintiff failed to establish that he was disabled under the ADA because he had not raised a material issue of fact as to whether he was substantially limited in a major life activity or that the defendant regarded him as disabled. The court reasoned that, because any impairment the plaintiff experienced was of a temporary nature, none qualified as disabilities because they were not substantially limiting. The court also found that the plaintiff was not substantially limited in working because his injuries did not preclude him from employment in an entire class or broad range of jobs. He could function by either working fewer hours or performing lighter duties.

Because the plaintiff presented no evidence of the lack of availability of lighter jobs in his geographical area, and because he actually secured employment elsewhere after his termination, he could not prevent summary judgment. The employer in Nave treated the plaintiff as though his impairment were substantially limiting by terminating his employment and then turned around and declared the impairment not to be substantially limiting because he could do “other jobs.” However, this employer had no such “other jobs” for him. If the plaintiff required such “other jobs” because of his impairment, and was terminated because no such “other jobs” were available, how is it that he was not terminated because of his impairment?

In Gordon v. Hamm & Associates, the plaintiff Gordon, an employee of Hamm & Associates (“Hamm”), was treated with six months of chemotherapy treatments for malignant lymphoma. Gordon’s doctor indicated that he was able to continue with his normal activities during his treatments and that his life activities were limited by the chemotherapy in that he had to visit the doctor’s office, receive the

152. See id. (explaining that although he was in remission, the plaintiff was still fatigued from the radiation therapy).
153. See id.
154. See Nave, 10 Nat’l Disability L. Rep. (LRP) at 611-12.
155. See id. at 609.
156. See id. 609-11.
157. See id. at 610.
158. See id. at 610, 611.
treatments, and endure any side effects involved. The side effects he experienced were weakness, dizziness, swelling of the ankles and hands, numbness of the hands, the loss of body hair, and vomiting.

Gordon missed ten days of work for diagnostic testing and upon his return, claimed that the terms, conditions, and privileges of his job had changed substantially. The only accommodation he required as a result of the cancer was leaving a couple of hours early every Friday. Two days after his return to work, Gordon had a dispute with his supervisor after he made an inadvertent error and was fired.

Gordon sued under the ADA, alleging unlawful discrimination, and the district court found that Gordon was a "qualified individual with a disability under the ADA." On appeal, the Eleventh Circuit held that "[w]hile the side effects that Gordon suffered... may qualify as 'physical impairments' under the ADA,... such impairments did not substantially limit his ability to care for himself or to work."

There were several factors that led the court to the above conclusion: Gordon was never hospitalized during his treatments; his side effects only lasted for approximately three days after each treatment session and he handled them fairly well; his doctor specifically stated that Gordon was not disabled by the cancer and could continue to work; and Gordon himself conceded that he was fully capable of working.

Gordon also contended that the employer regarded him as being impaired and that he was treated differently upon his return to work due to the fact that he had had cancer. His support for this contention was that when he returned to work, he had been replaced by another worker, he was assigned to different work, he no longer had access to a company vehicle, and he was not re-issued his set of keys which gave access to various buildings at the site. After conceding that ADA regulations are intended to combat the effects of "archaic attitudes, erroneous perceptions, and myths that have the effect of disadvantaging persons with, or regarded as having, disabilities," the court further held that there

161. See id.
162. See id.
163. See id.
164. See Gordon, 100 F.3d at 909.
165. See id.
166. Id. at 908.
167. Id. at 912.
168. See id.
169. See Gordon, 100 F.3d at 912.
170. See id.
171. Id. at 913.
was insufficient evidence to support a finding that Hamm regarded Gordon as having an impairment that substantially limited his ability to care for himself or to work. The court reasoned that because Hamm had a reasonable business justification for altering Gordon’s job specifications upon his return to work and because Hamm continued to provide Gordon with the same compensation and benefits as it had prior to his diagnosis, there was no evidence to support the claim that Hamm regarded Gordon as being impaired. Once again, it seems clear in Gordon that the plaintiff was regarded as substantially impaired enough to warrant a job change and subsequent termination but, not substantially impaired enough to be considered disabled.

