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BETWEEN A DISABILITY AND A HARD PLACE: THE CANCER SURVIVORS' CATCH-22 OF PROVING DISABILITY STATUS UNDER THE AMERICANS WITH DISABILITIES ACT

BARBARA HOFFMAN*

There was only one catch and that was Catch-22, which specified that a concern for one's own safety in the face of dangers that were real and immediate was the process of a rational mind. Orr was crazy and could be grounded. All he had to do was ask; and as soon as he did, he would no longer be crazy and would have to fly more missions. Orr would be crazy to fly more missions and sane if he didn't, but if he was sane he had to fly them. If he flew them he was crazy and didn't have to; but if he didn't want to he was sane and had to. Yossarian was moved very deeply by the absolute simplicity of this clause of Catch-22 and let out a respectful whistle.

"That's some catch, that Catch-22," he observed.

"It's the best there is," Doc Daneeka agreed.1

INTRODUCTION

Many cancer survivors2 have found themselves in a similar Catch-22 when encountering cancer-based employment discrimination. After years of successful employment, hundreds of thousands of Ameri-

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This Article is dedicated to the memory of Eric Neisser, former Acting Dean and Professor of Law, Rutgers Law School—Newark, who brilliantly and selflessly instilled in his friends, colleagues, and students a passion for learning and the pursuit of justice for others.


2. The oncology community generally considers a cancer survivor to be "anyone with a diagnosis of cancer, whether newly diagnosed or in remission or with recurrence or terminal cancer." Ellen Stovall & Elizabeth Johns Clark, Survivors as Advocates, in A CANCER SURVIVOR'S ALMANAC: CHARTING YOUR JOURNEY 274, 276 (Barbara Hoffman ed., 1996) [hereinafter CANCER SURVIVOR'S ALMANAC].
cans are diagnosed with cancer each year. Many seek reasonable accommodations, such as a change in duties or hours, to allow them to work while receiving medical treatment. Although many employers readily grant such requests, still other employers discharge, demote, or refuse to hire cancer survivors. This Article addresses whether those survivors who face such cancer-based employment discrimination qualify as disabled under the Americans with Disabilities Act.

Since 1992, the Americans with Disabilities Act of 1990 (ADA) has purported to have protected a "qualified individual with a disability" from employment discrimination. Although most cancer survivors should easily meet the statutory definition of an individual with a disability, certain courts have boxed survivors in a Catch-22 by finding that some cancer survivors do not have a "disability" as defined by the ADA. Contrary to the letter and to the intent of the ADA, certain courts have considered cancer survivors unqualified by finding that those survivors who are capable of working do not have an "impairment that substantially limits . . . [a] major life activity" because they can work; however, courts have labeled those survivors whose cancer limits their ability to work as not "qualified."
Although the ADA applies to an unlimited list of disabilities, most of the law review articles that have focused on a specific medical condition have analyzed how the ADA applies to persons with HIV/AIDS. Only a few commentators have devoted significant analysis to how the ADA applies to cancer survivors, despite the fact that cancer perform the essential functions of the employment position that such individual holds or desires.

10. See, e.g., Michael L. Closen, The Decade of Supreme Court Avoidance of AIDS: Denial of Certiorari in HIV-AIDS Cases and Its Adverse Effects on Human Rights, 61 ALB. L. REV. 897, 955-58 (1998) (examining the Supreme Court's denial of certiorari in HIV-AIDS cases from 1987-1997 and discussing the implications of the ADA as a cap on HIV-AIDS healthcare benefits); Armen H. Merjian, AIDS, Welfare, and Title II of the Americans with Disabilities Act, 16 YALE L. & POL'Y REV. 373, 375 (1998) (arguing that "public entities that fail reasonably to accommodate persons with AIDS in providing social welfare benefits and services are in clear violation of Title II of the ADA"); Michael D. Carlis & Scott A. McCabe, Comment, Are There No Per Se Disabilities Under the Americans with Disabilities Act? The Fate of Asymptomatic HIV Disease, 57 Md. L. Rev. 558, 559-60 (1998) (reviewing the origins and development of the ADA, federal cases that "examine the issue of whether asymptomatic HIV infection constitutes a disability under the ADA," and Fourth Circuit decisions that "rejected asymptomatic HIV infection as a federally protected disability under the ADA's principal definition of disability"); Elizabeth C. Chambers, Comment, Asymptomatic HIV as a Disability Under the Americans with Disabilities Act, 73 WASH. L. REV. 403, 405 (1998) (urging that the Supreme Court "should resolve the debate among the circuits by holding that asymptomatic HIV-positive persons are protected by the ADA, but not on the grounds employed by the district and circuit courts thus far"); Christine Spinella Davis, Comment, Asymptomatic HIV Under the ADA: The Invisible, Yet Legitimate, Disability, 15 J. CONTEMP. HEALTH L. & POL'Y 357, 359 (1998) (analyzing "the definition of a disability under the ADA, focusing on why asymptomatic individuals with the HIV virus qualify as disabled"); Robert C. Mathes, Note, The Status of Persons Infected with Asymptomatic HIV Under the Americans with Disabilities Act of 1990 After Bragdon—Did the Supreme Court Miss an Opportunity to Protect Disabled Americans? Bragdon v. Abbott, 118 S. Ct. 1196 (1998), 34 LAND & WATER L. REV. 237, 256-61 (1999) (examining the impact of Bragdon v. Abbott upon individuals who seek protection under the ADA); Alison A. Satchwill, Note, Asymptomatic HIV and The Americans with Disabilities Act: Runnebaum v. Nationsbank of Maryland, N.A., 123 F.3d 156 (4th Cir. 1997) (en banc), 66 U. CIN. L. REV. 1387, 1388, 1408-10 (1998) (discussing the Fourth Circuit's holding in Runnebaum v. Nationsbank of Maryland, N.A., which found that a plaintiff's asymptomatic "HIV infection did not constitute a disability under the ADA," and analyzing the case's subsequent impact on classifying a person with a "disability" under the ADA); Anupa Sonigohel, Note, Runnebaum v. Nationsbank of Maryland: Asymptomatic HIV Finds No Refuge in the Fourth Circuit's Workplace, 8 TEMPLE POL. & CIV. RTS. L. REV. 243, 245 (1998) (examining the Fourth Circuit's decision in Runnebaum and "explor[ing] the consequences of the Runnebaum holding on individuals who are perceived as having a debilitating disease in society but not in a legal forum").

11. See Susan M. Gibson, Note, The Americans with Disabilities Act Protects Individuals with a History of Cancer From Employment Discrimination: Myth or Reality?, 16 HOFSTRA LAB. & EMPLOYMENT L.J. 167, 168 (1998) (arguing that "judicial interpretation of the ADA has not provided the desired protection the Act was intended to afford the cancer survivor"); Barbara Hoffman, Cancer Survivors' Employment and Insurance Rights at the Turn of the Century: A Primer for Oncologists, 13 ONCOLOGY 841, 841 (1999) [hereinafter Hoffman, A Primer for Oncologists] (reviewing "the problems faced by cancer survivors in obtaining and keeping adequate employment and health insurance, explain[ing] the legal rights of survivors, and suggest[ing] ways that survivors and their caregivers can advocate for their rights").
has a significantly greater impact on our population. Almost ten times as many Americans have a cancer history than are infected with HIV. In addition, far more Americans die from cancer than from AIDS. Most of the 8,200,000 cancer survivors are considered by their oncologists to be cured, while a minority are still receiving cancer treatment. More than 1,200,000 Americans will be diagnosed with and approximately 563,100 Americans will die from cancer in 1999.


13. In 1997, 16,865 Americans died from AIDS. See Holmes, supra note 12, at A1. During this same time span, more than 500,000 people died from cancer. See American Cancer Society, Cancer Facts & Figures-1997, at 1 (1997) [hereinafter Cancer Facts & Figures-1997]. In 1997, the death rate from AIDS was 5.9 deaths per 100,000, Holmes, supra note 12, at A1, compared with approximately 25,000 deaths per 100,000 from cancer. See Cancer Facts & Figures-1997, supra, at 1.


15. See id.

16. See id. Note that these estimates do not include basal and squamous cell skin cancer and noninvasive cancer of any site except urinary bladder. See id.

17. Id.
Cancer is second only to heart disease as the leading cause of death in the United States.\textsuperscript{18}

Unlike AIDS, the relative survival rate\textsuperscript{19} for many cancers has improved significantly during the past thirty years. Currently, the five-year relative survival rate for all cancers combined is sixty percent.\textsuperscript{20} Survival rates have increased every decade.\textsuperscript{21}

This Article demonstrates that the ADA, the regulations that interpret the ADA, and the ADA's legislative history require federal courts to consider most cancer survivors as individuals with a disability under the ADA. The employment problems faced by cancer survivors are discussed in Part I. The legislative history of, statutory definitions in, and regulations that interpret the ADA are described in Part II. Part III reviews federal court decisions brought by cancer survivors prior to \textit{Sutton v. United Airlines, Inc.},\textsuperscript{22} the second case in which the United States Supreme Court reviewed the ADA. Part IV analyzes the impact of the United States Supreme Court's five rulings that interpret the employment discrimination provisions of the ADA. Finally, Part V suggests strategies for cancer survivors, who bring ADA claims, to avoid the Catch-22 and to establish a prima facie case that they have a disability as defined by the Act.

\section*{I. Employment Problems Faced by Cancer Survivors}

\subsection*{A. The Scope of Cancer-Based Employment Discrimination}

Working-age survivors find that their cancer experience detrimentally affects their employment opportunities.\textsuperscript{23} Job problems result not only from the physical results of cancer and of treatment side effects, but from illegal job discrimination as well. Typical remarks of

\begin{itemize}
  \item \textsuperscript{18} See \textit{id.} Approximately one of every four deaths in the United States is from cancer. \textit{See id.}
  \item \textsuperscript{19} See \textit{id.} at 1-2. The American Cancer Society defines the relative survival rate as: the survival rate observed for a group of cancer patients compared to the survival rate for persons in the general population who are similar to the patient group with respect to age, gender, race, and calendar year of observation. Relative survival adjusts for normal life expectancy (factors such as dying of heart disease, accidents, and diseases of old age). \textit{Id.}
  \item \textsuperscript{20} See \textit{id.} at 2.
  \item \textsuperscript{21} See \textit{Arthur I. Holleb, The American Cancer Society Cancer Book} xvii (1986) (explaining that in the 1930s, only one of five Americans diagnosed with cancer survived five or more years; in the 1940s, one of four survived as long; in the 1960s, one of three survived five or more years).
  \item \textsuperscript{22} 119 S. Ct. 2139 (1999).
  \item \textsuperscript{23} See generally Betty Ferrell et al., \textit{Quality of Life Among Long-Term Cancer Survivors}, 11 \textit{Oncology} 565, 567-68 (1997) (discussing the "long-term impact of cancer on . . . work").
\end{itemize}
a bone marrow transplant survivor—"I have not been able to return to work and must depend on my wife to support our family"—illustrate the far-reaching impact of cancer. Some employers and co-workers treat cancer survivors differently from other workers. Cancer survivors frequently report such workplace problems as "dismissal, failure to hire, demotion, denial of promotion, undesirable transfer, denial of benefits, and hostility in the workplace." Nearly two decades of studies have documented the problems that cancer survivors face at work because of their cancer histories. One five-year study of cancer-related employment discrimination against white- and blue-collar workers and against young people reported that more than one-half of the participants in each group had experienced work problems due to their cancer histories. All of the participants experienced anxiety over potential reactions by employers and by fellow employees to their medical histories. Approximately one-quarter were fired from their old jobs, or rejected from


26. For a discussion of underlying reasons for cancer-based discrimination and its effects, see Employment Discrimination Against Cancer Victims and the Handicapped: Hearings on H.R. 370 and H.R. 1294, Before the Subcomm. on Employment Opportunities of the House Comm. on Educ. and Labor, 99th Cong. 15 (1985) (statement of Robert J. McKenna, President, American Cancer Society) [hereinafter Statement of Robert J. McKenna] (reporting that individual misconceptions and various social attitudes, as a result of cancer, impact both the employer and the employee). Dr. McKenna noted that three classifications of work-related discrimination exist: (1) dismissal, demotion, and reduction or elimination of work-related benefits; (2) problems arising from coworkers' attitudes; and (3) problems relating to the cancer patients' attitudes about how they should be perceived by coworkers resulting in alienation and avoidance by others. Id. at 19 (citation omitted).

27. See Hoffman, The Need for Federal Legislation, supra note 11, at 1, 3 (discussing Frances Feldman, In Support of the Cancer Patients Employment Rights Act of 1985 (H.R. 1294): Some Justification from Research 1 (June 6, 1985)) (quoting participant in American Cancer Society study on workers diagnosed with cancer) (unpublished written testimony submitted to the House Comm. on Education and Labor, Subcomm. on Employment Opportunities summarizing research findings set forth in Work and Cancer Health Histories (1982) (five-year study of the work experiences of 344 white-collar workers, blue-collar workers, and youths with cancer histories)). Dr. Feldman's studies were sponsored by the California Division of the American Cancer Society in response to alleged incidents of discrimination, and were summarized in the proceedings of the 1982 Western States Conference on Cancer Rehabilitation in San Francisco. See id. at 3 n.11.

28. See id. at 3.

29. See id.
new jobs, because of their cancer.\textsuperscript{30} A Stanford University study of 403 Hodgkin’s disease survivors found that forty-two percent of the survivors experienced difficulties at work that they attributed to their cancer histories.\textsuperscript{31} Childhood cancer survivors, in a similar study, reported that they experienced job refusals, denied benefits, and conflicts with supervisors.\textsuperscript{32}

Despite significant gains in cancer survival rates and the passage of federal legislation, such as the ADA, to outlaw disability-based discrimination, cancer survivors still experience barriers to equal job opportunities. One 1996 survey questioned 500 cancer survivors who were employed at the time of their treatment, 100 supervisors, and 100 co-workers.\textsuperscript{33} The results showed that workers with cancer reported being fired or being laid off at five times the rate of other workers in the United States (7\% vs. 1.3\%).\textsuperscript{34} A follow-up survey of 662 employed adult Americans who had not been diagnosed with cancer found that forty percent worried about losing their jobs if they were diagnosed with cancer.\textsuperscript{35} Their fear of discrimination was so great that twenty percent would not disclose their diagnosis to anyone at work.\textsuperscript{36} Similarly, “a survey of Hodgkin’s disease and leukemia survivors indicated that more than one-third attributed at least one negative vocational (employment, income, or education) problem to their cancer.”\textsuperscript{37}

\textsuperscript{30} See id. Dr. Feldman found that 54\% of white-collar respondents described work problems that they attributed to cancer; 84\% of the blue-collar respondents identified such work problems, and 51\% of the youth reported discrimination at work or school. Id. at 7.

\textsuperscript{31} See Patricia Fobair et al., Psychosocial Problems Among Survivors of Hodgkin’s Disease, 4 J. CLINICAL ONCOLOGY 805, 810 (1986). Fobair reported a variety of job problems including “denial of insurance, 11\%; denial of other benefits, 6\%; not being offered a job, 12\%; termination of employment following therapy, 6\%; conflicts with supervisors or co-workers, 12\%; and rejection by the military, 8\%.” Id.


\textsuperscript{33} See Working Woman/AMGEN, Cancer in the Workplace Survey, 5 (conducted by CBD Research & Consulting; random telephone survey of 500 survivors employed at time of their treatment, 100 supervisors, and 100 co-workers in May 1996; published September 1996) (on file with author).

\textsuperscript{34} See id. at 1.

\textsuperscript{35} NCCS/Amgen, National Survey on Cancer & the Workplace (random telephone survey of 662 employed adult Americans interviewed from June 13 to June 15, 1997) (on file with author).

\textsuperscript{36} See id.

\textsuperscript{37} Hoffman, A Primer for Oncologists, supra note 11, at 841; see also A.B. Kornblith et al., Comparison of Psychosocial Adaptation of Advanced Stage Hodgkin’s Disease and Acute Leukemia Survivors, 9 ANNALS OF ONCOLOGY 297, 302 (1998) (providing study results that found that 36\% of Hodgkin’s disease survivors and 39\% of leukemia survivors attributed a negative socioeconomic impact to their cancer).
One reason survivors legitimately fear discrimination at work is because their supervisors and co-workers have misconceptions about survivors' abilities to work during and after their cancer treatment. Of the 200 supervisors questioned in the 1996 survey, thirty-three percent believed that the survivor could not handle the job and cancer, and thirty-one percent thought that the employee needed to be replaced. Yet after working with a survivor, thirty-four percent of supervisors and forty-three percent of co-workers said that they would be less concerned about working with a survivor in the future. A 1992 survey of 200 supervisors found that sixty-six percent were concerned that employees with cancer could no longer perform their jobs ade-

38. Three predominant myths about cancer influence survivors' employment opportunities. One myth is that cancer is a death sentence. See Statement of Robert J. McKenna, supra note 26, at 16 (noting that because cancer is a life-threatening illness, "some individuals expect a fatal outcome even though the prognosis may be excellent"). The impact of the death sentence myth is that employers are hesitant to invest in an individual whom they believe will die imminently; insurance companies increase rates or refuse to insure at all, banks deny loans, and society disallows long-term planning on the assumption of a short-term life. Yet, the five-year relative survival rate for all cancers combined is 60%. See CANCER FACTS & FIGURES-1999, supra note 12, at 2.

A second myth is that cancer is contagious. See Abby L. Wasserman et al., The Psychosocial Status of Survivors of Childhood/Adolescent Hodgkin's Disease, 141 A.J.D.C. 626, 628-29 (1987) (noting that one subject in an interview survey of survivors of childhood Hodgkin's disease was "transferred from his job in a hotel kitchen for fear that he might 'contaminate' the food"); Statement of Robert J. McKenna, supra note 26, at 16 (noting that "[a]lthough no scientific evidence exists that cancer is contagious, fear that it might be is sometimes a concern of fellow employees, employers and even friends and neighbors"). The impact of the contagious myth is that fellow workers physically and emotionally isolate those with cancer, and employers succumb to co-workers' demands to fire or to transfer survivors. Yet, no type of cancer is contagious. See NATIONAL CANCER INSTITUTE, U.S. DEP'T OF HEALTH & HUMAN SERVS., Pub. No. 84-2612, Cancer Prevention Research Summary: Viruses 4 (1984) (demonstrating that "viral infections that increase the risk of cancer may be contagious, but . . . cancer itself is not").

A third myth is that cancer survivors are unproductive, costly workers. See Statement of Robert J. McKenna, supra note 26, at 16 (noting that "[s]ome employers have concerns about productivity of the patient with cancer who is working"); Working Woman/AMGEN, supra note 33, at 4 (indicating that "[o]ne in three (33 percent) expressed doubts about the ability of the worker with cancer to handle his or her job and approximately the same number (31 percent) felt the employee needed to be replaced"); NCCS/AMGEN, supra note 35, at 1 (indicating that 27% of "American workers believe they would have to pick up the slack for a co-worker with cancer"); see also infra notes 39-44 and accompanying text (discussing these concerns). Cancer survivors, however, have relatively the same productivity rates as other workers. See George M. Wheatley et al., The Employment of Persons with a History of Treatment for Cancer, 33 CANCER 441, 445 (1974) (concluding that "the selective hiring of persons who have been treated for cancer, in positions for which they are physically qualified, is a sound industrial practice"). For a more complete discussion of the myths associated with cancer, see Hoffman, The Need for Federal Legislation, supra note 11, at 4-6.

40. See id.
quately.\textsuperscript{41} Nearly one-half admitted that a current cancer diagnosis would affect their decision to hire a qualified applicant.\textsuperscript{42} Of 662 employees surveyed in a 1997 study, fourteen percent believed that co-workers with cancer probably would not be able to do their jobs.\textsuperscript{43} Twenty-seven percent of co-workers thought they would have to work harder to pick up the slack.\textsuperscript{44}

B. The Impact of Cancer-Based Employment Discrimination

Fighting a cancer diagnosis can be a full-time job. Few adults, however, have the financial stability to abandon their employment during and after their cancer treatment. Most survivors retain their employment status not only for the obvious financial benefit, but also for the accompanying health insurance, self-esteem, and social support.

In cancer survivors' quality of life assessments, survivors stated that being able to work full-time and having an "enjoyable" job contribute to a better quality of life.\textsuperscript{45} Survivors reported that work provided not only an important source of emotional and financial support, but also a "sense of normalcy."\textsuperscript{46} Others noted the sense of control that work provided: "I think that the need to go back to work or to stay at work depending on your treatment, is extremely important. . . . I had at least control over that. I could go to work."\textsuperscript{47}

The physical and emotional demands of cancer treatment make it difficult for many survivors to work without at least temporary interruption to their previous employment schedules. Survivors of thyroid cancer reported that "[w]ork productivity, concentration, and quality changed dramatically" within a few weeks of going off their thyroid hormone medication.\textsuperscript{48} Some literally had to be carried home from

\begin{itemize}
  \item \textsuperscript{42} See id. at 12.
  \item \textsuperscript{43} See NCCS/AMGEN, supra note 35.
  \item \textsuperscript{44} See id.
  \item \textsuperscript{45} See Ferrell et al., supra note 24, at 249 (reporting that typically, bone marrow transplant survivors found that "being able to work full time," and having an "enjoyable job" improved their quality of life).
  \item \textsuperscript{46} See Betty R. Ferrell et al., Quality of Life in Breast Cancer Survivors as Identified by Focus Groups, 6 psycho-oncology 13, 20-21 (1997) ("The ability to continue working provided a sense of normalcy and helped the women to overcome the physical effects of treatment in order to maintain their employment and health care benefits.").
  \item \textsuperscript{47} Id. at 21.
  \item \textsuperscript{48} Karen Hassey Dow et al., Balancing Demands of Cancer Surveillance Among Survivors of Thyroid Cancer, 5 Cancer prac. 289, 294 (1997).
\end{itemize}
Fatigue resulting from cancer treatment affects survivors' work performance. One exhausted survivor commented, "I struggled to maintain my part-time job with integrity, poised on the edge of depression."

Unlike at the beginning of the century, when cancer was a literal death sentence, today, most survivors who are working-age return to work. Helen Crothers's summary of several studies from the 1970s and the 1980s concluded that eighty percent of employees returned to work after being diagnosed with cancer. Physicians are now more aware of cancer survivors' employment problems, offer more flexi-

49. See id.
50. See Betty R. Ferrell et al., "Bone Tired": The Experience of Fatigue and Its Impact on Quality of Life, 23 Oncology Nursing F. 1559, 1545 (1996) (quoting several patients who indicated problems with job performance due to cancer treatment fatigue).
51. Id.
52. See Cancer Facts & Figures-1998, supra note 12, at 2 (noting that "in the early 1900s, few cancer patients had any hope of long term survival").
53. A 1960s survey by the Bell Telephone System of more than 900,000 Bell employees found that each year 1.67 employees per thousand had seven or more days of illness related to malignancy. See Richard W. Stone, Employing the Recovered Cancer Patient, 36 CANCER 285, 285 (1975) (reporting that out of 1417 employees with cancer, 1346 "had an illness lasting 7 days or more that was related to malignancy of some type"). Of those employed at the time of their cancer diagnosis, 81.2% returned to work. See Hoffman, The Need for Federal Legislation, supra note 11, at 4 n.16. Only 4.1% were permanently disabled, while 14.7% died of cancer before returning to work. See id. Another study by the Metropolitan Life Insurance Company, conducted between 1959 and 1972, concluded that the work performance of people who were treated for cancer differs little from that of others hired at the same age for similar assignments. See id. (citing METROPOLITAN LIFE INSURANCE CO., Statistical Bulletin 5-6 (1973)). When compared with other employees of the same age, the turnover, the absence rates, and the work performance of the cancer patients were satisfactory. See id. Additionally, "no employees hired after treatment for cancer died during the observation period." See id.
55. For example, Dr. Anna T. Meadows, "the first" Director of the Office of Cancer Survivorship, National Cancer Institute in Bethesda, Maryland, has discussed the economic outcomes of cancer survivorship and has recognized the need for data on the "indirect cost of cancer survivorship, including lost work and wages." Anna T. Meadows, Cancer Survivors: Future Clinical and Research Issues, in American Society of Clinical Oncology Educa-
ble out-patient treatment to accommodate work schedules, and have an improved medical arsenal with which to combat the side effects of cancer, such as risk of infection, nausea, and hair loss.

Some employers erect unnecessary and sometimes illegal barriers to survivors’ job opportunities. Personnel decisions are usually driven by economic factors, not by charitable or by personal considerations. While some employers fear lost productivity, others, especially smaller employers, face increased costs due to insurance expenses.

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56. As cancer survivors have become greater advocates for themselves, healthcare providers have responded to their demands for greater flexibility in scheduling medical care. See generally Elizabeth J. Clark & Ellen L. Stovall, Advocacy: The Cornerstone of Cancer Survivorship, 4 CANCER PRAC. 239, 243 (1996) (noting the “changes in health care [for cancer patients]—such as shortened lengths of hospital stays, increased ambulatory and homecare services”).

57. See Patricia Ganz, Understanding Cancer, Its Treatment, and the Side Effects of Treatment, in CANCER SURVIVOR’S ALMANAC, supra note 2, at 3, 12-23 (providing an extensive review of the various symptoms and side effects of cancer and offering various methods of treatment for these symptoms and side effects).

58. See, e.g., infra note 177 and accompanying text (explaining how in Hirsch v. National Mall & Service, Inc., 989 F. Supp. 977 (W.D. Ill. 1997), the defendant employer feared that their insurance costs would rise as a result of their employee’s cancer). In all respects, cancer is one of the most expensive diseases. Most survivors experience a significant increase in monthly expenses because of their cancer. See Vincent Mor et al., The Role of Concrete Services in Cancer Care, 18 ADVANCES PSYCHOSOMATIC MED. 102, 104 (1988) (noting that with cancer care “[f]inancial deprivations accumulate as out-of-pocket expenditures for insurance deductibles and copayments are required, medication costs increase, and as income losses due to sickness having a growing impact on family financial resources”). One commentator noted that the costs of cancer treatment can be so overwhelming that some families may have to choose between treatment and food. See Rose Mary Carroll-Johnson, Editorial, Long Days and Full Shopping Bags, 23 ONCOLOGY NURSING F. 585, 585 (1996) (“We know that patients sometimes must choose between buying treatments and buying food.”).

Some survivors are forced to continue working, despite severe illness, to maintain health insurance to pay for cancer treatment. See Betty R. Ferrell, The Quality of Lives: 1,525 Voices of Cancer, 25 ONCOLOGY NURSING F. 909, 912 (1996) (noting that “[e]conomic factors have forced cancer survivors to maintain employment despite severe illness and devastating treatment”). One ovarian cancer survivor commented on the plight of other women she knew with ovarian cancer: “Women’s stories of how they work a 40-hour week, take chemo on Friday night, throw up or feel queasy all weekend between doing household chores and child care, and then go to work on Monday, as if they had a restful weekend, are frightening.” Id. Insurance companies, which often seem to prioritize cost controls over appropriate medical care, readily pass on the expenses of cancer treatment to policyholders. See Kimberly Calder & Irene C. Card, Straight Talk about Insurance and Health Plans, in CANCER SURVIVOR’S ALMANAC, supra note 2, at 167, 168. As a result, many employers who offer health insurance to their employees fear that their premiums will increase. See Hoffman, Working it Out: Your Employment Rights, in CANCER SURVIVOR’S ALMANAC, supra note 2, at 205, 209.
sors worry about the psychological impact of a survivor's cancer history on other employees.\textsuperscript{59} Congress designed the ADA to replace these raw economic considerations with a carefully calibrated approach under which disabled employees must be accommodated unless the accommodation imposes an undue burden on the employer.

Hopefully, cancer-based employment discrimination\textsuperscript{60} will decrease as more employers provide survivors reasonable accommodations and treat them based on their individual abilities instead of misconceptions and fears. Employers, however, are unlikely to be so altruistic of their own accord. Eliminating survivors' barriers to equal job opportunities will require federal courts' uniform enforcement of the ADA, public education about cancer survivorship, and constructive public and personal advocacy by cancer survivors.

II. CANCER AS A DISABILITY UNDER THE AMERICANS WITH DISABILITIES ACT

A. The Purpose of the ADA

Prior to 1990, the Federal Rehabilitation Act of 1973 provided the only federal remedy to disability-based employment discrimination.\textsuperscript{61} The Rehabilitation Act, however, failed to protect most persons with disabilities because it covered only persons who are employed by a "program or activity receiving Federal financial assist-

\textsuperscript{59} See Susan J. Mellette, The Cancer Patient at Work, 35 Cancer J. for Clinicians 360, 364 (1985) (noting that "[s]pecific problems, such as coworker attitudes toward the patient, were recognized by . . . employer[s] as a source of trouble"); see also Hoffman, The Need for Federal Legislation, supra note 11, at 6 (noting that "[t]he misconception that cancer patients or former cancer patients are an unproductive drain on their companies and fellow employees is based in part on the erroneous beliefs that cancer is always fatal and that people with a cancer history are not productive or reliable" (citing Grace Powers Monaco, Socioeconomic Considerations in Childhood Cancer Survival: Society's Obligations 8 (Apr. 1985) (unpublished manuscript)).

\textsuperscript{60} See 42 U.S.C. § 12112(b)(5)(A). As defined by the ADA, "discrimination" includes: "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 such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity." Id. (emphasis added).

When President George Bush signed the ADA, he suggested that it would bring an "end to the unjustified segregation and exclusion of persons with disabilities from the mainstream of American life." As discussed in Part III of this Article, President Bush's bold optimism has not been realized. In the introduction to the ADA, Congress found that, even in 1990, many Americans with disabilities had little recourse for employment discrimination.

In passing the ADA, Congress recognized that the then existing legislation, such as the Federal Rehabilitation Act and the state civil rights laws, failed to ensure that most private sector employees had a legal remedy for disparate treatment. The House of Representatives reported:

As in Section 504 [of the Federal Rehabilitation Act of 1973], the ADA adopts a framework for employment selection procedures which is designed to assure that persons with disabilities are not excluded from job opportunities unless they are actually unable to do the job. The requirement that job criteria actually measure the ability required by the job is a critical protection against discrimination based on disability. As was made strikingly clear during the hearings on the ADA, stereotypes and misconceptions about the abilities, or more
correctly the inabilities, of persons with disabilities are still pervasive today.67

Consequently, Congress intended that the ADA provide a clear mandate against, and adequate remedies for, disability-based employment discrimination.68

B. Definitions in the ADA and Supporting Regulations

1. Statutory Definitions.—Title I of the ADA, which prohibits employment discrimination, provides that "[n]o covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment."69 A "qualified individual with a disability" is one "who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires."70

The ADA provides three alternative definitions of a disability: "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment."71 The statute does not define the term "impairment." To prove that he or she is a "qualified individual with a disability," a plain-tiff must prove that he or she not only has a physical or mental impair-


68. The purpose of the ADA is:
(1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;
(2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;
(3) to ensure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities; and
(4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

42 U.S.C. § 12101(b).

69. Id. § 12112(a).

70. Id. § 12111(8).

71. Id. § 12102(2). This three-part definition is the same definition of a "handicapped individual" set forth in the Federal Rehabilitation Act of 1973. 29 U.S.C. § 706(8)(B) (1994). Congress explicitly intended the ADA to provide standards no less than "the standards applied under Title V of the Rehabilitation Act . . . or the regulations issued by Federal agencies pursuant to such title." 42 U.S.C. § 12201(a).
An employer "discriminates" against an employee if the employer fails to make "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 an undue hardship on the operation of . . . business." Reasonable accommodations include, but are not limited to, "making existing facilities . . . accessible[,] . . . job restructuring, part-time or modified work schedules, reassignment to a vacant position, [and] acquisition or modification of equipment or devices."

2. *Code of Federal Regulations.*—The EEOC regulations that govern the ADA further define these terms. The definitions of the first two terms, "physical or mental impairment" and "major life activity," which are relevant to this Article, are relatively straightforward. A "physical or mental impairment" is any physiological disorder that affects a major body system. A "major life activity" is a function "such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."

The definition of "substantially limits" is far more complex and problematic.

(1) The term *substantially limits* means:

(i) Unable to perform a major life activity that the average person in the general population can perform; or

(ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular
major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.

(2) The following factors should be considered in determining whether an individual is substantially limited in a major life activity:

(i) The nature and severity of the impairment;
(ii) The duration or expected duration of the impairment; and
(iii) The permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment.\(^7\)

The regulations provide more guidance to evaluate whether an individual's ability to work is substantially limited by an impairment than whether other major life activities are so limited. The inability to perform one specific job is insufficient to be a "substantial" limitation.\(^7\) Rather, to have a substantial limitation, one must be unable to perform an entire class of jobs or a broad range of jobs in different classes.\(^7\) Additionally, "in determining whether an individual is substantially limited in the major life activity of 'working,'" a court may consider three other factors, which focus on realistically available economic opportunities, to determine whether an individual's ability to work is substantially limited.\(^8\)

7. 29 C.F.R. § 1630.2(j)(1)-(2).
8. See id. § 1630.2(j)(3)(i).
9. See id. The EEOC states:

(3) With respect to the major life activity of working—

(i) The term substantially limits means 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. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.

Id. 77. See id. § 1630.2(j)(3)(ii)(A)-(C). These three factors are the following:

(A) The geographical area to which the individual has reasonable access;
(B) The job from which the individual has been disqualified because of an impairment, and the number and types of jobs utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (class of jobs); and/or
(C) The job from which the individual has been disqualified because of an impairment, and the number and types of other jobs not utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (broad range of jobs in various classes).

Id.; see also Sutton v. United Airlines, Inc., 119 S. Ct. 2139, 2151 (1999) (discussing and interpreting the EEOC's definition of "substantially limits" to mean that "one must be precluded from more than one type of job, a specialized job, or a particular job of choice,"
C. References in the Regulations and in the Legislative History to Cancer-Based Employment Discrimination

1. EEOC Compliance Manual.—Although the text of the Americans with Disabilities Act does not explicitly mention the word “cancer,” the EEOC's Compliance Manual (Manual), first issued in January 1992 to supplement the federal regulations, makes specific references to how the ADA applies to cancer-based discrimination. The ADA authorizes the EEOC to issue regulations to implement Title I of the Act that illustrate how the statute applies to specific circumstances. The Manual provides examples of how cancer is contemplated in the definitions “disability” and “reasonable accommodation.”

The Manual makes six references to cancer in explaining the factors that determine whether an individual has a “disability” as defined by the ADA. First, the Manual notes that the ADA is intended to cover not only individuals with a visible disability, but those, such as some cancer survivors, who have a “hidden” disability. Second, in defining what types of medical conditions may substantially limit a major life activity, the Manual states that “most forms of heart disease and cancer fall into this category.” Third, in defining a “record of a substantially limiting condition,” the Manual recognizes “former cancer


83. According to the Manual, [t]he ADA’s provisions concerning medical examinations and disability-related inquiries reflect the intent of Congress to prevent discrimination against individuals with ‘hidden’ disabilities such as epilepsy, diabetes, mental illnesses, heart disease, HIV infection/AIDS, and cancer. The guiding principle of these provisions is that while employers may ask applicants about the ability to perform job functions, employers may not ask about disability at the pre-offer stage.

84. Id. at II-§ 902.4 (emphasis added).

85. See 29 C.F.R. § 1630.2(k) (1999) (stating that “a record of such impairment means [that the individual] has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities”).

and stating that “if a host of different types of jobs are available, one is not precluded from a broad range of jobs”).
patients"86 as being covered by the ADA.87 Fourth, the Manual considers an individual who has a genetic marker for cancer as an example of an individual who is covered by the ADA because she is "regarded as having a substantially limiting impairment."88 Fifth, because cancer survivors are protected under the ADA, the Manual states that employers may not screen out cancer survivors in the hiring process:89

The ADA prohibits medical inquiries or medical examinations before making a conditional job offer to an applicant. This prohibition is necessary because the results of such inquiries and examination frequently are used to exclude people with disabilities from jobs they are able to perform.

***

Many employers currently use a pre-employment medical questionnaire, a medical history, or a pre-employment medical examination as one step in a several-step selection process. Where this is so, an individual who has a 'hidden' disability such as diabetes, epilepsy, heart disease, cancer, or mental illness, and who is rejected for a job, frequently does not know whether the reason for rejection was information revealed by the medical exam or inquiry (which may not have any relation to this person's ability to do the job), or whether the rejection was based on some other aspect of the selection process.

***

86. Cf. id. app. § 1630.2(k) ("The intent of this provision, in part, is to ensure that people are not discriminated against because of a history of disability. For example, this provision protects former cancer patients from discrimination based on their prior medical history.” (emphasis added)). See infra text accompanying notes 100-102.

87. The Manual states that the "record of a substantially limiting condition" refers to "people with a history of cancer, heart disease, or other debilitating illness, whose illnesses are either cured, controlled or in remission." EQUAL EMPLOYMENT OPPORTUNITY COMMISION, A TECHNICAL ASSISTANCE MANUAL ON THE EMPLOYMENT PROVISIONS (TITLE 1) OF THE AMERICANS WITH DISABILITIES ACT II-§ 2.2(b) (1992) [hereinafter 1992 EEOC TECHNICAL ASSISTANCE MANUAL] (emphasis added).