In Ellison v. Software Spectrum Inc., an employee who was treated for breast cancer with daily radiation therapy for over a month was able to continue working on a modified schedule without a day’s absence. The lower court granted the employer’s motion for summary judgment finding that Ellison’s breast cancer was not a “requisite” disability under the ADA. The Court of Appeals for the Fifth Circuit affirmed the lower court’s decision because the treatment did not affect her ability to do the job and she never missed a day of work. “Obviously, her ability to work was affected; but,... far more is required to trigger coverage under [the ADA].”

The employee, Phyllis Ellison, further contended that she had a record of having a substantially limiting impairment, which triggered the second prong of the ADA definition of disability. The court discounted this contention because nothing in her personnel file indicated that she was substantially limited by any impairment.

Ellison’s third contention was that the employer, Software Spectrum Inc. (“SSI”), regarded her cancer as being a substantial limitation on her ability to work. The court responded by noting that simply because an employer believes an employee is incapable of performing a

172. See id. at 912.
173. See id. at 913-15.
174. 85 F.3d 187 (5th Cir. 1996).
175. See id. at 189.
176. See id.
177. See id. at 192.
178. Id. at 191.
179. See Ellison, 85 F.3d at 192.
180. See id. (adding that the employer’s acquiescence in a modified schedule to accommodate her treatment did not create a material fact issue on whether she had the requisite record, in that she never missed any work and her ability to work was not substantially limited).
181. See id.
particular job, does not mean that the employer necessarily regards the employee as having a substantially limiting impairment.\textsuperscript{182}

Ellison based this third contention on several remarks made by her supervisor.\textsuperscript{183} When she informed him that she needed a modified work schedule to facilitate her treatments, he expressed irritation by suggesting that she have a mastectomy instead because her breasts were not worth saving.\textsuperscript{184} Second, upon hearing that she got sick every time she thought of eating or drinking, he responded that it had not affected her weight.\textsuperscript{185} On a third occasion, during a company power outage, he told other employees to follow Ellison out of the building during the evacuation because she was glowing and could thus guide them out of the building.\textsuperscript{186} The court conceded that these remarks were reprehensible but declined to find that they fulfilled the third prong of the disability test under the ADA.\textsuperscript{187}

A fourth remark occurred at a meeting in which a departmental reduction was discussed and human resources asked whether any of the potentially affected employees had special circumstances that needed consideration.\textsuperscript{188} Ellison's supervisor responded, "Phyllis has cancer."\textsuperscript{189} The court considered this last comment to present a closer question as to whether or not it created a material fact issue.\textsuperscript{190} However, the court reasoned that because Ellison had voluntarily accepted another position within the firm with the same salary and benefits, and since others in the company had job changes as well, there was no material issue of fact as to whether she was regarded as having an impairment by SSI.\textsuperscript{191}

It is hard to conceive how the four comments made by Ellison's supervisor did not indicate that Ellison was "regarded as" having an impairment and that she was subjected to discrimination as a result. The third part of the ADA definition was designed to protect people with

\textsuperscript{182} See id. (citing Forrisi v. Bowen, 794 F.2d 931, 935 (4th Cir. 1986) which stated: "[t]he statutory reference to a substantial limitation indicates instead that an employer regards an employee as [substantially limited] in his or her ability to work by finding the employee's impairment to foreclose generally the type of employment involved.").

\textsuperscript{183} See id.

\textsuperscript{184} See Ellison, 85 F.3d at 192.

\textsuperscript{185} See id.

\textsuperscript{186} See id. at 192-93.

\textsuperscript{187} See id. at 192-93.

\textsuperscript{188} See id.

\textsuperscript{189} Id.

\textsuperscript{190} See Ellison, 85 F.3d at 193.