88. The Manual provides an illustrative example:
CP's genetic profile reveals an increased susceptibility to colon cancer. CP is currently asymptomatic and may never in fact develop colon cancer. After making CP a conditional offer of employment R learns about CP's increased susceptibility to colon cancer. R then withdraws the job offer because of concerns about matters such as CP's productivity, insurance costs, and attendance. R is treating CP as having an impairment that substantially limits a major life activity.


89. See 1992 EEOC TECHNICAL ASSISTANCE MANUAL, supra note 87, at II-§ 2.2(b) (claiming that the "record of substantially limiting condition" protects, for example, "people with a history of cancer").
A history of such rejections has discouraged many people with disabilities from applying for jobs, because of fear that they will automatically be rejected when their disability is revealed by a medical examination. The ADA is designed to remove this barrier to employment.\textsuperscript{90}

Finally, the Manual recognizes that \textit{how} a person contracts cancer is irrelevant to determining whether she is a person with a disability.\textsuperscript{91}

Additionally, the Manual cites to cancer in two examples that explain what types of reasonable accommodations are required by the ADA. In an illustration of flex-time as an accommodation, the Manual states that cancer survivors are entitled to reasonable modifications in their work schedules to accommodate the side effects of cancer treatment.\textsuperscript{92} In an example of the impact of coworkers' attitudes towards individuals with disabilities, the Manual instructs that an employer may not discriminate against an employee on the basis that other employees react negatively to the employee because of the employee's

\textsuperscript{90} \textit{Id.} at II-§ 6.3 (emphasis added). The Manual also recognizes the dilemma some cancer survivors face in applying for a new job if their cancer affected their performance at a previous job:

If an applicant has had a poor attendance record on a previous job, s/he may wish to provide an explanation that includes information related to a disability, but the employer should not ask whether a poor attendance record was due to illness, accident or disability. For example, an applicant might wish to disclose voluntarily that the previous absence record was due to surgery for a medical condition that is now corrected, treatment for cancer that is now in remission or to adjust medication for epilepsy, but that s/he is now fully able to meet all job requirements.

\textit{Id.} at § 5.5(f), at V-15 (emphasis added).

\textsuperscript{91} The Manual states:

Voluntariness is irrelevant when determining whether a condition constitutes an impairment. For example, an individual who develops \textit{lung cancer} as a result of smoking has an impairment, notwithstanding the fact that some apparently volitional act of the individual may have caused the impairment. The cause of a condition has no effect on whether that condition is an impairment.


\textsuperscript{92} The Manual provides the following example:

38. Must an employer provide a reasonable accommodation that is needed because of the side effects of medication or treatment related to the disability, or because of symptoms or other medical conditions resulting from the underlying disability?

Yes. The side effects caused by the medication that an employee must take because of the disability are limitations resulting from the disability. Reasonable accommodation extends to all limitations resulting from a disability.

Example A: An employee with \textit{cancer} undergoes chemotherapy twice a week, which causes her to be quite ill afterwards. The employee requests a modified schedule—leave for the two days a week of chemotherapy. The treatment will last six weeks. Unless it can show undue hardship, the employer must grant this request.

cancer history. The EEOC’s eight specific references to cancer in the Manual support the conclusion that Congress, by delegating regulatory authority to the EEOC, intended the ADA to prohibit cancer-based employment discrimination.

2. References in the Legislative History to Cancer-Based Employment Discrimination.—The legislative history to the ADA further confirms that Congress intended the ADA to prohibit cancer-based employment discrimination. The House and the Senate subcommittees held numerous hearings on the ADA throughout 1988 and 1989, which included testimony on the need for federal legislation to prohibit cancer-based discrimination.

Mary DeSapio, a breast cancer survivor, testified before the Senate Committee on Labor and Human Resources and the Subcommittee on the Handicapped on May 9, 1989. DeSapio told the Subcommittee of the discrimination that challenged her “road to re-

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

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

94. See H.R. Rep. No. 101-485, pt. 2, at 51 (1990), reprinted in 1 LEGISLATIVE HISTORY OF THE AMERICANS WITH DISABILITIES ACT, supra note 67, at 324 (noting that “[i]t is not possible to include in the legislation a list of all the specific conditions, diseases, or infections that would constitute physical or mental impairments because of the difficulty of ensuring the comprehensiveness of such a list” and clarifying, however, that under the ADA, the term “disability” does “include[ ]... such conditions, diseases and infections as:... cancer” (internal quotation marks omitted)); see also infra notes 106-114 and accompanying text (discussing the final ADA Reports of the House and of the Senate).

95. See H.R. Rep. No. 101-485, pt. 2, at 24-28 (1990), reprinted in 1 LEGISLATIVE HISTORY OF THE AMERICANS WITH DISABILITIES ACT, supra note 67, at 297-301 (recognizing the various hearings that the House Subcommittee on Select Education and the Subcommittee on Employment Opportunities held regarding the ADA).

covery," an experience that she acknowledged was not unique.\textsuperscript{97} DeSapio stated:

I became employed on a full-time basis as vice president in charge of transportation by Josephthal and Company, Inc., on March 11, 1987. On January 29, 1988, I was diagnosed as having breast cancer. I immediately informed my superior at Josephthal. On February 1st, I was hospitalized for treatment, a lumpectomy and auxiliary nodes were excised. My superiors knew that my recovery would take about a month. During my recuperation I would report daily by phone, even while I was in the hospital, to advise my clients as to market strategy. After I returned home, I often dropped by the office to pick up mail and work on any urgent matters.

One month later, on March 1st, I returned to Josephthal, ready to resume my life and my employment on a full-time basis. I scheduled my radiation treatments at the earliest possible time in the morning so that they would not interfere with my daily work schedule. My superiors were aware of this treatment schedule. Immediately upon my return I was asked to attend a meeting with the director of Research and the Senior Vice President. At that meeting I was told that I was terminated, effective immediately. They told me that I was no longer needed.\textsuperscript{98}

Describing the stigmatizing effect of cancer, DeSapio stated: "I feel like I have been unfairly branded for life. Cancer does not discriminate."\textsuperscript{99}

In addition to DeSapio's testimony, the subcommittee accepted written testimony from the National Coalition for Cancer Survivorship, a national advocacy organization, which detailed the need for federal legislation.\textsuperscript{100} This testimony cited studies that documented


\textsuperscript{97} See id. at 24, app. at 259 (stating "[m]y story is not unique"); id. ("During my lifetime I have never experienced a more difficult and challenging road to recovery.").

\textsuperscript{98} Id. at 24-25, app. at 260.

\textsuperscript{99} Id. at 25, app. at 262.

\textsuperscript{100} See Americans with Disabilities Act of 1989: Hearings on S. 933, Before the Subcomm. on the Handicapped of the Senate Comm. on Labor and Human Resources, 101st Cong. (1989) (statement of Barbara Hoffman, vice president of the National Coalition for Cancer Survivorship), reprinted in Reams et al., supra note 96, at app. 383 [hereinafter Statement of the National Coalition for Cancer Survivorship].
employment discrimination against cancer survivors. 101 The National Coalition for Cancer Survivorship argued that, without the passage of the ADA, cancer survivors would find an "inadequate patchwork" of state laws that failed to address most instances of cancer-based employment discrimination. 102 In 1989, the employment discrimination laws of twelve states 103 protected only individuals who had an actual handicap, and not those who were regarded as having a handicap or who had a history of a handicap. 104 The National Coalition for Cancer Survivorship testified that the ADA was needed to fill this critical gap in the civil rights laws to protect individuals who encountered employment discrimination solely because of their cancer histories, yet who had no legal remedy because they are too healthy to be "handicapped" as defined by some statutes. 105

The final reports of both the House and the Senate illustrate how the ADA would provide a remedy for cancer-based employment discrimination. 106 Both reports note that the law could not include an exhaustive list of specific conditions that could be a physical impairment "because of the difficulty of ensuring the comprehensiveness of such a list, particularly in light of the fact that new disorders may de-

101. See id., app. at 383. For example, the testimony discussed "[s]tudies of the work experience of cancer survivors [that] found that between 20% and 84% report employment discrimination attributed to their cancer histories." Id. (citation omitted).

102. Id. at 388. For example, the testimony discussed a lawsuit brought by Walter Ray Ritchie, a lymphatic cancer survivor whom the Houston Fire Department failed to hire solely because of his cancer history. Id. at 387; see also Ritchie v. City of Houston, Civ. A. No. H-87-504, 1988 WL 24676 (S.D. Tex. Mar. 7, 1988). Ritchie brought a claim under the Federal Rehabilitation Act and the Texas Commission on Human Rights Act. See id. at *1. The court ruled that the City violated Mr. Ritchie’s federal rights and, as the City Fire Department was a recipient of federal funds regardless of whether Mr. Ritchie was substantially limited in a major life activity, "it is uncontroversial that he was treated by [the Fire Department] as having such a limitation." Id. at *3. The court, however, rejected Ritchie’s state law claim on the ground that he was not a “handicapped person” as defined by Texas law because he was not severely limited by his cancer history. Id. at *2. In the absence of federal legislation, like the plaintiffs in cases discussed in Part III of this Article, Ritchie would have found himself in the Catch-22 of being healthy enough to be a firefighter, but too healthy to be protected from disparate treatment. See infra Part III.

103. See Statement of National Coalition for Cancer Survivorship, supra note 100, app. at 387-88 (noting that the ADA expands "the rights of individuals living in Alabama, Connecticut, Delaware, Kansas, Kentucky, Minnesota, Nebraska, Nevada, South Carolina, South Dakota, Texas, and Virginia").

104. See id. at 388.

105. See id. at 387-88.

velop in the future." The reports recognize, however, that diseases such as cancer are an impairment. Furthermore, in defining the second prong of the definition of a disability—record of such an impairment—the reports note that "persons with histories of . . . cancer" were included in this definition.

To achieve that end, the ADA prohibits employers from making pre-employment medical inquiries that are designed to screen out individuals with disabilities. The House Report explains that this provision was intended to prohibit employers from using medical examinations and inquiries "to exclude applicants with disabilities, particularly those with 'hidden' disabilities such as . . . cancer, before their ability to perform the job was even evaluated." The Senate recognizes that a pre-employment medical question that is not job-related serves no legitimate employer purpose, but simply serves to stigmatize the person with a disability. For example, if an employee starts to lose a significant amount of hair, the employer should not be able to require the person to be tested for cancer unless such testing is job-related.

Finally, the ADA requires employers to make reasonable accommodations. Although it did not specifically mention cancer treatment, the Senate noted that "persons who need medical treatment


110. See 42 U.S.C. § 12112(b)(6) (1994) (stating that, within the ADA, "the term 'discriminate' includes . . . using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities"); id. § 12112(d) (applying the ADA's prohibitions against discrimination to "medical examinations and inquiries").


113. See 42 U.S.C. § 12112(b)(5)(A) (defining "discriminate" to include "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability").
may benefit from flexible or adjusted work schedules." A flexible work schedule, to accommodate appointments for an examination, radiation, chemotherapy, surgery, or other medical treatment, is one of the most common types of accommodations requested by cancer survivors.

III. LOWER FEDERAL COURT CANCER-BASED EMPLOYMENT DISCRIMINATION CASES BEFORE SUTTON V. UNITED AIR LINES

The following discussion analyzes the twenty-four leading cases in which lower federal courts have discussed whether cancer was a disability under the ADA. These cases illustrate how some courts have placed plaintiffs in a Catch-22, while other courts have adhered to the letter and the purpose of the ADA. These cases represent less than one percent of the ADA cases filed that alleged cancer-based discrimination. Given that approximately 2615 complaints of cancer-based discrimination were filed with the EEOC from 1992 to 1998, I do not suggest that the results of these reported decisions represent how most cancer survivors have fared under the ADA. Indeed,

115. See supra notes 23-44 and accompanying text; cf. Hoffman, A Primer for Oncologists, supra note 11, at 843 (noting that "[c]ommon accommodations for [cancer] survivors include change in work hours...to accommodate medical appointments and treatment side effects").
116. This Article does not discuss other ADA cases brought by cancer survivors in which the court declined to evaluate, either explicitly or implicitly, whether cancer was a disability. For example, one court granted summary judgment to an employer who terminated a breast cancer survivor who claimed that she was "unable to perform her job because of the severity of her disability" with or without accommodations, and therefore, was not qualified to perform the essential functions of her job. Graham v. Rosemount, Inc., 40 F. Supp. 2d 1093, 1100-01 (D. Minn. 1999). Additionally, this Article does not discuss post-Sutton cancer discrimination cases under the ADA. See, e.g., Cinelli v. U.S. Energy Partners, No. 97-5630 (BJS), 1999 U.S. Dist. LEXIS 14958, at *2, 21 (D.N.J. Sept. 21, 1999) (holding "that plaintiff has raised genuine issues of material fact as to whether defendants fired him because of perceived disability" because he "cites as evidence a series of occurrences which, taken in combination, raise genuine issues as to whether his supervisors felt that he was unable to do his job because of his cancer").
117. See, e.g., infra note 144 and accompanying text (citing language in Ellison v. Software Spectrum, Inc., 85 F.3d 187, 192 (5th Cir. 1996)).
120. Most lower court decisions are not reported. For example, in an unreported decision, an employee with a brain tumor who was demoted and then fired, won a jury award
nothing in these cases suggests that cancer survivors, like all other ADA plaintiffs, ultimately prevail in more than a small minority of ADA claims.  

A. Cases Holding That Cancer is Not a Disability

1. Circuit Courts of Appeals Decisions That Misapply the ADA.—In thirteen cases, federal courts concluded that cancer survivors did not have a disability as defined by the ADA. Of these, despite the glaring flaws in its analysis of the ADA, the Fifth Circuit’s seven page against his former employer. See Cline v. Wal-Mart Stores, Inc., 144 F.3d 294, 298, 300 (1998) (discussing the district court’s unreported decision in which the “district court entered judgment against Wal-Mart in the amount of $668,895.18”). The court subsequently reduced the jury award to $300,000 to comply with statutory caps.

121. Defendants prevail in the vast majority of ADA claims. According to Colker, “defendants prevail in more than ninety-three percent of reported ADA employment discrimination cases decided on the merits at the trial court level. Of those cases that are appealed, defendants prevail in eighty-four percent of reported cases.” Ruth Colker, The Americans with Disabilities Act: A Windfall for Defendants, 34 HARV. C.R.-C.L. L. REV. 99, 108 (1999). Colker noted:

The editors of the National Disability Law Reporter and Disability Compliance Bulletin collected 261 decisions in which federal courts of appeals have issued rulings on claims made under the ADA. In 209 of 261 decisions decided between 1994 and 1997, they found that the appellate panel sided with the defendant on the ADA claim or claims, in employment and non-employment cases, resulting in an 80% success rate for ADA defendants overall. The American Bar Association’s Commission on Mental and Physical Disability Law ... concluded that of the 760 decisions in which one party or the other prevailed, employers prevailed in 92.11% of those cases. Similarly, the Equal Employment Opportunity Commission has reported that it achieved ‘merit resolutions’ in only 13.6% of all cases filed with the commission for fiscal years 1992 through 1997. ‘Merit resolutions’ are defined as ‘charges with outcomes favorable to charging parties and/or charges with meritorious allegations. These include negotiated settlements, withdrawals with benefits, successful conciliations, and unsuccessful conciliations.’ ... The success rate for plaintiffs at the pre-trial level is extraordinarily low, as it is at the appellate level.

Id. at 100 n.9 (internal citations omitted).


123. The Fifth Circuit has earned a reputation so hostile to ADA employment cases that one commentator suggested that the Circuit is attempting to "repeal the law through judi-
opinion in *Ellison v. Software Spectrum Inc.*,\(^{124}\) has been relied upon more than any other case by federal courts considering cancer-based discrimination claims.\(^{125}\)

Phyllis Ellison began working full-time for Software Spectrum in January 1992 after working there for two years as a temporary employee.\(^{126}\) Ellison was diagnosed with breast cancer in August 1993.\(^{127}\) Like many cancer survivors, Ellison had surgery and daily radiation treatments from mid-September through October 1993.\(^{128}\) Eager to continue to work, Ellison worked on a modified schedule until she felt “back to normal” by February 1994.\(^{129}\) Soon after Ellison returned to her regular schedule, Software Spectrum decided to downsize from thirty-five to thirty-one employees.\(^{130}\) On March 2, Software Spectrum fired Ellison and three other employees.\(^{131}\)

The United States District Court for the Northern District of Texas granted summary judgment to Software Spectrum on the ground that Ellison’s breast cancer was not a disability.\(^{132}\) The Fifth Circuit affirmed,\(^{133}\) relying on circular reasoning that ignored the language and the intent of the ADA.

124. 85 F.3d 187 (5th Cir. 1996).
126. See *Ellison*, 85 F.3d at 189.
127. See *id*.
128. See *id*. Prior to her radiation treatment, Ellison underwent a lumpectomy. See *id*.
129. *Id*. Ellison “arrived at work at 10:30 a.m. following her radiation therapy, skipped her lunch hour and morning break, and took work home.” *Id*.
130. See *id*.
131. See *id*. Ellison was subsequently rehired to a different position several weeks later. See *id*. The fact that Ellison continued to work for Software Spectrum, and thus suffered little harm, may have contributed to the court’s denial of her claim. See *id* at 193 (concluding that “[t]he fact that SSI offered Ellison another position in the company . . . precludes there being a material fact issue”).
132. See *Ellison*, 83 F.3d at 193.
133. See *id*.
The court limited its analysis to whether Ellison's breast cancer substantially limited her ability to work. Although the Fifth Circuit began its analysis with a selective review of the ADA's three-part definition of disability and the EEOC regulations that provide guidance as to how an impairment can affect work, the court inexplicably ignored other relevant parts of the regulations and imposed a Catch-22 on Ellison.

The court first concluded that Ellison was able to perform her job during and after her cancer treatment. Acknowledging that Ellison experienced nausea, fatigue, swelling, inflammation, and pain resulting from her treatment, the court found that she could nonetheless perform her essential job duties with accommodations. Although "[o]bviously, her ability to work was affected," the court concluded that these limitations were not sufficient to render Ellison a person with a disability as defined by the ADA.