\textsuperscript{191} See id.
disabilities from stereotyping\textsuperscript{192} and it seems clear that Ellison was a victim of just such stereotyping. Her supervisor continually referred to her disease in a pejorative manner in front of other employees. The remark made at the meeting called specifically to discuss departmental reduction was perhaps even a clearer example of what Congress intended to circumvent with the ADA. Clearly, Ellison's employer's response to the question posed by human resources indicated that he regarded her breast cancer as an issue affecting her ability to work. This court seems to be saying that as long as a person is still employed and earning the same salary, employers are immune from attack under the ADA.

In \textit{E.E.O.C. v. R.J. Gallagher Co.},\textsuperscript{193} a corporate executive, Michael Boyle, alleged he was demoted and given a salary reduction for taking time off during chemotherapy treatments.\textsuperscript{194} When he returned to work, his cancer was in remission and his doctor said he could return to work with no limitations except that he needed six more treatments, each lasting three to five days.\textsuperscript{195} When Boyle was informed of his demotion from president to vice president and an accompanying salary reduction, he quit and never returned to work.\textsuperscript{196}

Boyle asserted that he was discriminated against because of his cancer and that his employer regarded him as disabled.\textsuperscript{197} The court held that he "had no disability-actual, historic, or perceived. He was not disabled; he was critically ill."\textsuperscript{198} The court went on to say that cancer is not a disability.\textsuperscript{199} In response to the argument that Boyle was perceived as disabled, the court said,

\begin{quote}
[t]he "or perceived" language is in the law to protect people who have some obvious specific handicap that employers might generalize in to a disability. Boyle did not have a condition—a defect—that Gallagher
\end{quote}

\textsuperscript{193} 959 F. Supp. 405 (S.D. Tex. 1997).
\textsuperscript{194} See id. at 406.
\textsuperscript{195} See id. at 407.
\textsuperscript{196} See id.
\textsuperscript{197} See id. at 408-09.
\textsuperscript{198} Gallagher, 959 F. Supp. at 409.
\textsuperscript{199} See id. (adding that this law [the ADA] covers temporary or permanent conditions affecting a specific functional capacity that are essentially incurable with current medical science; the effects of cancer can leave a person disabled but, cancer itself is not a disability).
[the employer], based on erroneous social stereotypes, could generalize into an inability to function on the job.200

C. ADA Cases in Which Plaintiff Has Prevailed

In E.E.O.C. v. AIC Securities Investigation, Ltd.,201 the first case the EEOC brought under the ADA, the plaintiff Wessel, the Executive Director at AIC, was diagnosed with terminal lung cancer.202 After AIC discharged him from his job, Wessel brought this action claiming discrimination on the basis of his disability.203 AIC moved for summary judgment which the Illinois District Court denied.204

Wessel was treated for lung cancer in June of 1987 and in July of 1991 and was able to return to work at AIC following surgery and recuperation.205 By April of 1992, his condition was terminal but, he still received treatments to prolong and improve his quality of life.206 Wessel continued to work throughout the course of his treatments, although he would have to leave work early on certain days.207 The amount of work he missed in 1992 is disputed; the EEOC and Wessel claim that he missed no work before July 29 and AIC claims he missed fifteen workdays in April and May and two days in July.208 It is undisputed that Wessel missed a total of fifty-one and one-half days in 1991.209 Wessel’s employment at AIC was terminated effective July 31, 1992 because an executive at AIC decided it was time for him to retire.210

AIC claimed Wessel was not a “qualified individual with a disability” because he could not perform the “essential functions” of his job due to his frequent absences for treatment and his severe short-term memory loss.211 The position Wessel held before his termination was the