Next, the court rejected Ellison's claim that her cancer established a record of an impairment. The court selectively ignored the regulations' express reference to "former cancer patients" as individuals with a "record" of an impairment, as well as the Supreme Court's declaration that a hospitalization is sufficient to establish a record of an impairment. Instead, the court relied on the conclu-

134. The Fifth Circuit agreed with Ellison that her "cancer was an 'impairment.'" Id. at 190 (citation omitted). The court confined its analysis to the major life activity of working because "'working' is the only major life activity for which Ellison claimed a substantial limitation." Id.; see also supra notes 76-86 and accompanying text (discussing the EEOC regulations that define "major life activity" and "substantially limits").
135. See Ellison, 83 F.3d at 189-90; see also supra notes 69-72 (explaining the ADA's three-part definition of disability).
136. See Ellison, 83 F.3d at 190-91. The court explained:
[A]t all times, she had demonstrated the physical and mental ability to work. SSI also submitted excerpts from Ellison's deposition; she testified that the radiation treatment made her nauseous and tired and she suffered an allergic reaction to the radiation which caused painful swelling and inflammation, but that the treatment did not affect her ability to do her job and she never missed a day of work. She testified further that her normal workday was seven and one-half hours; that she was able to work almost that amount while receiving treatment, by working from 10:30 a.m. until 6:00 p.m., with no lunch and only an afternoon break; and that she improved steadily after the radiation treatment was completed, and was back to normal in three or four months (by February 1994).
Id.
137. See id. at 191.
138. Id.
139. Id.
140. 29 C.F.R. app. § 1630.2(k) (1999); see supra note 86 and accompanying text (providing relevant text).
sion of Software Spectrum's Human Resources Department that "nothing in Ellison's personnel file has ever indicated that she was substantially limited by a physical or mental impairment either in her ability to perform her job or in any other respect."\textsuperscript{142} Furthermore, the court relied on the fact that "Ellison did not present any evidence to counter that affidavit."\textsuperscript{143} The court also stated that "SSI's [Software Spectrum's] acquiescence in her modified schedule to accommodate her treatment does not create a material fact issue on whether she had the requisite record, in that she did not miss a day of work and her ability to work was not substantially limited."\textsuperscript{144}

Finally, Ellison asserted that four comments by her supervisor, Logan, evidenced that he regarded her breast cancer as substantially limiting her ability to work. First, when Ellison told Logan that she would need to change her working hours to accommodate her radiation treatments, "Logan expressed his irritation by suggesting that she get a mastectomy instead because her breasts were not worth saving."\textsuperscript{145} Second, when Ellison told Logan that she had been in the restroom suffering from nausea resulting from thinking about eating or drinking, "Logan responded that it had not affected her weight."\textsuperscript{146} Third, Ellison encountered a power outage at work when she returned from radiation treatment.\textsuperscript{147} As employees were trying to evacuate a dark building, "Logan laughed and said, 'don't worry about it. Follow Phyllis . . . see, look over there. She's glowing.'"\textsuperscript{148} Fourth, during a meeting at which human resources personnel asked if any of the downsized employees had special circumstances, Logan stated that "Phyllis has cancer."\textsuperscript{149}

The court held that none of these comments were sufficient to allege that Software Spectrum regarded Ellison's cancer as substantially limiting her ability to work.\textsuperscript{150} Again the court narrowly read the regulations:

As noted [in the regulations], an employer does not necessarily regard an employee as having a substantially limiting

\begin{itemize}
  \item \textsuperscript{142} Ellison, 83 F.3d at 192.
  \item \textsuperscript{143} Id.
  \item \textsuperscript{144} Id. This language clearly illustrates the court's use of a Catch-22.
  \item \textsuperscript{145} Id.
  \item \textsuperscript{146} Id.
  \item \textsuperscript{147} See id. at 192-93.
  \item \textsuperscript{148} Id. at 193.
  \item \textsuperscript{149} Id.
  \item \textsuperscript{150} See id. at 192-93.
\end{itemize}
impairment simply because it believes she is incapable of performing a particular job; "[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{151}

The court then concluded that none of Logan’s first three comments, although "beneath contempt," created "a material fact issue on whether [Software Spectrum] regarded Ellison as having a substantially limiting impairment."\textsuperscript{152} Although acknowledging that it "presents a closer question," the court held that Logan’s notifying the human resources department that Ellison had cancer was also insufficient evidence that Software Spectrum regarded Ellison as substantially limited because it subsequently hired her back at her previous pay scale.\textsuperscript{153}

In essence, the Fifth Circuit concluded that Ellison was not entitled to the protection of the ADA because she had so successfully fought to mitigate the effects of her cancer. Under the Fifth Circuit’s logic, had Ellison chosen to take several months of medical leave during the first stage of her treatment, and then returned to work halftime for the next several weeks, she would have demonstrated a "substantial limiting impairment"\textsuperscript{154} of her ability to work. Thus, under the Fifth Circuit’s analysis, those employees who work the hardest to maintain their jobs are precisely the ones denied protection under the ADA. Bringing this irony full circle, the Fifth Circuit would doubtlessly have concluded that had Phyllis Ellison taken an extended medical leave from work, she would not have been “otherwise qualified”\textsuperscript{155} for her job, and therefore, it would have caught her with the other prong of the Catch-22.

Several months after Ellison, the Eleventh Circuit followed the Fifth Circuit’s Catch-22 logic to reverse a jury verdict for a cancer survivor in Gordon v. E.L. Hamm & Associates.\textsuperscript{156} E.L. Hamm and Associates hired Mervin Gordon in January 1993 to perform on-site maintenance for military housing at an air base.\textsuperscript{157} Four months later,
Gordon discovered a growth in his shoulder, which turned out to be malignant lymphoma.\(^{158}\) Gordon took a medical leave from June 18 until June 28, 1993.\(^{159}\) From June 25 through November 1, Gordon received chemotherapy while continuing his normal activities.\(^{160}\) Although Gordon attempted to go back to work on June 28, Hamm would not let him return to his job until July 8.\(^ {161}\) Gordon alleged that upon his return to work, Hamm changed the conditions of his employment to be less desirable.\(^ {162}\) Subsequently, Gordon had a dispute with his supervisor, who fired him on July 16.\(^ {163}\)

At trial, the jury found that Gordon had a disability under the ADA.\(^ {164}\) Hamm filed motions for judgment as a matter of law and a new trial, which the district court denied.\(^ {165}\) In an opinion that relied considerably on Ellison, the Eleventh Circuit reversed and remanded to the district court to enter judgment for Hamm.\(^ {166}\)

As did the Fifth Circuit, the Eleventh Circuit reviewed the regulations to define disability,\(^ {167}\) yet failed to note that a cancer history is evidence of a record of a disability.\(^ {168}\) The Eleventh Circuit held that Gordon did not have a disability because "except for a couple of days of medical testing and a leave of absence from June 18 until June 28, \[\text{Id.}\]

\(^{158}\) See id.

\(^{159}\) See id.

\(^{160}\) See id. Gordon's doctor noted that Gordon's life activities were limited by the chemotherapy to the extent that Gordon had to go to the doctor's office, receive the treatments, and endure the side effects that often occur in many patients. The side effects that Gordon experienced included weakness, dizziness, swelling of the ankles and hands, numbness of the hands, the loss of body hair, and vomiting. \[\text{Id.}\]

\(^{161}\) See id. As an accommodation, Gordon required "leaving work a few hours early every Friday for blood testing and chemotherapy." \[\text{Id.}\]

\(^{162}\) See id. (describing Gordon's assertions that his job had changed when he returned including being "assigned . . . to more physically taxing work").

\(^{163}\) See id. at 909 (explaining that Gordon and his supervisor "had a dispute after Gordon inadvertently cut a window shade for one of the units at the air station improperly"). Gordon alleged that he was fired, although his supervisor contended that he "simply told Gordon to go home." \[\text{Id.}\] No doubt, this evidence, which suggested that Gordon was not the most cooperative employee, affected the Eleventh Circuit's analysis.

\(^{164}\) See id. at 908 (noting that the "district court concluded that the evidence . . . supported the jury's finding that the plaintiff was a 'qualified individual with a disability' under the ADA").

\(^{165}\) See id.

\(^{166}\) See id. at 915.

\(^{167}\) See id. at 912-13 (discussing the definition of "disability" articulated in the EEOC's regulations, 29 C.F.R. § 1630.2); see also supra notes 140, 150-153 and accompanying text (discussing the Fifth Circuit's review of the regulations in Ellison v. Software Spectrum Inc., 85 F.3d 187 (5th Cir. 1996)).

\(^{168}\) See supra notes 81-115 and accompanying text (analyzing references in the regulations and in the legislative history to cancer-based discrimination).
in which Gordon underwent the bone marrow biopsy, Gordon was fully capable of working." The court stressed that "Gordon himself conceded that he was fully capable of working," a position supported by his physician. The Eleventh Circuit concluded that, because Gordon could work despite the side effects of chemotherapy, his cancer did not substantially limit him as required by the ADA. Like the Fifth Circuit in Ellison, the court regarded, as determinative, the fact that Gordon demonstrated laudable success in working despite the debilitating effects of his disease. Instead, the court first should have recognized that Gordon had a disability because he had an impairment that, as his physician showed, substantially limited major life activities, and then the court should have considered whether Hamm fired Gordon because of his disability or because of a legitimate business reason.

2. Lower Court Decisions that Followed Ellison.—Five federal district court decisions relied on Ellison to grant defendants' summary judgment motions against employees who had cancer. In the most illogical of these decisions, the District Court for the Northern District of Illinois granted a defendant's summary judgment motion against

169. Id. at 912.
170. Id.
171. See id. (noting that Gordon's oncologist "stated that Gordon was not disabled by the cancer and that he could continue to work" (citation omitted)).
172. See id. (finding that "the extent, duration, and impact of Gordon's chemotherapy treatment side effects on his ability to care for himself and to work reveal that these side effects did not substantially limit his ability to care for himself or to work"). Additionally, the court rejected Gordon's claim that Hamm regarded him as having an impairment. See id. at 912-13. The court did not consider whether Gordon had a history of an impairment. Substituting itself for the jury, the court found that Hamm gave Gordon different assignments when he returned from medical leave because of legitimate business reasons, and not because of Gordon's cancer. See id. at 914 (finding that upon his return to work, "Gordon was assigned that work which was then available," and those assignments "merely reflected the types of work... pending... completion," and "in no way support a finding that [Gordon's supervisor] regarded Gordon as having a physical impairment under the ADA which substantially limited his ability to... work").
173. See id. at 913-14 ("Following his diagnosis with cancer, Gordon continued to perform the same or similar work that he had previously performed for Hamm at the Jacksonville project site."); see also supra text accompanying notes 154-155 (discussing the Fifth Circuit's acknowledgment of how well Ellison was able to work despite her bout with cancer).
an employee who ultimately died from his cancer.\textsuperscript{175} Paul Hirsch worked for the defendant for nearly thirty years when he was diagnosed with non-Hodgkin’s lymphoma, a hematic cancer.\textsuperscript{176} Although Hirsch continued to work for several years after his diagnosis, his employer feared that Hirsch’s future health insurance claims would cause his insurance costs to rise ten to twelve percent.\textsuperscript{177} After concluding that he would save money without Hirsch on the payroll, the defendant fired Hirsch.\textsuperscript{178}

Judge James Moran concluded “that the ADA was not truly meant to apply to this situation” because Hirsch claimed he was discriminated against because of the costs of his cancer treatment, and not because of the cancer itself.\textsuperscript{179} Then, after conceding that “[t]here is no question that someone with a history of cancer may be considered disabled for ADA purposes,”\textsuperscript{180} Judge Moran held that, even though Hirsch had a “life-threatening” disease, his cancer did not substantially limit a major life activity.\textsuperscript{181} The court based its conclusion on Hirsch’s failure to produce “medical records or other affirmative evidence to show exactly how Hirsch was impaired in his daily activities.”\textsuperscript{182} This conclusion ignored the record that Hirsch “asked to work at home part-time and was forced to be occasionally absent from work,”\textsuperscript{183} and ultimately died from his lymphoma a year and a half after he was fired.\textsuperscript{184} Finally, the court inexplicably concluded that Hirsch was not fired “because he had cancer,” but because his employer “wanted to cut back on expenses” and so “terminated Hirsch to avoid

\textsuperscript{175} See Hirsch, 989 F. Supp. at 984.
\textsuperscript{176} See id. at 979.
\textsuperscript{177} See id. at 984 (explaining that “defendants were aware of and concerned about their rising health insurance premiums . . . [and] Hirsch’s health care costs may have been a factor in driving up insurance costs . . . ten to twelve percent”).
\textsuperscript{178} See id. at 979. In June 1994, Elmer and Carl Schmitt realized that they would have to make some budgetary adjustments to deal with Photo-Vend’s lack of business. They discussed how terminating Paul Hirsch would affect Photo-Vend’s finances. Carl Schmitt calculated how much money the company would save by firing Hirsch, including the amounts that would be saved by not having to pay for his health care. \textit{Id.}
\textsuperscript{179} Id. at 980.
\textsuperscript{180} Id. at 981.
\textsuperscript{181} See id. (concluding that the “[p]laintiff . . . failed to produce evidence sufficient to show . . . that Hirsch’s performance of major life activities was substantially limited by his cancer”).
\textsuperscript{182} Id. The court noted that Hirsch did “continue to work and although plaintiff indicate[d] [that] work was difficult for him, [plaintiff] . . . [did] not indicate how or why. Many people with cancer are able to walk, see, hear, speak, breathe and work without impairment until late stages of the disease.” \textit{Id.} at 981-82.
\textsuperscript{183} Id. at 981.
\textsuperscript{184} See id. at 978. Hirsch died while this action was pending. \textit{See id.} at 979. His wife was substituted as the plaintiff and she continued the action on behalf of Hirsch’s estate. \textit{See id.}
the financial repercussions of his illness."\textsuperscript{185} This logic flies in the face of the underlying purpose of the ADA, to prohibit discrimination whatever the motivation, as recognized in the regulations, which expressly prohibit discrimination "because of concerns about . . . insurance costs."\textsuperscript{186}

In two separate decisions, the United States District Court for the Northern District of California adopted Ellison’s Catch-22 analysis in rejecting the claims of cancer survivors. In Madjlessi \textit{v. Macy’s West, Inc.},\textsuperscript{187} a breast cancer survivor sued Macy’s for failing to retain her when it purchased her employer, Broadway Stores, Inc. in its Emporium retail unit.\textsuperscript{188} Virginia Madjlessi worked as sales manager of the lingerie department of Emporium, a California department store, when she was diagnosed with breast cancer in February 1994.\textsuperscript{189} She received radiation and chemotherapy throughout the year.\textsuperscript{190} Emporium accommodated her by arranging her work schedule around her treatments.\textsuperscript{191} After Macy’s purchased Broadway Stores, Inc., Macy’s refused to offer Madjlessi employment in December 1995.\textsuperscript{192}

Judge Vaughn Walker concluded that Madjlessi failed to prove that she had a disability, a record of a disability, or was regarded as having a disability.\textsuperscript{193} The court correctly concluded that "loss of a breast or any portion thereof fits squarely into [the definition of an impairment]."\textsuperscript{194} It rejected, however, Madjlessi’s claim that she had a disability because, according to the court, her "breast cancer did not substantially limit her ability to work."\textsuperscript{195} Although the court noted that Madjlessi required flex-time accommodations for six months, it nonetheless concluded that her cancer treatment did not substantially limit her ability to work:

Madjlessi admits that except for the four days she took off every month, she worked as usual. Indeed, in her papers,

\textsuperscript{185} \textit{Id.} at 982.


\textsuperscript{187} 993 F. Supp. 736 (N.D. Cal. 1997).

\textsuperscript{188} \textit{See id.} at 738.

\textsuperscript{189} \textit{See id.} at 737-38.

\textsuperscript{190} \textit{See id.} at 738.

\textsuperscript{191} \textit{See id.} (noting that "[d]uring her chemotherapy, Madjlessi experienced side effects such as nausea, vomiting and weakness which rendered her unable to work for four days following each monthly treatment" and explaining that Emporium allowed Madjlessi to structure her work schedule "so that she would not have to work during those difficult four-day periods").

\textsuperscript{192} \textit{See id.}

\textsuperscript{193} \textit{See id.} at 740-41.

\textsuperscript{194} \textit{Id.} at 740 n.1 (construing 29 C.F.R. § 1630.2(h)(1); 42 U.S.C. § 12102(2)).

\textsuperscript{195} \textit{Id.} at 741.
she avers that she worked even harder to move herself up the career path. Her coworkers praise her ability to work through adversity. Even though she may have worked while suffering the side effects of vomiting, weakness and nausea, this alone does not satisfy the "substantial limits" standard.\textsuperscript{196}

Next, the court concluded, despite its description of Madjlessi's cancer treatment, that she did not have a record of an impairment: "The documents Madjlessi presents to the court establish only that she saw an oncologist, underwent surgery, and unfortunately, had a difficult time during the two days following each [of six] chemotherapy treatment[s]."\textsuperscript{197} The court reasoned, however, that "the mere fact that Madjlessi had cancer and was utterly incapacitated for brief periods of time after chemotherapy does not mean she was 'substantially limited' for purposes of the ADA."\textsuperscript{198} Although the court noted Madjlessi's surgery, it declined to conclude that her hospitalization created a record of an impairment. Finally, the court rejected Madjlessi's claim that Macy's regarded her as being disabled because her supervisor continued her employment for nearly a year after she completed treatment.\textsuperscript{199}

In a second case before the Northern District of California,\textsuperscript{200} Judge Fern Smith correctly granted Owens-Brockway Glass Container's summary judgment motion against a long-time employee, but for the wrong reason. Larry Barger had worked at the Owens-Brockway plant in Oakland, California since 1961.\textsuperscript{201} In May 1995, he was diagnosed with cancer of the mandible (lower jaw), for which he later endured extensive surgery to remove part of his jaw.\textsuperscript{202} Barger took several medical leaves during the next year for surgeries related to his cancer, as well as to an accidental injury.\textsuperscript{203} Although Barger

\textsuperscript{196} Id. (citing Ellison v. Software Spectrum Inc., 85 F.3d 187, 192 (5th Cir. 1996)). Although the court recognized that Madjlessi required accommodations for six months, it reasoned that the flex-time was "of such short duration" that her work was not substantially limited. \textit{Id.}

\textsuperscript{197} \textit{Id.}

\textsuperscript{198} \textit{Id.}

\textsuperscript{199} See id. at 742-43 (concluding that "there is no doubt that Madjlessi continued to work at Emporium until it became Macy's," and rejecting the argument that the store manager "would suddenly perceive Madjlessi as substantially limited months after she finished treatment").


\textsuperscript{201} See \textit{id.} at *1.

\textsuperscript{202} See \textit{id.} at *2.

\textsuperscript{203} See \textit{id.} at *2-3.
was able to return to work without accommodations, he filed an ADA claim that alleged a fellow employee had created a hostile work environment by making a single offensive comment about his physical appearance.