200. Id.
202. See id. at 1061.
203. See id. at 1060.
204. See id.
205. See id. at 1061.
206. See AIC, 820 F. Supp. at 1061.
207. See id.
208. See id.
209. See id. at 1061-62.
210. See id. at 1062 (adding that prior to his termination from AIC, Wessel was given no warnings relating to performance, attendance, or any disciplinary action).
211. See AIC, 820 F. Supp. at 1063, 1064-65 (claiming further that regular, predictable full-time attendance was an essential function of Wessel’s job which he could not perform regardless of any reasonable accommodations and that his memory loss problem was affecting the survival of
highest management position at AIC and required, as an essential function, overall management and direction of over three hundred employees.\textsuperscript{212}

In denying the employer's motion for summary judgment, the court stressed the minimal impact of the employee's impaired performance on the company and observed that "if perfection is to be the standard for qualification under the ADA, very few individuals would be qualified."\textsuperscript{213}

The court went on to determine that the employee's frequent absences and short-term memory loss were a disputed issues of fact.\textsuperscript{214} The court noted that due to the supervisory nature of the job, regular attendance was not as critical as it might be in other types of jobs and that since most of the business was, or could be, conducted by telephone, it could easily be performed from anywhere.\textsuperscript{215}

In denying summary judgment to AIC, the court showed its willingness to afford plaintiffs their day in court to prove whether they are able to perform the essential functions of their jobs by meeting the thresholds needed under the ADA.

In a New York case, \textit{Mark v. Burke Rehabilitation Hospital},\textsuperscript{216} the plaintiff, a physician, filed suit under the ADA alleging that he was terminated because he had cancer and because he could not postpone his chemotherapy treatments so he could cover for another doctor.\textsuperscript{217}

In its analysis, the court in \textit{Mark} considered all three prongs of the ADA definition of disability.\textsuperscript{218} It first considered whether cancer is a physical or mental impairment under the ADA.\textsuperscript{219} The court noted that the plaintiff had produced medical evidence that his lymphoma affected his digestive system and thus met the EEOC definition of physical im-

\textsuperscript{212} See id. at 1061 (adding that other essential functions included "dealing with labor unions, supervising investigations, tracking litigation AIC was involved in, the development of policy, site walk-throughs, handling labor matters, establishing price rates and monitoring and disciplining subordinates").

\textsuperscript{213} Id. at 1065.

\textsuperscript{214} See id. (adding that a factual question exists as to there being no accommodation for Wessel's memory loss due to the testimony of AIC's own expert witness who stated in his deposition that writing things down, keeping logical notes and prior experience and expertise can aid in overcoming memory loss).

\textsuperscript{215} See id. at 1064.

\textsuperscript{216} 9 Nat'l Disability L. Rep. (LRP) ¶ 322, at 1155 (S.D. N.Y. 1997).

\textsuperscript{217} See id.

\textsuperscript{218} See id. at 1157.

\textsuperscript{219} See id.
The court further noted that the legislative history of the ADA indicates that Congress considered cancer to be an impairment and held that the plaintiff’s cancer is a physical impairment. The defendant contended that even if the plaintiff’s cancer qualified as an impairment, he was not disabled when his position was terminated because his cancer had already been cured at the time. In denying summary judgment to the defendant, the court held that the plaintiff had sufficiently shown that he was “disabled” as a former cancer patient under the ADA because he had a record of his physical impairment. The court further noted that the Supreme Court has categorized an impairment that was “serious enough to require hospitalization” as an impairment that substantially limits one or more major life activities and that the plaintiff submitted sufficient evidence to that effect.

Because the ADA only protects qualified individuals with disabilities, the court next endeavored to determine if the plaintiff was “qualified.” First, the court noted that the parties did not dispute that Mark had the necessary skill, education and experience for the job. Second, the court determined that filling in for the other doctor was an essential function of the plaintiff’s job. The court then held that the plaintiff carried his burden of showing he could perform the essential functions of the job with or without accommodation because he submitted evidence that he was capable of filling in for the other doctor if the

220. See id.; 29 C.F.R. § 1630.2(h)(1) (defining “physical or mental impairment” as “any physiological disorder, or condition, ... affecting one or more of the ... body systems ... [including] digestive”).