For Owens-Brockway to prevail, the court need only have concluded that Owens-Brockway had not in fact created a hostile work environment. The court need not have reached the issue of whether Barger had a disability. Instead, the court improperly rejected Barger's claim that his facial cancer substantially limited his ability to eat. Despite its recognition that Barger had difficulty eating for more than one year, the court concluded that Barger did not have a record of an impairment because he did "not produce any evidence tending to show that he has, or ever had, an impairment that substantially limits or limited a major life activity." Finally, the court correctly concluded that Owens-Brockway did not perceive Barger as disabled because it allowed Barger to return to work after each medical leave, and it disciplined the employee who made the derogatory statements.

In a case particularly ill-suited for summary judgment, the United States District Court for the Middle District of Florida granted defendant's summary judgment motion against a cashier whom it fired two months after her diagnosis. Patricia Cook joined Robert G. Waters,

204. See id. (noting that "[a]fter each of these leaves, Barger was able to perform his job without any medical restrictions").

205. Id. at *3. Barger claimed that the employee wrote "Larry's jaw" under the heading "things to fix" on a company black board. Id. Owens-Brockway suspended the employee for three days without pay. Id. at *4.

206. See id. at *9-11 (noting that if Barger's psychiatric impairment was caused by the hostile work environment created by the defendant, then the impairment was not the reason for the alleged discrimination as required by the ADA).

207. Rather than considering the activity of eating, the opinion focused on the major life activity of working. The court stressed the fact that Barger's condition "did not interfere with his ability to do his job and ... he never told anyone at work that there was any particular job ... he was unable to do." Id. at *7 (citations omitted).

208. See id. (noting that "[d]uring the thirteen month period between Barger's initial surgery to remove part of his mandible in July of 1995 and the reconstructive surgery in August 1996, he had difficulty eating salad or any hard foods" (citation omitted)).

209. Id. at *11. Additionally, the court noted that Barger "admitted that his injuries did not prevent him from performing his current job." Id. at *9.

210. See id. at 12; cf. id. (concluding that in proving an employer regarded an individual as having a substantially limiting impairment, "[e]vidence of derogatory statements by a co-worker, of the type made by Vitug, does not suffice" (citing Ellison v. Software Spectrum, Inc., 85 F.3d 187, 192-93 (5th Cir. 1996))).

211. Cook v. Robert G. Waters, Inc., 980 F. Supp. 1463, 1469 (M.D. Fla. 1997). The court made factual determinations inconsistent with the standard of summary judgment by concluding that the plaintiff did not have a substantially limiting physical or mental impairment or was subject to unlawful discrimination. See id. at 1469.
Inc. (Waters) as a full-time cashier in January 1993. Waters fired her only two months after she was diagnosed with a brain tumor. The defendant alleged that Cook failed to work with her new supervisor; Cook claimed that the defendant refused to accommodate changes in her ability to concentrate and in her personality resulting from her medication. Judge Elizabeth Kovachevich held that Cook was not substantially limited in her ability to work because “except for during doctor appointments and during Plaintiff’s headaches, Plaintiff states that she could fulfill the essential requirements of the job by continuing to perform her job until she was terminated.”

The court concluded that “[w]hile the side effects of Plaintiff’s medication and headaches [might] qualify as ‘physical impairments’ under the ADA,” they did “not substantially limit Plaintiff’s ability to care for herself, or to work.”

Lastly, the District Court for the Southern District of Florida relied on Ellison, but nonetheless correctly rejected a cancer survivor’s ADA claim because her employer had had legitimate business reasons for firing her. In Malewski v. NationsBank of Florida, the district court dismissed the claims of a breast cancer survivor who was fired from her position as an administrative assistant. Malewski took time off for a lumpectomy and radiation treatments. The following year, she was terminated, along with other employees, as part of a “reduction in force.” In rejecting Malewski’s claim that her employer perceived her cancer as a disability, the court properly recognized that the factual circumstances of each case dictate whether the plaintiff has a disability. The court concluded that NationsBank did not

212. Id. at 1464.
213. See id. at 1464-65 (explaining that Cook was diagnosed with a brain tumor in May 1994, and terminated on July 11, 1994).
214. See id. at 1465 (“Plaintiff alleges she was substantially impaired in her ability to work because the headaches required numerous medications which affected her ability to concentrate, her ability to complete her work, and her personality.”).
215. Id. at 1469 (citation omitted).
216. Id.
218. See id. at 1105 (granting NationsBank’s summary judgment motion because it “proffered evidence supporting a legitimate, non-discriminatory reason for Malewski’s termination” and because Malewski did “not come forward with any evidence to show that [the proffered reason was] . . . pretextual”).
219. See id. at 1097.
220. See id. at 1097-98.
221. The court noted that Malewski did “not argue that she had a disability, but rather that the defendant perceived her as disabled.” Id. at 1100.
222. See id. (stating that “whether or not [cancer] substantially limits major life activities depends upon each case’s factual circumstances” (citation omitted)).
regard Malewski as disabled just because it gave her consistently poor performance reviews before and after her diagnosis. Accordingly, the court held that Malewski was fired because of inferior performance, and not because of her cancer history.

3. Decisions That Improperly Grant Summary Judgment for the Employer Based on Misreading of the ADA.—In one case of blatant summary judgment abuse, the District Court for the Southern District of Texas grossly misapplied the ADA in confining a cancer survivor to a Catch-22. For twenty years, Michael Boyle worked his way up from salesman to president of the Gallagher Company (Gallagher). At the age of fifty-nine, after serving as president for one year, Boyle was diagnosed with leukemia. When he was first diagnosed, Boyle was hospitalized for chemotherapy for thirty days. His cancer was in remission when he was released from the hospital, so his doctor gave him permission to return to work without limitations. When Boyle

223. See id. at 1101 (pointing out that Malewski’s “1994 review was consistent with her ratings for 1992, before she was diagnosed with breast cancer” and concluding that “[t]he fact that she again received an unsatisfactory review in 1994 does not raise an inference that NationsBank perceived Malewski as foreclosed from being able to perform her job because of her cancer”).

224. See id. at 1103 (concluding that “there is no evidence that a perception of disability because of Malewski’s cancer was a motivating factor in NationsBank’s decision to terminate her employment”).

225. See EEOC v. R.J. Gallagher Co., 959 F. Supp. 405 (S.D. Tex. 1997), aff’d in part, vacated in part, 181 F.3d 645 (5th Cir. 1999). Although this opinion has been affirmed in part, vacated in part, and remanded for further proceedings, an analysis of the district court opinion is still necessary for a number of reasons. First, the case remains a useful reflection on how lower federal courts often misapply the ADA. See R.J. Gallagher Co., 181 F.3d at 656 (describing the district court’s analysis of what satisfies the “regarded as” prong of the ADA’s definition of disability, as “off the mark”). Second, as to the district court’s analysis of the second prong of disability under the ADA, a record of impairment that substantially limits a major life activity, the Fifth Circuit simply found that the “district court’s analysis [did] not resolve the matter” and instructed the court, on remand, to apply the principles articulated by the Supreme Court in Bragdon v. Abbott, 524 U.S. 624 (1998), “to determine whether the record of Boyle’s impairment includes a substantial effect on a major life activity.” R.J. Gallagher Co., 181 F.3d at 656. This determination does not change the fact that the district court ignored the Supreme Court’s mandate that the hospitalization alone establishes a record of an impairment, see infra note 236, nor does such a determination change the fact that the district court grossly misapplied the “regarded as” prong of the ADA’s definition of disability.


227. See id. at 407.

228. See id.

229. See id. “The only complication was that Boyle would require six monthly chemotherapy treatments, with each treatment lasting three to five days.” Id.
returned to work the next week, Gallagher demoted him to executive vice-president with a lower salary.\textsuperscript{290}

Judge Lynn Hughes granted summary judgment on Boyle's ADA claims.\textsuperscript{291} With only fleeting reference to the ADA's definition of disability, no consideration of the regulations or any case law, she concluded that Boyle was not disabled:

Boyle had no disability—actual, historic, or perceived. He was not disabled; he was critically ill. This law covers conditions, temporary or permanent, affecting specific functional capacity that are essentially incurable with current medical science. . . . Although the cause of cancer is not known, it may result from genetic misprogramming or from an external influence on sound programming; it is not a disability. The effects of cancer can leave a person disabled. It may cause a leg to be amputated or lung capacity to be restricted. An ordinary illness does not disable the patient, but the course of the illness may cause a disability.\textsuperscript{292}

The court noted that the only accommodation Boyle sought was time off each month for chemotherapy.\textsuperscript{293} Judge Hughes concluded that the need for flex-time is "not a disability under this act; it is a right under another act."\textsuperscript{294} She then ignored the Supreme Court's clear mandate in \textit{Arline}\textsuperscript{295} that hospitalization alone establishes a record of an impairment.\textsuperscript{296} Judge Hughes first failed to consider

\textsuperscript{290} See id. "Boyle left and never returned to work." \textit{Id.} He died one year later. See id.\textsuperscript{291} See id. at 410. On appeal, however, the Fifth Circuit held that summary judgment was inappropriate. See EEOC v. R.J. Gallagher Co., 181 F.3d 645 (5th Cir. 1999). Though the Fifth Circuit agreed that Boyle was not substantially limited in any major life activity at the time he was demoted, the court found that the district court erred in assuming that Boyle must have had "some obvious specific handicap" to be "regarded as" being disabled. \textit{Id.} at 655-56. The Fifth Circuit concluded that Boyle raised a genuine issue of material fact as to whether Gallagher regarded him as disabled. \textit{Id.} at 657. Furthermore, the Fifth Circuit concluded that the district court erred in granting summary judgment on the issue of whether Boyle had a record of an impairment because Boyle's thirty-day hospital stay may have had a substantial limitation on a major life activity. \textit{Id.} at 656. Accordingly, the Fifth Circuit remanded the case for further proceedings. \textit{Id.} at 657.\textsuperscript{292} R.J. Gallagher Co., 959 F. Supp. at 409.\textsuperscript{293} See id.\textsuperscript{294} See \textit{id.}\textsuperscript{295} Id. Judge Hughes did not name the act under which it is a right, and she failed to recognize that "the need for flex-time" is the need for a reasonable accommodation, a specific type of accommodation illustrated in the EEOC Compliance Manual. See 1999 EEOC Compliance Manual § 915.002, \textit{supra} note 92.\textsuperscript{296} 480 U.S. 273 (1987).\textsuperscript{297} See id. at 281 (holding that a hospitalization is sufficient to establish a record of an impairment under the Rehabilitation Act); see also \textit{supra} note 141 (discussing the \textit{Arline} decision); cf. \textit{R.J. Gallagher Co.}, 181 F.3d at 655 (interpreting 29 C.F.R. § 1630.2 and \textit{Sutton v. United Air Lines}, 119 S. Ct. 2139 (1999), and concluding that "it is not enough for an ADA plaintiff to simply show that he has a record of a cancer diagnosis, in order to estab-
whether Boyle's hospitalization created a record of an impairment. She then concluded that Gallagher did not regard Boyle as having a disability because "Gallagher perceived Boyle as ill," and not as being unable to work based on social stereotypes.237

In a similar case, Judge Marjorie Rendell granted summary judgment to an employer that fired a Hodgkin's Disease survivor when he tried to return to work after treatment.238 John Nave was hired by Wooldridge Construction (Wooldridge) on February 23, 1994, to work in landscaping and in lawn care.239 Nave was diagnosed with Hodgkin's Disease the following month and had surgery on April 26, 1994.240 After months of treatment, Nave returned to work part-time in September.241 Wooldridge fired him on January 12, 1995.242

lish the existence of a 'disability'... there must be a record of an impairment that substantially limits one or more of the ADA plaintiff's major life activities"). Additionally, the Arline Court specifically referred to cancer as a condition that generates the types of erroneous stereotypes that result in discrimination:

By amending the definition of 'handicapped individual' to include not only those who are actually physically impaired, but also those who are regarded as impaired and who, as a result, are substantially limited in a major life activity, Congress acknowledged that society's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment. Few aspects of a handicap give rise to the same level of public fear and misapprehension as contagiousness. Even those who suffer or have recovered from such noninfectious diseases as epilepsy or cancer have faced discrimination based on the irrational fear that they might be contagious.

Arline, 480 U.S. at 284 (citations omitted).

237. R.J. Gallagher Co., 959 F. Supp. at 409. Judge Hughes's reasoning, fueled by a not-so-veiled hostility toward ADA plaintiffs, stands logic on its head:

As usual in these cases, when the record shows no actual disability the worker claims that the employer perceived him as disabled. Assuming that Gallagher perceived Boyle as ill, that is not a perception of disability. The "or perceived" language is in the law to protect people who have some obvious specific handicap that employers might generalize into a disability. Boyle did not have a condition—a defect—that Gallagher, based on erroneous social stereotypes, could generalize into an inability to function on the job.

Id. Concluding that this analysis was "off the mark," the Fifth Circuit pointed out that "the text of the ADA could not be clearer on" the application of the "regarded as" prong. R.J. Gallagher Co., 181 F.3d at 656. Under that definition, an individual is "disabled" if he or she is "regarded as having" an impairment that "substantially limits one of the major life activities." 42 U.S.C. § 12102(2) (1994). As the Fifth Circuit noted, one does not have to actually have "some obvious specific handicap" to fall into this category. R.J. Gallagher Co., 181 F.3d at 656.


239. See id. at *4.

240. See id.

241. See id. at *5. Nave did not work during the period from about April 26, 1994, to September 15, 1994. See id. at *4-5.

242. See id. at *6.
The court rejected Nave's claim that his Hodgkin's Disease was a disability.\(^{243}\) Although the court conceded that lymphatic cancer was an impairment\(^{244}\) and detailed Nave's erratic work schedule during his treatment, the court concluded that Nave's cancer did not substantially limit his ability to work because he "could function by either working fewer hours or performing lighter duties."\(^{245}\) The court then reasoned that if Nave had had a disability prior to his remission in December 1994, then his "impairment . . . [would have been] of a temporary nature since the disease was only active for a temporary period, and as such does not qualify as a disability."\(^{246}\) Finally, the court held that Wooldridge did not regard Nave as disabled because Wooldridge's perception "was not based upon speculation, stereotype or myth, but instead was responsive to plaintiff's own representations as to what he could and could not do at his job" and encouraged him to work.\(^{247}\)

4. Decision that Failed to Consider Whether Cancer Established a Record of an Impairment.—A court that evaluates only whether the plaintiff has a disability, and not whether the plaintiff is regarded as or has a record of a disability, is less likely to find that the plaintiff belongs to a class protected by the ADA than is a court that considers all three prongs of the definition.\(^{248}\) For example, the United States District Court for the Southern District of New York dismissed an ADA complaint brought by Rene Olmeda against the New York State Depart-

\(^{243}\) See id. at *31 (concluding that the "plaintiff has failed to establish that he was 'disabled' under the ADA because he has not raised a material issue as to whether he was substantially limited in a major life activity or that the defendant regarded him as disabled"). Nave did not claim that he had a record of impairment. See id. at *9 n.5.

\(^{244}\) See id. at *10 ("Hodgkin's disease is a cancer of the lymphatic system and as such is a physical impairment as that term is defined under the ADA." (citing 29 C.F.R. § 1630.20(h)(1), (2) (1996))).

\(^{245}\) Id. at *19.

Dr. Glick [Nave's oncologist] note[d] that it "would be impossible for individuals such as Mr. Nave to work full time or to perform manual tasks requiring heavy physical activity." Dr. Glick d[id] not, however, indicate that plaintiff could not work at all or that he was substantially limited in his ability to work. Plaintiff also d[id] not testify that he could not work at all, but instead testifie[d] that he could only work for so many hours before he started to feel fatigued, which was usually about three to four hours. Id. at *21 (citation omitted).

\(^{246}\) Id. at *26 (citing Rakestraw v. Carpenter Co., 898 F. Supp. 386 (N.D. Miss. 1995)).

\(^{247}\) Id. at *29 (citing Wooten v. Farmland Foods, 58 F.3d 382, 386 (8th Cir. 1995)).

\(^{248}\) See infra note 387 and accompanying text (discussing why plaintiffs should plead every potentially applicable prong of the three part definition of disability).
ment of Civil Service for failing to hire him as a Parole Officer.\textsuperscript{249} Olmeda was placed on the “certified eligible list” to be hired as a parole officer after receiving a passing score on the civil service exam.\textsuperscript{250} The Division of Parole offered Olmeda employment, subject to his completion of a physical examination.\textsuperscript{251} During the physical, Olmeda revealed that he had been successfully treated for leukemia seven years earlier, which had been in remission since 1987.\textsuperscript{252} The Division of Parole told Olmeda that it would not hire him until it received a letter from his doctor that stated that his leukemia was in remission and that he was able to perform the duties of a parole officer.\textsuperscript{253} While Olmeda obtained the letter, the Division of Parole instituted a hiring freeze.\textsuperscript{254} Instead of hiring Olmeda when it received his physician’s letter, the Division told him that he would have to retake the exam the following year to apply for a post-freeze position.\textsuperscript{255}

Judge Harold Baer ruled that Olmeda did not have a disability because “his leukemia has been in remission since 1987,” and he “asserted that he is not limited in any way.”\textsuperscript{256} The court did not consider the obvious—that the Division of Parole regarded Olmeda’s leukemia history as a disability and as an obstacle to employment because it required him to submit medical evidence not required of other employees.\textsuperscript{257}

\textsuperscript{250} See id. at *2.
\textsuperscript{251} See id. ("By letter . . . plaintiff received from the Division of Parole a conditional offer of employment subject to him meeting the requirements for the position, including a physical and a background investigation.").
\textsuperscript{252} See id.
\textsuperscript{253} See id. at *3.
\textsuperscript{254} See id.
\textsuperscript{255} See id. Olmeda filed an ADA complaint instead of waiting to sit for the next exam. See id. at *3-4.
\textsuperscript{256} Id. at *6 (citation omitted).
\textsuperscript{257} See id. (defining disability under the ADA as “a physical or mental impairment that substantially limits one or more of the major life activities of such individual or being regarded as having such an impairment” and concluding that because the plaintiff “asserted that he is not limited in any way” he failed to prove “a physical or mental impairment that substantially limits one or more of his major life activities”). Such reasoning virtually erases the “regarded as” prong of the ADA’s definition of disability. The fact that the plaintiff testified at trial that he was not limited in any way is irrelevant to the inquiry of whether he was “regarded as” disabled and thus burdened with additional tasks, such as presenting a letter of certification from his doctor. The court noted that the ADA does provide that “it is appropriate for an employer to require a medical examination after an offer of employment has been made to a job applicant, and may condition an offer of employment on the results of such examination, provided that all entering employees are subject to such an examination.” Id. at *7 (citing 42 U.S.C. § 12112(d)(3)). The ADA
5. Decisions that Correctly Dismissed Plaintiffs’ Claims.—Three of the thirteen cases discussed here correctly ruled that the plaintiff failed to establish a prima facie case under the ADA. The Act provides an appropriate balance between an employee’s right to be protected from disability-based discrimination and an employer’s right to make legitimate, nondiscriminatory business decisions. Accordingly, one federal court correctly granted the defendant’s summary judgment motion against a prostate cancer survivor whose cancer diagnosis unfortunately coincided with his employer’s economic difficulties. At the age of fifty-six, James Farmer lost his job as Vice-President and Assistant General Auditor in a downsizing one month after he returned to work from undergoing prostate cancer surgery. Although the court recognized that Farmer’s cancer was an impairment, it found that Farmer failed to show that his cancer, resulting impotence, or incontinence substantially limited a major life activity, including working and a “loving and supportive relationship with his wife of thirty-two years.”