221. See Mark, 9 Nat’l Disability L. Rep. (LRP) at 1157 (citing S. Rep. No. 101-116, at 22 (1989) which states: the term “physical and mental impairment” includes “such conditions, diseases and infections as ... cancer”).

222. See id.

223. See id.; see also 29 C.F.R. app. § 1630.2(k) (stating “this provision protects former cancer patients from discrimination based on their prior medical history”).

224. Id. at 1157; see also School Board of Nassau County v. Arline, 480 U.S. 273, 281 (1987) (holding that plaintiff’s hospitalization for tuberculosis sufficed to establish a record of impairment within the meaning of 29 U.S.C. § 706(7)(B)(ii)). But see Demming v. Housing and Redevelopment Authority of Duluth, Minn., 66 F.3d 950, 955 (8th Cir. 1995) (holding that hospitalization alone is insufficient to establish an impairment under the ADA).

225. See Mark, 9 Nat’l Disability L. Rep. (LRP) at 1157.

226. See id. at 1157-58 (stating, “the determination of whether an individual with a disability is ‘qualified’ is made in two steps”). The first step is to decide whether the individual satisfies the prerequisites for the position and the second step is to decide whether the individual can perform the essential functions of the job, with or without reasonable accommodation. See id.

227. See id. at 1158.

228. See id.
hospital had provided the reasonable accommodation of rescheduling or postponing her vacation. 229

An employer has an affirmative obligation to provide reasonable accommodations to the known limitations of a qualified person with a disability and therefore, the court held that there was sufficient evidence to establish a prima facie case that the plaintiff was fired because of his disability. 230

In Bizelli v. Amchem,231 an employee sued under the ADA because he was terminated when he refused to return to work after his cancer treatment unless the employer lifted temporary restrictions. 232 The plaintiff employee was diagnosed with testicular cancer, placed on short-term disability, and underwent aggressive chemotherapy and major surgery. 233 He was cancer free after his surgery but suffered complications during his recovery which required his physician to release him for light duty assignments only. 234 Due to the fact that the defendants refused to allow the plaintiff to return to work because he could not perform the essential functions of his job, with or without reasonable accommodation, the plaintiff went on long-term disability for two months. 235 His return from disability was contingent upon his successful completion of the company’s pre-employment physical, which the plaintiff maintained was never required of anyone else. 236 The results of the physical allowed him to return to work as a chemical operator with temporary restrictions, on the condition that he would be reevaluated at some future date. 237 The plaintiff alleged that the employer suggested that his employment could be terminated if he was unable to demonstrate full capacity in the subsequent physical. 238 When the plaintiff refused to return to work unless the restrictions were lifted, he was terminated. 239

The defendants claimed that the plaintiff was not a qualified individual with a disability under the ADA because his cancer was not sub-

232. See id. at 1256.
233. See id. at 1255-56.
234. See id. at 1256.
235. See id.
236. See Bizelli, 981 F. Supp. at 1256.
237. See id.
238. See id.
239. See id.
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stantially limiting his major life activities at the time they terminated him. They further argued that "[a]n impairment that disqualifies a person from only a narrow rank of jobs is not considered a substantially limiting one." The plaintiff argued that whether or not his cancer was substantially limiting his major life activities was irrelevant because he had "a record of such an impairment."

The court first held that "there is no dispute that cancer can constitute a physical impairment under the ADA." The court further held that the plaintiff established a "record of impairment," and thus was a "qualified individual with a disability," because he had been on a leave of absence, was receiving short-term disability benefits since his diagnosis, and the defendants were aware of both his chemotherapy and his surgery. The court found the EEOC Interpretive Guidelines dispositive in that the "record of impairment" provision was intended to ensure that former cancer patients are not discriminated against on the basis of their prior medical history.

The court further held that the "plaintiff... met his burden with respect to his ability to perform the essential functions of the job and the reasonableness of any accommodations that he may have needed." His submission of an expert witness report which said that he could have performed his job with minimal accommodation and the fact that all of the other chemical operators were not required to perform every function of the job on a daily, weekly or monthly basis led to the court's conclusion.

The United States Supreme Court has addressed the plight of the asymptomatic plaintiff under the ADA in Bragdon v. Abbott. While not a case involving employment discrimination, this case has enormous precedential value to the plaintiff who is discriminated against on the basis of cancer history.

The respondent was infected with the human immunodeficiency virus ("HIV"), but had not manifested its most serious symptoms when

240. See id. at 1257.
241. See Bizelli, 981 F. Supp. at 1257 (citing Wooten v. Farmland Foods, 58 F.3d 382, 386 (8th Cir. 1995)).
242. See id.
244. See id.
245. See id.; see also 29 C.F.R. app. § 1630.2(k) (1997).
246. See Bizelli, 981 F. Supp. at 1258.
247. See id. at 1257-58.
she went to the petitioner's office for a dental examination. When she disclosed her HIV status, petitioner informed her of his policy against filling cavities of HIV-infected patients in his office and offered to treat her at the hospital at no extra charge. The respondent declined and filed suit under the ADA.

The District Court granted the respondent summary judgment and the First Circuit affirmed, agreeing that respondent’s HIV was a disability under the ADA, even though asymptomatic, and that treating her in petitioner's office posed no direct threat to the health and safety of others. The United States Supreme Court granted certiorari in part to review whether HIV infection is a disability under the ADA when it is asymptomatic.

The Supreme Court held that respondent's HIV infection was a "disability" under the ADA, even when the infection had not yet progressed to the symptomatic phase, as a physical impairment which substantially limits the major life activity of reproduction. The Court declined to address the question of whether HIV infection is a per se disability under the ADA.

In deciding on the first element of the definition of "disability," the Court determined that HIV infection is an impairment from the moment of infection in light of the immediacy with which the virus begins to damage the infected person’s white blood cells and the severity of the disease.

The definition of "disability" is not satisfied unless the impairment affects a major life activity and respondent asserted that her ability to

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249. See id. at 2198.
250. See id. (adding that petitioner would have to pay for the use of the hospital facilities).
251. See id.; see also 42 U.S.C. § 12182(a) (1994) (prohibiting discrimination against any individual "on the basis of disability in the . . . enjoyment of the . . . services . . . of any place of public accommodation by any person who . . . operates [such] a place"); 42 U.S.C. § 12182(a)(3) (stating: "Nothing herein shall require an entity to permit an individual to participate in or benefit from the . . . accommodations of such entity where such individual poses a direct threat to the health and safety of others.").
252. See Bragdon, 118 S. Ct. at 2198.
253. See id. at 2200 (reviewing as well whether the First Circuit Court of Appeals, in affirming a grant of summary judgment, cited sufficient material in the record to determine, as a matter of law, that respondent’s HIV posed no direct threat to the health and safety to her dentist).
254. See id. at 2207 (satisfying the first prong of the ADA definition of disability: "[A] physical or mental impairment that substantially limits one or more of the major life activities of such individual" under 42 U.S.C. § 12102(2)(A) (1994)).
255. See id.
256. See id. at 2204.
reproduce was affected.\textsuperscript{257} The Court went on to determine that “[r]eproduction falls well within the phrase ‘major life activity.’”\textsuperscript{258}

The final element of the disability definition is whether the physical impairment was a substantial limitation on the major life activity respondent asserts.\textsuperscript{259} The Court determined that respondent’s infection substantially limited her ability to reproduce because in trying to conceive, she would risk the life of any man she tried to have a child with, and because of the risk of infecting her own child during gestation or childbirth.\textsuperscript{260}

In light of \textit{Bragdon}, it would seem that the plaintiff with a history of cancer who is asymptomatic could prevail using a similar analysis. Cancer in its many forms is a serious, life-threatening illness with ensuing damage to the affected individual’s bodily functions.\textsuperscript{261} If the plaintiff could then show that a major life activity was being substantially limited by the individual’s cancer history, then it would seem that a “disability” could be established under the ADA.