In other situations, plaintiffs unjustifiably allege an ADA claim in the absence of any evidence to prove disability status. In a rejection of a cancer survivor’s apparent last minute attempt to add an ADA claim to his lawsuit against his employer, the Ninth Circuit rejected his creative allegation that “staying awake and alert” is a substantial life activity under the ADA. The court affirmed the lower court’s refusal to allow James Innes to amend his complaint to include a claim for cancer-based discrimination under the ADA. The court held that Innes failed to make a prima facie case that his cancer treatment caused

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258. See infra notes 259-270 and accompanying text (discussing cases where the plaintiff failed to establish a prima facie case under the ADA).


260. See id. at *1-3. Farmer was diagnosed 2-3 months prior to surgery, which took place in September 1992, and he returned to work in October 1992. Id. at *3, 16. He was “selected for displacement” on November 18, 1992. Id. at *2-3.

261. See id. at *15 (“There is no dispute that plaintiff was treated for prostate cancer and that he suffered side effects of incontinence and impotence. Hence, under the definition set forth in the regulations, plaintiff suffered a physical impairment.”).

262. Id. at *16.

263. See Innes v. Mechatronics Inc., No. 96-35515, 1997 U.S. App. LEXIS 18000, at *7-8 (9th Cir. July 17, 1997) (citing 29 C.F.R. § 1630.2(i)).

264. See id. at *4-5; see also id. at *7-8 (finding that “the district court correctly determined Innes was not disabled within the meaning of the ADA” because “Innes admitted he was able to perform all of his job duties while undergoing treatment, despite the treatment’s side effects”).
a substantial limitation on a major life activity because he claimed that his cancer treatment limited only his ability to stay awake and alert.265

Similarly, the District Court for the Northern District of New York appropriately dismissed an ADA claim where the plaintiff offered scant evidence that her dismissal was related to her cancer diagnosis.266 Angela Giruzzi claimed that Blue Cross "repeatedly denied her promotions because it regarded her as disabled" due to her breast cancer.267 Less than four months after Blue Cross hired her as a support clerk, Giruzzi took eight months disability leave for surgery and follow-up treatment for breast cancer.268 She worked for four more years, before taking another medical leave for recurrence.269 The court justifiably held that an interviewer's "one fairly innocuous comment" was not sufficient to prove that he regarded her as disabled.270

B. Cases Holding that Cancer is a Disability

While a number of federal courts have boxed cancer survivors in a Catch-22, almost as many federal courts have found cancer survivorship to be a disability.

1. Wessel: The First Jury Verdict.—The first case to result in a jury verdict under the ADA was brought by an executive who was fired when his lung cancer metastasized to his brain.271 Charles Wessel, an experienced security guard executive, was hired in 1986 as the Executive Director of the security guard division of AIC International.272 After being diagnosed with lung cancer in 1987, Wessel returned to work.273 Although he continued to work for the next five years, Wes-

265. See id. at *6-8.
267. Id. at *1. Giruzzi also claimed that Blue Cross denied her promotions "because she was older than the successful applicants for the positions she sought." Id.
268. See id. at *2.
269. See id.
270. Id. at *14. The interviewer asked Giruzzi, during an interview for an executive secretary position, if she "‘could handle the job in light of the disability involved.’” Id. at *2 (citation omitted). Giruzzi did not claim that she had a disability, only that Blue Cross perceived her breast cancer as a disability. Id. at *13.
272. See AIC Sec. Investigations, Ltd., 820 F. Supp. at 1061 (noting that Wessel was a "widely recognized leader in the security guard industry").
273. See id. (explaining that after being diagnosed with lung cancer, Wessel was away from work due to surgery and recuperation).
sel's lung cancer ultimately spread, and his doctors declared that he had six to twelve months to live.\textsuperscript{274} Shortly after this diagnosis, AIC fired Wessel although he had never been subject to any negative work evaluations.\textsuperscript{275}

AIC moved for summary judgment on the ground that Wessel was not a qualified individual with a disability.\textsuperscript{276} Magistrate Judge Guzman denied summary judgment, finding that disputed facts remained as to the medical evidence regarding Wessel's ability to perform his job.\textsuperscript{277} The court's analysis focused primarily on whether Wessel was able to perform the "essential functions" of his job.\textsuperscript{278} The court apparently assumed, without express discussion, that Wessel's brain tumors were a disability under the ADA\textsuperscript{279} because it denied AIC's motion and set a trial date.\textsuperscript{280} Following an eight-day trial, the jury found that AIC and its owner had fired Wessel because of his terminal cancer at a time when he was still able to perform the "essential functions" of his job.\textsuperscript{281} The jury awarded Wessel $22,000 in back pay, $50,000 in compensatory damages, and $250,000 in punitive damages against the defendants.\textsuperscript{282}

2. Decisions that Relied Upon the Regulations to Conclude the Plaintiff Had a Disability under the ADA.—Most courts that deferred to the EEOC regulations, as well as contemplated the legislative history of the ADA, found that cancer survivors stated a claim under the ADA.\textsuperscript{283}

\textsuperscript{274} See id.

\textsuperscript{275} See id. at 1062 ("Prior to his termination from AIC, Wessel was never subject to any warning relating to his performance, his attendance, or any disciplinary action.").

\textsuperscript{276} See id. at 1063.

\textsuperscript{277} See id. at 1066-67.

\textsuperscript{278} See id. at 1064 (recognizing that "only those persons who are qualified—that is, able, with or without reasonable accommodation, to perform the essential functions of a particular job—may state a claim under the ADA" (citing 42 U.S.C. § 12111(8))).

\textsuperscript{279} See id. at 1063-64. AIC first argued that Wessel could "not meet his initial burden of proof that he was a qualified individual with a disability." \textit{Id.} at 1063. Second, AIC argued that Wessel "could not perform his job without risk to himself and others, regardless of any reasonable accommodation." \textit{Id.} at 1066. Without examining the preliminary matter of whether Wessel's impairment qualified as a disability under the ADA, the court considered whether Wessel was a "qualified" individual and whether he could perform his job without risk to himself or others. Of course, such considerations are only necessary if Wessel's impairment is in fact a disability under the ADA.

\textsuperscript{280} See id. at 1067.


\textsuperscript{282} See id. The court later denied AIC's motion for a new trial. The court did, however, reduce the punitive damages award to $150,000 to comply with the limitation on punitive and compensatory damages under 42 U.S.C. § 1981(b)(3)(C). See id. at 576.

\textsuperscript{283} See infra notes 284-344 and accompanying text (discussing the effect of a court's consideration of the regulations and legislative history).
The first published, yet unreported, decision in which a federal court engaged in a detailed analysis of how the ADA applied to cancer-based discrimination was issued five and a half years after the ADA took effect when the Southern District of New York denied summary judgment in Berk v. Bates Advertising, USA, Inc.284 Claudia Berk was hired by Bates Advertising in 1980 as an advertising executive.285 Berk took time off for breast cancer treatment in 1993.286 After two and a half months of medical leave, Berk attempted to return to her position.287 At that time, she informed Bates that she could schedule her six to eight weeks of daily radiation treatments around her work schedule.288 After several months of negotiating with Berk about her work assignments, Bates fired her.289 Berk sued Bates for violating her rights under the ADA and under state law.290

The court denied Bates's summary judgment motion.291 The court rejected Bates's argument that Berk did not have a disability when she attempted to return to work because her breast cancer imposed "no limitation on her major life activities."292

First, Judge Charles Haight carefully reviewed the ADA, supporting regulations, and the legislative history and concluded that cancer is an impairment under the ADA. He stated:

The legislative history of the ADA makes clear that cancer patients were intended to receive protection under the statute. For example, an early report on the bill lists cancer among the list of conditions constituting an "impairment." H.R. Rep. 101-485(II), 101st Cong., 2d Sess., at 51 (1990). Persons with a history of cancer are listed among "frequently occurring examples" of persons with a "record" of impairment. Id. at 52-53. The report explained that testimony heard by Congress "indicated there still exists widespread irrational prejudice against persons with cancer." Id. at 75.

Likewise, EEOC Regulations implementing the ADA state

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285. See id. at *2. In 1985, Bates was promoted to Management Representative and became the “Senior Vice President and Management Representative for Bates’s TWA and Philip Morris advertising accounts.” Id.
286. See id.
287. Id. at *2-3 (explaining that Berk “stopped reporting to work . . . on July 12” and on “September 24 . . . informed Anne Melanson, Director of Human Resources at Bates, that she was ready to return to work”).
288. See id. at *3.
289. Id. at *3-4.
290. See id. at *1 (citations omitted).
291. See id. at *25.
292. See id. at *10.
that the provision regarding a "record" of impairment serves, for example, to protect "former cancer patients from discrimination based on their prior medical history." 29 C.F.R. Pt. 1630, App. 1630.2(k).

It is clear that cancer patients were contemplated in the drafting of the ADA. It is also clear that cancer constitutes an "impairment" under the ADA.293

Second, the court concluded that Berk’s breast cancer substantially limited a major life activity.294 While the court declined to hold "that cancer, like HIV, is inherently substantially limiting,"295 it held that Berk’s cancer was a disability that had in fact substantially limited her in the past and that had also resulted in "a record of an impairment" because she had had breast cancer surgery.296 The court stated:

Plaintiff missed work and was in and out of the hospital on three occasions over the course of two months for surgical procedures; this is sufficient evidence of a disability under the ADA, as her breast cancer substantially limited her major life activities. Moreover, upon plaintiff’s return to work, her hospitalization established a record of impairment as articulated by the Supreme Court in Arline. Plaintiff, with a history of battling breast cancer, is precisely one type of person that Congress intended to receive the protection of the ADA. Accordingly, at all pertinent times plaintiff has demonstrated that she had a disability under the statute: first, a physical impairment under § 12102(2)(A), and then a record of such an impairment under § 12102(2)(B).297

Additionally, the court held that Berk was presently substantially limited in her ability to have children.298

The court, therefore, found that Berk was a "qualified individual with a disability" when she returned to work.299 In rejecting the

293. Id. at *10-11.
294. See id. at *14.
295. Id.
296. Id. (citing 42 U.S.C. § 12102(2)(B)).
297. Id. at *14.
298. See id. at n.3 (explaining that because of her “treatment for cancer, [Berk] was unable to have children” and concluding that “[t]he inability to reproduce and bear children constitutes a limitation on a major life activity” (citing Pacourek v. Inland Steel Co., 916 F. Supp. 797, 802 (N.D. Ill. 1996))).
299. See id. at *15 (noting that under the ADA, Berk was required to prove that she was a “qualified individual with a disability” and explaining that "plaintiff was ‘qualified’ upon her return to work” (quoting 42 U.S.C. § 12111(8))).
Catch-22 analysis employed in *Ellison*\(^{300}\) and *Gordon*,\(^{301}\) the court properly recognized that an employee does not lose her "qualified" status simply because she misses ten weeks of work for medical treatment.\(^{302}\) The court stated:

A person may be qualified even though, as part of a reasonable accommodation, she requires some time away from work for treatment. An employer cannot claim that a recently disabled employee missed work and became, therefore, "unqualified." Congress, in passing the ADA, certainly did not intend to provide an incentive to employers to terminate their employees the first time they missed work for a disability.\(^{303}\)

The court thus denied Bates' alternative argument for summary judgment on the ground that Berk was able to return to work after ten weeks of cancer treatment.\(^{304}\)

In a well-reasoned, but extremely cautious opinion, the Eastern District of Texas considered whether testicular cancer is a disability under the ADA in *Anderson v. Gus Mayer Boston Store*.\(^{305}\) David Anderson began working for Gus Mayer, a women's clothing store, in 1982.\(^{306}\) Six years later, Anderson was diagnosed with testicular cancer and received surgery and radiation.\(^{307}\) After Anderson's cancer and subsequent HIV diagnosis, Gus Mayer selected a new group health insurance provider, which rejected Anderson's health insur-

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\(^{300}\) See *Ellison* v. Software Spectrum, Inc., 85 F.3d 187, 191 (5th Cir. 1996) (recognizing that although plaintiff's breast cancer was an impairment, it was not a disability under the ADA); see also supra notes 124-155 and accompanying text (examining the *Ellison* court's analysis of the ADA).

\(^{301}\) See *Gordon* v. E.L. Hamm & Assocs., 100 F.3d 907, 912 (11th Cir. 1996) (failing to find plaintiff's malignant lymphoma a disability under the ADA because it "did not substantially limit his ability to care for himself or to work"); see also supra notes 156-173 and accompanying text (examining the *Gordon* court's analysis of the ADA).

\(^{302}\) *Berk*, 1997 U.S. Dist. LEXIS 19224, at *16-17. The court distinguished *Ellison* and *Gordon* on the facts without deciding "whether these cases, . . . were properly decided." Id. at *12.

\(^{303}\) Id. at *16 (footnote omitted). The court recognized that an employee who requires "indefinite leave" as an accommodation may not be qualified. See id. at *16 n.4 (citing Rogers v. International Marine Terminals, 87 F.3d 755, 759-60 (5th Cir. 1996); Hudson v. MCI Telecomms. Corp., 87 F.3d 1167, 1169 (10th Cir. 1996)).

\(^{304}\) See id. at *9, *22 (rejecting the defendant's argument that when Berk returned to work, despite her continuing treatment for cancer, she no longer had a "'disability' under the [ADA]").

\(^{305}\) 924 F. Supp. 763 (E.D. Tex. 1996).

\(^{306}\) See id. at 769.

\(^{307}\) See id. Anderson was diagnosed with HIV and AIDS in 1991 and ultimately died prior to the court's decision. See id.
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ance application because of his medical history. Anderson sued Gus Mayer under the ADA for failing to provide him with the same health insurance benefits provided to other employees.

In determining whether Anderson was a person with a disability, Judge Howell Cobb reviewed the EEOC regulations and guidelines, declaring them to be "immensely probative to the issues of this case. . . . Economies of scale, collective expertise, and other factors weigh in favor of deferring to the agencies who are most familiar with specialized issues of regulation." The court noted that judicial deference to agency interpretations is most important when judges have little guidance from other court decisions.

The court recognized that conditions that are not per se disabilities must be evaluated on a case-by-case basis to determine whether they meet the definition of a disability under the ADA. Relying on three cancer-discrimination cases under other laws, the court concluded that Anderson's testicular cancer, which was treated by surgery

308. See id. at 769-70 (explaining that Randolph Ney, sole proprietor of the Gus Mayer Boston Store, "told his agent Ross Green to seek other coverage with new carriers" when some of the employees participating in the group plan informed Ney "that if reduced premiums were not secured they would withdraw from the group" because of recent premium increases, due, in part, to Anderson's cancer and AIDS status, and that the new carrier, John Alden Life Insurance Company, "had the flexibility to deny some members of the group").

309. See id. at 770-71. The ADA prohibits discrimination in terms of employment, which includes fringe benefits such as health insurance. See 42 U.S.C. § 12112(a) (1994) (stating that a covered entity shall not discriminate in regard to "terms, conditions, and privileges of employment").

310. See Anderson, 924 F. Supp. at 772. The court cited to the United States Supreme Court's deference to administrative agency expertise: "The Americans With Disabilities Act clearly allows the EEOC to promulgate regulations to fill many gaps in the statutory scheme. In this situation, the EEOC's interpretations (i.e. regulations) are given 'controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.'" Id. (quoting Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843-44 (1984)).

311. Id. (construing Chevron, 467 U.S. 837).

312. See id. The court explained:

Not only do courts need to give deference to agency regulations and heightened deference to agency interpretations of those regulations, but there is an additional reason why the EEOC interpretation of the ADA is to be respected. When, as is the case with the ADA, an agency is entrusted with implementing an entirely new statutory scheme, judicial deference is especially appropriate.

Id.

313. See id. at 775 (concluding that "some conditions have been established through regulations and case law to be per se disabilities" and explaining that "if a condition has not been established to be a per se disability" an individual may attempt to classify a condition using "precedent established under the Rehabilitation Act as a guide").
and by radiation, "is probably a disability or is regarded as such."

Although it recognized that former cancer patients are frequently cited as an example of persons who are "regarded as disabled," the court, "in an abundance of caution" and without further elaboration, refused to hold "that Anderson's testicular cancer was a condition covered by section 12101(2)." In denying defendant's motion for summary judgment, the court had the luxury of evading the cancer issue—finding that Anderson's cancer was "probably" but not definitely a disability—because it ruled that Anderson's HIV was a per se disability.

In *Mark v. Burke Rehabilitation Hospital*, the court considered whether lymphoma is a disability under the ADA. Herbert Mark was a part-time attending physician in the cardiac Rehabilitative Service Department at The Burke Rehabilitation Hospital. After working for a little more than one year, Mark was diagnosed with lymphoma, a hematic cancer, in February 1992. Although Mark continued to work during his cancer treatment, he had to avoid contact with patients for three to four days after each of six monthly chemotherapy treatments. One of Mark's responsibilities was to cover for another physician when she was on vacation. Burke fired Mark in August 1992 when Mark was unable to postpone a chemotherapy treatment.

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314. *Id.* at 777. The court cited three cases that found cancer to be a disability. *Id.* at n.40 (citing Moore v. SunBank of North Florida, 923 F.2d 1423, 1424-25 (11th Cir. 1991); Katradis v. Dav-El of Washington, DC, 846 F.2d 1482, 1484 (D.C. Cir. 1988); C932 ALI-ABA 343 (July 21, 1994)).

315. *Id.* (footnote omitted).

316. See *id.* at 781. When the court denied the defendant's motion for summary judgment, it held that only two issues of fact remained to be determined: "Whether Gus Mayer . . . appropriately availed itself of the ADA's undue hardship defense and what recoverable damage were sustained by Anderson." *Id.*

317. See *id.* at 774-75 (recognizing that HIV is a per se disability because it has been established by the court that conditions such as HIV "impact a major life activity and that this impact is substantially impairing of a given activity" (citations omitted)).