\section*{D. Where the Cancer History Patient Fits in Under the ADA}

The individual with a history of cancer might use the aforementioned strategy in \textit{Bragdon} to prove the first prong of the ADA definition of “disability.” However, it would seem that this individual would fare best under the second and third prongs of the ADA definition.\textsuperscript{262} Protection of people who do not currently suffer from an impairment that affects their functioning, but are nevertheless discriminated against because of a prior impairment is one of the main goals of the ADA.\textsuperscript{263} However, this recourse has consistently been denied to people in this class.\textsuperscript{264} This is no doubt due to the fact that the ADA plaintiff must first prove a “disability” which can be difficult with “hidden” impairments.

\begin{itemize}
\item \textsuperscript{257} See \textit{id}.
\item \textsuperscript{258} See \textit{Bragdon}, 188 S. Ct. at 2205 (adding that “[r]eproduction and the sexual dynamics surrounding it are central to the life process itself”).
\item \textsuperscript{259} See \textit{id}.
\item \textsuperscript{260} See \textit{id.} at 2206.
\item \textsuperscript{261} See generally E.E.O.C. TECHNICAL ASSISTANCE MANUAL (giving descriptions and treatments of forms of cancer).
\item \textsuperscript{262} See supra notes 96-109 and accompanying text.
\item \textsuperscript{263} See 29 C.F.R. § 1630.2(k) (1997); see also LEGISLATIVE HISTORY OF THE ADA, VOL. I, at 326 (Comm. Print 1990).
\item \textsuperscript{264} See, e.g., Runnebaum v. Nationsbank of Maryland, 123 F.3d 156, 169, 175 (4th Cir. 1997) (holding that plaintiff’s asymptomatic HIV infection was not a disability under the ADA); Nave v. Wooldridge Construction, 10 Nat’l Disability L. Rep. (LRP) § 183, at 607, 611-12 (E.D.
The second part of the definition, "having a record of a substantially limiting impairment," can protect those who do not currently suffer from the impairment if they can prove that at some point there was a substantially limiting impairment on record.\textsuperscript{265} Case law seems to indicate that to prevail under this prong, people with a cancer history need to have the substantial limitation of a major life activity delineated in their personnel file.\textsuperscript{266} This puts an unfair burden on the employee, however, because of the very real fear that such a record will cause the very discrimination they are trying to avoid. The United States Supreme Court has declared that there is a disability if there is a record of hospitalization.\textsuperscript{267} One court held that the second prong was satisfied because the employee took a leave of absence, received disability benefits, and the employer was aware of the cancer treatments he received.\textsuperscript{268} However, this prong of the disability definition has provided little protection for the individual with cancer history.

The third, or "regarded as," prong of the definition was specifically designed to guard against discrimination based on public attitudes.\textsuperscript{269} It was supposed to apply to individuals who have had difficulty obtaining or holding onto meaningful employment because of other people's erroneous perceptions.\textsuperscript{270} The protections this part of the definition was designed to afford the disabled have been likened to the protections afforded victims of discrimination under Title VII because the victims are "objectively capable of performing as well as the unimpaired," but are denied employment "because of their skin color or some other vocationally irrelevant characteristic."\textsuperscript{271} It has been suggested that "under the 'regarded as' prong, the major activity of working is the only relevant factor to examine."\textsuperscript{272} An analysis of an actual impairment is irrele-

\textsuperscript{265} See Mark v. Burke Rehabilitation Hospital, 9 Nat'l Disability L. Rep. (LRP) ¶ 322, at 1135, 1157 (S.D. N.Y. 1997) (holding that plaintiff had established a record of a disability because he was hospitalized for cancer surgery and his employer was aware of the surgery when it occurred and was thus disabled under the ADA).

\textsuperscript{266} See Ellison, 85 F.3d at 192.

\textsuperscript{267} See Arline, 480 U.S. at 281.

\textsuperscript{268} See Bizelli, 981 F. Supp at 1257.

\textsuperscript{269} See supra notes 52-70 and accompanying text.

\textsuperscript{270} See id.

\textsuperscript{271} Vande Sande v. Wisconsin Dep't of Admin., 44 F.3d 538, 541 (7th Cir. 1995).

\textsuperscript{272} Steven S. Locke, The Incredible Shrinking Protected Class: Redefining the Scope of Disability under the Americans with Disabilities Act, 68 U. COLO. L. REV. 107, 142 (1997).
vant because the real question is whether the attitudes of others have had a disabling effect on the employment prospects of the individual.273

The employer’s perception of the plaintiff’s ability to work is at issue in these cases. Courts are requiring the plaintiff to prove not only that the employer erroneously regarded the plaintiff as incapable of performing the essential functions of his job,274 but that the employer also regarded the plaintiff’s impairment “to foreclose generally the type of employment involved.”275 This inquiry should be reserved for the determination of “actual disability.” If the employee has been discriminated against on the basis of his cancer history, and there are other jobs available in the workplace for which he is qualified, the employer effectively can discriminate with impunity. The ADA was enacted to prevent just this scenario.

E. How the ADA Can Protect Those With a Cancer History

Except for a few instances, individuals with a history of cancer have been effectively closed out of ADA protection. Under the third prong of the ADA definition of disability, the plaintiff should only have to prove that the employer incorrectly viewed him as having a disability and made an adverse employment decision based upon his perception of that disability. It has been argued that this approach would allow a plaintiff to claim discrimination because he failed to obtain a single job because of a single requirement.276 However, the employer is still free to prove that his perception was indeed correct or that the individual is not qualified for the job. The employer is free as well to prove one of the affirmative defenses under the ADA such as undue hardship or direct threat to health and safety.277 The ADA recognizes the difference between being disabled and not being qualified. The employer is free to make employment decisions based on the latter without implicating the

273. See id.
275. See, e.g., Ellison, 85 F.3d. at 192; Forrisi v. Bowen, 794 F.2d 931, 935 (4th Cir. 1986).
276. See Forrisi, 794 F.2d at 934-35.
277. See 42 U.S.C. § 12182(b)(3) (1994). “Direct threat” is defined as a: significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures or by the provision of auxiliary aids or services. Nothing [herein] shall require an entity to permit an individual to participate in or benefit from the . . . accommodations of such entity where such individual poses a direct threat to the health and safety of others.

Id.
ADA. This approach would facilitate the purpose behind the ADA and would better speak to Congress’ intent behind its enactment.

IV. CONCLUSION

The ADA had very lofty goals, however, in 1994, four years after its enactment, at least two-thirds of working-age Americans with disabilities remained unemployed.278 “Our society is still infected by the ancient, now almost subconscious assumption that people with disabilities are less than fully human and therefore are not fully eligible for the opportunities, services and support systems which are available to other people as a matter of right. The result is massive, society-wide discrimination.”279

“Not working is perhaps the truest definition of what it means to be disabled in this country.”280 If any individual, at any time, is denied even one job he or she wants because of the misfortune of having had cancer at one time, the individual is indeed disabled. A disease that affects so many should not be allowed to further affect one’s ability to perform the essential function of working. An inability to secure gainful employment strikes at the heart of the pursuit of the American dream.

The ADA has the capacity to provide the needed protection to this class of people. It is clear from congressional discussion that this legislation was designed to do just that. Courts should endeavor to utilize the ADA in furtherance of this commendable goal.

Susan M. Gibson*

280. Senator Bob Dole, Are We Keeping America’s Promises to People with Disabilities?—Commentary on Blanck, 79 IOWA L. REV. 925, 928 (1993).
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