319. See *id.* at *9 (considering whether, under the specific facts of the case, plaintiff's condition qualified as a "disability" under any of the ADA's three tests); see also 42 U.S.C. § 12102(2) (1994) (articulating the three alternative definitions of disability); *supra* note 71 and accompanying text.


321. See *id.* at *2-3.

322. See *id.* at *3 (explaining that "Mark's white blood cell count usually dropped to low levels for three to four days following each chemotherapy treatment," and as a precaution to prevent Mark from contracting an infection, the hospital's Associate Director concluded that Mark "should not make contact with patients during this time" (citation omitted)).

323. See *id.* at *2.
therapy treatment to cover for his supervisor while she was on summer vacation.  

Judge Robert Carter correctly examined the EEOC regulations and legislative history to support the characterization of Mark's lymphoma as an impairment. First, Mark's lymphoma affected his digestive system. The court reiterated that the EEOC regulations for the ADA define "physical . . . impairment" as "any physiological disorder or condition . . . affecting one or more of the . . . body systems . . . [including] digestive." Therefore, the court concluded that Mark's cancer was a physical impairment.

Second, the court held that Mark's lymphoma history was a "record of his physical impairment." In giving "great deference" to the EEOC guidelines, the court recognized that the "record of" definition "protects former cancer patients from discrimination based on their prior medical history." Relying on School Board of Nassau County v. Arline, the court held that Mark had a record of a substantially limiting impairment because he was hospitalized for cancer surgery. Accordingly, the court denied Burke's summary judgment motion because its failure to provide Mark with a reasonable accommodation of his chemotherapy treatment was prima facie evidence that it fired him because of his disability.

324. See id. at *3 (citation omitted).
325. See id. at *9-12. The court noted that "the legislative history of the ADA indicates that Congress considered cancer to be an impairment." Id. at *9-10 (citing S. Rep. No. 101-116, 22 (1989), reprinted in 1 LEGISLATIVE HISTORY OF THE AMERICANS WITH DISABILITIES ACT, supra note 67, at 120).
328. See id. at *10-11 (citing 29 C.F.R. app. § 1630.2(k) (1992)).
329. Id. at *10 n.5 ("In reviewing cases under the federal disability statutes, courts must give 'great deference' to guidelines of the EEOC, though those guidelines are not binding." (internal quotation marks omitted) (quoting Castellano v. City of New York, 946 F. Supp. 249, 255 (S.D.N.Y. 1996) (citing Blum v. Bacon, 470 U.S. 132, 141 (1982); Teal v. State of Conn., 645 F.2d 133, 137 n.6 (2d Cir. 1981), aff'd, 457 U.S. 440 (1982))).
330. Id. at *10-11 (quoting, in a parenthetical, 29 C.F.R. app. § 1630.2(k) (1992)).
332. See Mark, 1997 U.S. Dist. LEXIS, at *12 (analyzing that under Arline an impairment that is "'serious enough to require hospitalization' [is] an impairment that substantially limits one or more major life activities" and that, under Arline, "a hospitalization sufficiently represents a record of that impairment" (quoting and citing Arline, 480 U.S. at 281)).
333. See id. at *22 (concluding that, because Burke "knew about the physical limitations that Mark experienced after chemotherapy treatments[,] . . . Burke had an affirmative obligation to reasonably accommodate those physical limitations" (citation omitted)).
In a rare jury verdict, a testicular cancer survivor won damages against the employer who fired him.\(^{334}\) John Bizelli was hired as a chemical operator by Parker Amchem in 1987.\(^{335}\) Seven years later, he was diagnosed with testicular cancer.\(^{336}\) After six months of non-work related medical leave, Bizelli's physician suggested that he could return to work with lifting restrictions.\(^{337}\) Parker Amchem refused to allow Bizelli to return to limited duty and ultimately refused to allow him to return to full duty unless he successfully completed a physical examination to which no other employee was subject.\(^{338}\)

Judge Limbaugh relied on the ADA's legislative history and *Mark v. Burke Rehabilitation Hospital*\(^{339}\) to first acknowledge that "[t]here is no dispute that cancer can constitute a physical impairment under the ADA."\(^{340}\) The court then concluded that Bizelli's particular medical history placed him under the protection of the ADA:

Plaintiff has established a record of an impairment. The Plaintiff had been on a leave of absence and receiving short term disability benefits since he was diagnosed with testicular cancer. Moreover, the Defendants were aware of both his chemotherapy and his surgery. Plainly, this provision of the ADA was intended to ensure that former cancer patients are not discriminated against on the basis of their prior medical history. Accordingly, the Court finds that the Plaintiff has met his burden of establishing that he is a qualified individual with a disability under the ADA.\(^{341}\)

The court denied Parker Amchem's summary judgment motion because Bizelli established a genuine issue as to whether he could per-

\(^{334}\) See Bizelli v. Parker Amchem, 17 F. Supp. 2d 949, 951 (E.D. Mo. 1998) (noting that a jury returned a verdict in favor of Bizelli on November 24, 1997); see also Bizelli v. Parker Amchem, 981 F. Supp. 1254, 1258 (E.D. Mo. 1997) (denying the defendants' motion for summary judgment on the basis that the defendants had "not advanced . . . a legitimate nondiscriminatory reason for their actions"). Of the twenty-four lower court cases discussed in this Article, only *Bizelli, Wessel,* and *Gordon* resulted in reported jury verdicts for the plaintiffs. See supra notes 156-173, 271-282 and accompanying text (discussing the *Gordon* and *Wessel* decisions); infra notes 335-338 and accompanying text (discussing the *Bizelli* decision).

\(^{335}\) See *Bizelli,* 981 F. Supp. at 1255.

\(^{336}\) See *id.*

\(^{337}\) See *id.* at 1256.

\(^{338}\) See *id.* (explaining that "[a]lthough [Bizelli] successfully completed the first part of his medical examination, he was given certain temporary restrictions after his functional capacity exam").


\(^{341}\) *Id.* (internal citations omitted).
form the essential functions of his job with reasonable accommodations.\textsuperscript{342}

A jury considered Bizelli's two claims: whether Parker Amchem had a duty to accommodate his return to work with a temporary lifting restriction and whether he was fired because of his record of testicular cancer.\textsuperscript{343} The jury awarded Bizelli $5,000 in lost wages and benefits and $400,000 in compensatory damages on the first count; it awarded $50,000 in lost wages and benefits and $100,000 in compensatory damages on the second count.\textsuperscript{344}

3. Decisions that Recognized that Summary Judgment is Inappropriate to Resolve Whether the Plaintiff has a Disability Because this Determination Usually Involves Disputes over Material Facts.—Two years after the ADA took effect,\textsuperscript{345} the United States District Court for the District of Maine held that the issue of whether a plaintiff who suffered from cancer had a disability under the ADA is a question of material fact.\textsuperscript{346} Melvin Braverman worked for the Penobscot Shoe Company from 1983 to 1992, when he was diagnosed with prostate cancer.\textsuperscript{347} Penobscot fired Braverman the first day that he returned to work from a leave for radiation treatment.\textsuperscript{348} Judge Brody denied the defendant's summary judgment motion on Braverman's claim that Penobscot fired him because of his cancer.\textsuperscript{349} The court held that summary judgment was inappropriate because the parties disagreed upon whether the facts of the case were sufficient to support the conclusion that Braverman was substantially limited in a major life activity and upon whether the facts of the case supported that Braverman had a record of impairment under the ADA.\textsuperscript{350}

\begin{itemize}
\item \textsuperscript{342} See id. at 1258.
\item \textsuperscript{343} See Bizelli v. Parker Amchem, 17 F. Supp. 2d 949, 951 (E.D. Mo. 1998).
\item \textsuperscript{344} See id. The court denied defendant's motion for a new trial or to amend the judgment. See id. at 955.
\item \textsuperscript{345} See id.; see also supra note 271 (explaining that the ADA took effect on July 26, 1992).
\item \textsuperscript{346} See Braverman v. Penobscot Shoe Co., 859 F. Supp. 596, 603 (D. Me. 1994) (finding that Braverman "has raised a question of material fact about having a disability, and is, therefore, within the protected class for summary judgment purposes"). The court also found that "Braverman ha[d] narrowly raised a question of material fact regarding whether Defendants had discriminatory intent based on the timing of Braverman's termination." Id.
\item \textsuperscript{347} See id. at 599.
\item \textsuperscript{348} See id. Penobscot fired Braverman on August 3, 1992, just one week after the ADA took effect. See id.
\item \textsuperscript{349} See id. at 603.
\item \textsuperscript{350} Id. Unlike the courts in Gallagher and Nave, supra, at notes 225-247, the court in Braverman correctly recognized the material-fact dispute inherent in such ADA claims. Judge Brody stated:
In *Overturf v. Penn Ventilator Co.*, the United States District Court for the Eastern District of Pennsylvania considered whether Penn Ventilator regarded Steven Overturf as disabled when it fired him after he was diagnosed with a tumor behind his eye. Judge Curtis Joyner ruled that Overturf did not allege sufficient evidence that created an issue of fact as to whether his tumor substantially limited his ability to see, despite the fact that Overturf experienced double and triple vision and had lost all peripheral vision. The court denied Penn Ventilator's summary judgment motion, however, because it found a question of fact as to whether Penn Ventilator perceived Overturf as disabled. Overturf alleged that a supervisor had noted at a managers' meeting that he had a "brain tumor" and later remarked that the company needed "youth, vigor and health and that Plaintiff was better off being terminated because he could concentrate on getting treatment and not let other things, like his job, take precedence over his health."

In a similar case, Sandra Vendetta claimed that the Bell Atlantic Corporation transferred her to an undesirable location and treated her differently from other employees after she was diagnosed with Hodgkin's Disease. Judge Buckwalter held that Vendetta raised an

Braverman argues that his major life activities were substantially limited at the time of his termination. He had just missed a significant amount of work due to radiation treatment, and the treatment had caused various intestinal, rectal, anal and urinary difficulties. Although Braverman had an excellent response to the treatment, Braverman's cancer was not in remission when he returned to work at the Company. A question of material fact obviously remains about whether this constitutes a substantial limit on Braverman's major life activities. A question of material fact also remains over whether Braverman had a record of, or was regarded as being substantially limited at the time of his termination. Braverman argues that Hansen [his supervisor] regarded him as disabled. Braverman also maintains that his leave for radiation treatment established a record of disability. See *School Bd. of Nassau County v. Arline*, 480 U.S. 273, 281, 107 S. Ct. 1123, 1127-28, 94 L. Ed. 2d 307 (1987) (Under the Rehabilitation Act, hospitalization sufficient to establish substantial limitation of major life activity). Summary judgment is therefore inappropriate on the issue of Braverman's alleged disability because of the factual issues that remain for resolution.

Id.

352. See id. at 898-99.
353. See id. at 898.
354. See id. at 898-99.
355. Id. at 899.
issue of fact as to whether she had a disability because she continued to suffer fatigue resulting from chemotherapy. Additionally, her supervisor's negative comments about her health "strongly evince[d] a fact issue as to whether Vendetta was 'regarded as' disabled by" her employer.

Three other cancer survivors who were fired several years after their diagnoses also withstood their employers' summary judgment motions by alleging sufficient evidence to prove that they had a disability under the ADA. The Village Green Care Center hired Patricia Shea in October 1991. From July 1994 until December 1994, she worked part-time while receiving cancer treatment. Although she returned to work full-time in early 1995, her employer subsequently fired her in January 1996. Senior Judge Britt denied the defendant's summary judgment motion on the ground that Shea presented evidence that she had a record of a disability and that her supervisors regarded her as disabled.

Another cancer survivor defeated her employer's summary judgment motion twenty-three years after her initial cancer diagnosis. Dodge Management Company, which managed rental properties, hired Marilyn Cornman in 1973. Three years later, Cornman had a mastectomy for breast cancer and reconstructive surgery with silicone implants.

357. See id. at *23-24. The court noted that Vendetta's cancer was in remission "during the period at issue in her [c]omplaint"; however, the record stated that "Vendetta continued to suffer from the effects of her cancer treatment, particularly chemotherapy, and that the greatest effect was fatigue." Id. at *23. The court also noted that "Vendetta experienced a severe bout of arthritis around the time she returned to Bell." Id.

358. See id. at *24 (quoting 42 U.S.C. § 12102(2)(c)).


360. See id.

361. See id.

362. See id. at *2 (citation omitted).

363. See id. at *6. The court stated that:

[p]laintiff has put forth evidence that she had a record of disability from her 1994 diagnosis and treatment of and recovery from cancer. . . . Further, plaintiff's treating oncologist, Dr. Joseph Moore, stated that her treatment required monthly hospitalization of five days and kept her from working and limited other major life activities from June until December 1994. Id. at *6 (internal citations omitted).

364. See id. at *6-7. Shea's employer "expressed concerns about her future health and its impact upon responsibilities she may have in the future." Id. (citation omitted). He also "told her that her job was in jeopardy because [her supervisors] feared her cancer would return, rendering her unable to do her job." Id. (citation omitted)


366. See id.
implants.\textsuperscript{367} After her implants ruptured in 1992, Cornman sought four to six weeks leave to recover from surgery to remove the implants.\textsuperscript{368} Although her employer told her not to discuss her surgery with the owners of a residential complex that had high vacancy rates, Cornman informed the owners that her temporary replacement would work on their property while she was recuperating from surgery to remove breast implants.\textsuperscript{369} Cornman was fired when she returned from medical leave.\textsuperscript{370}

In denying the defendant's summary judgment motion,\textsuperscript{371} Judge Frank considered the three-part definition of disability in determining whether Cornman's medical condition was a disability. First, the court held that Cornman did not have a disability when she was fired because she did not then have cancer and "the silicone leakage did not itself amount to a disability under the ADA."\textsuperscript{372} The court held, however, that Cornman sufficiently alleged that she had a record of a disability because she had spent two weeks in the hospital in 1976 for breast cancer surgery\textsuperscript{373} and because her mastectomy had had a significant impact on her sexual self-image.\textsuperscript{374} Additionally, the court held that Cornman raised facts that suggested her employer regarded her cancer as a disability because he asked her not to disclose her medical history to the residential complex owners.\textsuperscript{375}

\textsuperscript{367} See id.
\textsuperscript{368} See id. at 1069.
\textsuperscript{369} See id.
\textsuperscript{370} See id. Cornman never actually returned to work. See id. After her medical leave, Cornman arranged a meeting with Paul Curry, then president of N.P. Dodge, "to discuss when [Cornman] would be cleared to return to work." Id. At this meeting, Curry fired Cornman. See id.
\textsuperscript{371} See id. at 1074.
\textsuperscript{372} Id. at 1071.
\textsuperscript{373} See id. at 1071-72. In support of its conclusion that Cornman's hospital stay created a record of a disability, the court cited School Board of Nassau County v. Arline, 480 U.S. 273 (1987). See supra notes 331-332 and accompanying text (discussing the Arline decision).
\textsuperscript{374} See Cornman, 43 F. Supp. 2d at 1072. The court extended the Supreme Court's rationale in Bradgon v. Abbott, 524 U.S. 624 (1998), which held that reproduction is a major life activity, to conclude that:

an impairment which impedes, limits, or otherwise negatively affects a person's sexual relations in a substantial way may be considered a disability under the ADA. This society clearly considers a woman's breasts to be a integral part of her sexuality, the loss of which would necessarily involve some significant impact on her sexual self-image.

Id. (discussing "Curry's admonition to [Cornman] not to inform clients of her illness"). The court further stated:

Thus, whether or not Plaintiff's cancer genuinely had a substantial impact on a major life activity, it is possible to conclude that, while Defendant may not have had a skewed perception of the effect of a cancer recurrence, Defendant acted
Finally, Stanley Freiman was fired four years after being diagnosed with throat cancer. Freiman worked for the Chicago Housing Authority (CHA) from 1982 to 1995. After throat cancer surgery in February 1991, he used a tracheostomy to breathe and to speak. Because he had trouble breathing, Freiman could not walk and talk at the same time. CHA fired Freiman during a downsizing. Freiman claimed that after his surgery, "he was taunted by several fellow employees, including his supervisor, who called him 'button neck' and 'dark cloud.'" Although the court did not explicitly discuss whether Freiman's throat cancer was a disability, it held that Freiman's major life activities were substantially limited when he was fired because his "ability to speak and breathe . . . was substantially limited."

C. Analysis: Why Some Federal Courts Place ADA Plaintiffs in a Catch-22

Most of the decisions discussed in this Article are resolutions of summary judgment motions. Unfortunately, ADA cases are particu-

out of fear of the reaction of clients. In other words, even if Plaintiff's situation and the record thereof does not place her squarely within the definition of a "record of" disability, she may be classified as a person with a disability through an analysis which bridges the "record of" and "regarded as" prongs of the definition of a disabled person in that she has a record of a condition which, in light of the attitudes of Defendant's clients, Defendant regarded as a disability.

The court concludes that there is adequate evidence in the record from which a reasonable jury could conclude that the Defendant became aware of Plaintiff's past impairment—an impairment which led to a grave anatomical loss, and which either did substantially limit a major life activity or might be perceived as so limiting by Defendant's clients—and sought to terminate Plaintiff's employment as a result, out of fear of a recurrence of cancer.

Id. at 1072-75.


377. See id. at *1.

378. See id. at *1-2.

379. See id. at *2.

380. See id. at *2-3.

381. Id. at *6.

382. Id. at *9.

larly poorly suited for resolution at summary judgment because in many cases, the parties disagree on material facts as to whether the plaintiff's impairment substantially limits a major life activity. With the exception of Bizelli and Wessel, no published decisions reveal the post-summary judgment disposition of these cases.


384. See Colker, supra note 121, for an excellent discussion of how many federal courts are abusing summary judgment, in two ways, to dismiss ADA complaints. Colker stated:

First, district courts are refusing to send 'normative' factual questions to the jury, such as issues of whether an individual has a 'disability.' ... Instead, trial courts are substituting their own normative judgments for that of the jury. The question of whether cases go to the jury is significant because it can affect overall outcomes. Eisenberg has found, for example, that plaintiffs fare better in jury trials than in court trials in civil rights, employment discrimination, and prisoner civil rights cases. Thus, a reluctance to send cases to the jury may make a difference in substantive outcome under the ADA.

Courts are also abusing the summary judgment device by creating an impossibly high threshold of proof for defeating a summary judgment motion. Colker, supra note 121, at 101-02 (internal footnotes omitted).


ered by all three parts of the definition of a person with a disability provided courts with more opportunities to reject summary judgment.\(^{387}\) Second, courts that did not give deference to the regulations and/or the legislative history were less likely to recognize that Congress intended the ADA to avoid confining plaintiffs in a Catch-22. Third, courts seemed more receptive to characterizing certain cancers as more disabling than others.

Turning first to the importance of comprehensive pleading, those plaintiffs who pleaded that they had a disability under more than one part of the three-part definition were more likely to convince the court that at least one part of the definition covered them. For example, Herbert Mark asserted that his lymphoma was a disability, that his hospitalization for cancer surgery established a record of a disability, and that The Burke Rehabilitation Hospital fired him because it regarded his lymphoma as a disability.\(^{388}\) The court ruled that Mark’s hospitalization for cancer surgery “sufficiently represents a record of that impairment.”\(^{389}\) Because the court found sufficient evidence to hold that Mark had a record of an impairment, it did not consider whether his cancer was a disability at the time he was fired.\(^{390}\) Had Mark pled only that he had a disability, the court may not so easily have rejected the defendant’s summary judgment motion.

On the contrary, John Nave did not claim that his surgery to stage and to treat his Hodgkin’s Disease established a record of an impairment.\(^{391}\) The court rejected Nave’s claim that his Hodgkin’s Disease was a disability because Nave failed to present evidence that it substantially limited a major life activity.\(^{392}\) Thus, the court boxed Nave into a Catch-22 by dismissing his claim because he was not presently limited in his ability to work, among other activities. Had Nave pleaded that

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387. Compare Cook, 980 F. Supp. at 1463 (granting the defendant’s motion for summary judgment when the plaintiff only claimed that her impairment actually substantially limited a major life activity), and Farmer, U.S. Dist. LEXIS 20941 (granting the defendant’s motion for summary judgment when the plaintiff claimed that his impairment was substantially limiting and he was regarded as having a substantially limiting impairment), with Cornman, 43 F. Supp. 2d 1066 (denying the defendant’s motion for summary judgment after considering all three prongs of the ADA’s definition of disability), and Braverman, 859 F. Supp. 596 (same).


389. Id. at *12 (citing School Bd. of Nassau County v. Arline, 480 U.S. 273, 281 (1987)).

390. See id. at *11-12.

391. See Nave v. Wooldridge Constr., No. 96-2891, 1997 U.S. Dist. LEXIS 9203, at *9 n.5 (E.D. Pa. June 30, 1997) (declining to consider whether the plaintiff established a record of a substantially limiting impairment because the “plaintiff assert[ed] no claim in his pleading, motion or responses that he has a record of such an impairment”).

392. See id. at *31.
his hospitalization established a record of an impairment, his claim may have survived summary judgment.

Next, courts that did not defer to the EEOC regulations and/or to the legislative history of the ADA were more likely to rule for the defendant than courts that did defer to the regulations and/or legislative history. Although most of the courts at least mentioned the EEOC regulations that interpret the definitions of the ADA, only

393. Professor Colker argued that one reason federal courts reject the majority of ADA claims is that many courts have refused to defer to the EEOC regulations, despite a congressional mandate that they do so. Colker, supra note 121, at 133-59. Colker contended:

First, the plain language of the ADA requires courts to defer to the EEOC's historic views under section 504 as well as its contemporaneous view under the ADA. Congress has expressly delegated enforcement of the employment discrimination provisions of the ADA to the EEOC.

Not only was the EEOC required by Congress to draft regulations, but it did so in a manner that is usually accorded the highest judicial deference.

Second, regulations are particularly entitled to deference when it is clear that Congress has put its stamp of approval on them. By directly incorporating pre-existing section 504 EEOC regulations into the ADA, Congress clearly indicated that it approved of the agency's historical interpretations of disability discrimination law.

Yet given Congress' clear statement of intentions, the courts should defer to the views of the EEOC under the ADA.

Nonetheless... many lower courts have refused to defer to the EEOC's views under the ADA. The EEOC's ADA regulations have been a victim of the agency's historic second-class status; the courts continue to disregard its regulations and guidance, even when a very strong case can be made that Congress intended courts to give deference to those rules under the ADA.

Id. at 134-36 (internal footnotes omitted).

394. See id. at 137. Professor Colker noted that although courts should consider the legislative history of the ADA, the mandate for deferring to legislative history is not nearly as strong as is the mandate for deferring to agency regulations. Id. at 136-37.

The use of legislative history has its critics. Justice Scalia has suggested that young staffers may seek to transform obscure district court cases into the law of the land by planting language in congressional committee reports. Even Judge Mikva, who is less skeptical of legislative history than Justice Scalia, acknowledges that colloquies on the floor of Congress are often not worthy of serious consideration. Nonetheless, because the ADA was passed by an overwhelming margin, its legislative history is arguably entitled to significant weight. The House of Representatives approved the conference report on the ADA by a vote of 377-28 on July 12, 1990, and the Senate approved the conference report on July 13, 1990, by a vote of 91-6. Thus, the ADA is a consensus statute whose legislative history should arguably be given much deference.

Id. at 137 n.192 (internal citations omitted).

five decisions discussed the EEOC regulations and the legislative history of the ADA in considering whether the plaintiffs had a disability.\textsuperscript{396} The plaintiff prevailed in each of those cases, except in \textit{Nave}, where the court found that Nave "presented no evidence that he is substantially limited in his ability to care for himself, perform manual tasks, or stand."\textsuperscript{397} Courts that did not consider the legislative history ruled overwhelmingly in favor of the defendants.\textsuperscript{398}

Finally, the type of cancer the plaintiff had appears to have some effect on the courts' analysis of whether the cancer substantially lim-

\textsuperscript{396}See Berk v. Bates Advert. USA, Inc., No. 94 Civ. 9140 (CSH), 1997 U.S. Dist. LEXIS 19224, at *10 (S.D.N.Y. Dec. 2, 1997) (discussing the legislative history of the ADA and concluding that the ADA was intended to protect cancer patients); Bizelli v. Parker Amchem, 981 F. Supp. 1254, 1257 (E.D. Mo. 1997) (interpreting the legislative history of the ADA and finding that cancer may be considered a physical impairment under the statute); Nave v. Wooldridge Constr., No. 96-2891, 1997 U.S. Dist. LEXIS 9203, at *10-11 (E.D. Pa. June 30, 1997) (relying on the EEOC's regulations to establish whether the plaintiff's disability substantially limited any major life activities); Mark v. Burke Rehab. Hosp., 94 Civ. 3596 (RLC), 1997 U.S. Dist. LEXIS 5159, at *9-10 (S.D.N.Y. Apr. 16, 1997) (utilizing EEOC regulations to evaluate whether the plaintiff's cancer constituted a physical or mental impairment under the ADA); Anderson v. Gus Mayer Boston Store, 924 F. Supp. 763, 774-75, 777 (E.D. Tex. 1996) (relying heavily upon agency's guidance in determining if the plaintiff had a disability that substantially limited major life activities).

\textsuperscript{397}Nave, 1997 U.S. Dist. LEXIS 9203, at *13.

Survivors of solid tumors and testicular cancer fared well. Of the eight survivors with solid tumors or testicular cancer, two prevailed at trial, and three others survived summary judgment motions. Survivors of breast and hematologic cancers seldom convinced courts that their cancer substantially limited their major life activities. Of the six breast cancer cases analyzed, only Berk and Cornman prevailed. Of the seven plaintiffs with hematologic cancers, only Mark and Vendetta prevailed.

Several factors seemed to have no impact on the plaintiffs' chance of success. Gender had no effect; women prevailed at the same rates as did men. Additionally, whether the plaintiff was in...
treatment or was post-treatment at the time of the discrimination had no effect on the outcome. Finally, with the possible exception of cases brought in Florida and in the Northern District of California, jurisdiction had little effect on the outcome.


Most of the lower court decisions discussed above were issued prior to any consideration of the ADA by the United States Supreme Court. Until its 1997-1998 term, the Court refused to consider the application of the ADA. Since then, however, the Court has inter-


406. Defendants prevailed in the three Florida cases, Cook, 980 F. Supp. 1463, Gordon, 100 F.3d 907, and Malewski, 978 F. Supp. 1095, all of which relied on Ellison, 85 F.2d 187. Defendants also prevailed in the two cases from the United States District Court for the Northern District of California, Madjlessi, 993 F. Supp. 736, and Barger, 1999 U.S. Dist. LEXIS 945. In other jurisdictions, with more than one case, the decisions were divided. For example, in Texas, the plaintiffs survived defendant's motion for summary judgment in Anderson, 924 F. Supp. 763 (Eastern District), and in R.J. Gallagher, 959 F. Supp. 405 (Southern District), but lost in Ellison, 85 F.2d 187 (Fifth Circuit). In New York, the plaintiffs survived summary judgment in Berk, 1997 U.S. Dist. LEXIS 19224, and in Mark, 1997 U.S. Dist. LEXIS 5159 (Southern District), but lost in Giruzzi, 1998 U.S. Dist. LEXIS 15589 (Northern District) and in Olmeda, 1998 U.S. Dist. LEXIS 345 (Southern District). In Illinois, the plaintiffs survived summary judgment in AIC Sec. Investigations, 823 F. Supp. 571 (Northern District), but lost in Hirsch, 989 F. Supp. 977 (Northern District). Finally, in Pennsylvania, the plaintiffs survived summary judgment in Overturf, 929 F. Supp. 895 and in Vendetta, 1998 WL 575111 (Eastern District), but lost in Nave, 1997 U.S. Dist. LEXIS 9203 (Eastern District).
presented the ADA in five decisions. One decision considered whether an individual who was disabled enough to receive Social Security Disability Insurance was too disabled to be a qualified employee under the ADA. The other four decisions analyzed the factors that a lower court must consider to determine whether an individual has a disability under the ADA.

A. The Five Decisions

1. Cleveland v. Policy Management Systems Corp.—One issue that resulted in sharply conflicting opinions in the courts of appeals was whether an individual who sought to receive or who received Social Security Disability Insurance (SSDI) benefits was automatically estopped from pursuing an ADA claim. The Supreme Court finally resolved the controversy with a unanimous “no.”

Carolyn Cleveland took medical leave from her job when she developed side effects from a stroke that she had at work. She applied for and received SSDI benefits by claiming that she was totally

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408. See Cleveland, 119 S. Ct. at 1599-1600.

409. See Kirkingburg, 119 S. Ct. at 2167-69; Sutton, 119 S. Ct. at 2146; Murphy, 119 S. Ct. at 2143; Bragdon, 524 U.S. at 628.

410. See Cleveland, 119 S. Ct. at 1601. The court noted the following cases:


Id.

411. Cleveland’s stroke affected her concentration, memory, and language skills. See id. at 1600.

412. See id.
disabled. After she returned to work, she informed the Social Security Administration (SSA) that she was employed, yet she did not withdraw her application for disability benefits. Cleveland's return to work was not successful. She sought, but did not receive accommodations. Her employer subsequently fired her for poor job performance.

The Court ruled that, "despite the appearance of conflict that arises from the language of" the ADA and the SSDI, claims under the two acts do not sufficiently conflict to allow courts to presume that a plaintiff can never prevail under both acts. For example, the Court explained that the ADA considers reasonable accommodations in determining whether an individual has a disability; the SSDI does not. Additionally, the SSA grants benefits in several circumstances "to individuals who not only can work, but are working."

Finally, the Court acknowledged that individuals should not be estopped from ADA claims simply because they apply for SSDI because plaintiffs do not know which claims will succeed and such inconsistent pleadings are "the sort normally tolerated by our legal system." A plaintiff, however, has the burden of explaining contradictory factual allegations: 

"[t]o defeat summary judgment, that explanation must be sufficient to warrant a reasonable juror's concluding that, assuming the truth of, or the plaintiff's good faith belief in, the earlier state-

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413. See id. Cleveland filed an SSDI application on January 28, 1994 "in which she stated that she was 'disabled' and unable to work." Id. (citation omitted).

414. See id. Cleveland returned to work on April 11, 1994, and reported this to SSA two weeks later. See id. On July 11, 1994, SSA denied her SSDI application. See id.

415. See id. (citation omitted).

416. See id. Cleveland was fired on July 15, 1994.

417. Id. at 1602. The Court found that "the two claims do not inherently conflict to the point where courts should apply a special negative presumption." Id.

418. See id. (observing that the "ADA defines a 'qualified individual' to include a disabled person 'who . . . can perform the essential functions' of her job 'with reasonable accommodation'" (quoting 42 U.S.C. § 12112)).

419. See id. (contrasting the ADA's definition of disability with the SSDI's and pointing out that the SSDI, unlike the ADA, "does not take the possibility of 'reasonable accommodation' into account"). The Court reasoned that the "result is that an ADA suit claiming that the plaintiff can perform her job with reasonable accommodation may well prove consistent with an SSDI claim that the plaintiff could not perform her own job (or other jobs) without it." Id.

420. Id. at 1603. The Court provided the example that "to facilitate a disabled person's reentry into the workforce, the SSA authorizes a 9-month trial-work period during which SSDI recipients may receive full benefits." Id. (citing 42 U.S.C. § 422(c); 423(e)(1); 20 C.F.R. § 404.1592 (1998)).

421. Id.

422. See id. (holding that "an ADA plaintiff cannot simply ignore the apparent contradiction that arises out of the earlier SSDI total disability claim," and as such, "must proffer a sufficient explanation").
ment, the plaintiff could nonetheless ‘perform the essential functions’ of her job, with or without ‘reasonable accommodation.’”

2. Bragdon v. Abbott.—Almost eight years after President Bush signed the ADA into law, the United States Supreme Court issued Bragdon v. Abbott, its first opinion that interpreted the definitions of the ADA. Sidney Abbott was infected with the human immunodeficiency virus (HIV) that causes AIDS. When she went to Randon Bragdon’s office for a dental appointment, even though her HIV was asymptomatic, she disclosed her HIV infection on the patient registration form. After examining Abbott and discovering a cavity, Bragdon notified her that he would fill her cavity only in the hospital and not in his office. Although Bragdon would not charge her an additional fee, Abbott would have to pay for the extra hospital charges. Abbott sued Bragdon, alleging discrimination on the basis of her disability—HIV infection.

The majority held that HIV was a disability as defined by the ADA. In vacating and remanding the lower court’s order, the Court did not consider whether Bragdon regarded Abbott’s HIV infection as a disability or treated her differently because of her history of an impairment. While the Court declined to decide whether HIV is a per se disability, in concluding that Abbott’s HIV was a disability, the Court walked through the three-part definition set forth in section 12102(2) of the ADA. In so doing, it recognized that

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423. Id. at 1604 (quoting 42 U.S.C. § 12111(8)).
424. President Bush signed the ADA on July 26, 1990. See supra notes 61-68 and accompanying text.
426. Justice Kennedy delivered the opinion of the Court, with Justices Stevens, Souter, Ginsburg, and Breyer joining in full, and Justice O’Connor joining in part.
427. See Bragdon, 524 U.S. at 628.
428. See id. at 628-29.
429. See id. at 629.
430. See id.
431. See id.
432. See id. at 631 (holding that the “respondent’s HIV infection was a disability under subsection (A) of the definitional section of the statute”).
433. See id. (declining to consider whether Bragdon was regarded as having a disability or had a record of a disability in light of concluding that Bragdon actually was disabled under the ADA).
434. See id. at 641-42 (stating “[i]n view of our holding, we need not address the second question presented, i.e., whether HIV infection is a per se disability under the ADA”).
435. See id. at 631.
Congress intended that federal courts rely upon cases and regulations that interpreted the Rehabilitation Act to resolve ADA claims.\footnote{See id. at 631-32 (noting Congress's directive that "nothing . . . [in the ADA] shall be construed to apply a lesser standard than the standards applied under Title V of the Rehabilitation Act of 1973 . . . or the regulations issued by Federal agencies pursuant to such title" (quoting 42 U.S.C. § 12201(a))).}

The first step that the Court considered was whether Abbott had a physical impairment.\footnote{See id. at 632.} The majority looked to the Department of Health, Education, and Welfare (HEW) regulations that interpreted the Rehabilitation Act for examples of substantial impairments.\footnote{See id. The HEW regulations simply promulgated a definition of a "physical or mental impairment" under the Rehabilitation Act. See 45 C.F.R. § 84.5(j)(2)(i) (1997). According to the Court, rather than including an uncomprehensive list of qualifying disorders in the text, the HEW included a list of qualifying disorders in commentary accompanying the regulations. Bragdon, 524 U.S. at 633 (citing 42 Fed. Reg. 22685 (1977), reprinted in 45 C.F.R. § 84, app. A).} Recognizing that the regulations, which now apply to the ADA, did not include an exhaustive list, the Court noted that they did contain "a representative list of disorders and conditions constituting physical impairments, including . . . 'cancer.'"\footnote{Bragdon, 524 U.S. at 633 (quoting 45 C.F.R. pt. 84, app. A).} Based on this, the Court concluded that Abbott had a physical impairment because she had an infection that affected her hemic and lymphatic systems. The Court explained:

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, we hold it is an impairment from the moment of infection. As noted earlier, infection with HIV causes immediate abnormalities in a person's blood, and the infected person's white cell count continues to drop throughout the course of the disease, even when the attack is concentrated in the lymph nodes. In light of these facts, HIV infection must be regarded as a physiological disorder with a constant and detrimental effect on the infected person's hemic and lymphatic systems from the moment of infection.\footnote{Id. at 637; see id. at 633-63. According to the Court, the regulations to the Rehabilitation Act and the ADA state that a "physical or mental impairment" means "any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: . . . hemic and lymphatic." Id. at 632 (citing 45 C.F.R. § 84.3(j)(2)(i) (1997)).}

Next, the Court analyzed what major life activity the impairment affected. The majority held that reproduction is a major life activity.\footnote{See id. at 638 ("Reproduction falls well within the phrase 'major life activity.'")} Unlike Justice Rehnquist in his dissent,\footnote{Id. at 637; see id. at 633-63. According to the Court, the regulations to the Rehabilitation Act and the ADA state that a "physical or mental impairment" means "any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: . . . hemic and lymphatic." Id. at 632 (citing 45 C.F.R. § 84.3(j)(2)(i) (1997)).} the majority did not
limit this analysis to whether Abbott considered reproduction a personal major life activity. The Court correctly reasoned that Congress intended reproduction to be a major life activity per se.

We ask, then, whether reproduction is a major life activity.

We have little difficulty concluding that it is. As the Court of Appeals held, "[t]he plain meaning of the word 'major' denotes comparative importance" and "suggest[s] that the touchstone for determining an activity's inclusion under the statutory rubric is its significance." Reproduction falls well within the phrase "major life activity." Reproduction and the sexual dynamics surrounding it are central to the life process itself.

Finally, the Court considered whether Abbott's HIV infection substantially limited her major life activity of reproduction. The Court concluded that Abbott's medical condition "substantially limited her ability to reproduce" because she risked exposing a sexual partner, as well as a fetus, to HIV. Justice Kennedy surmised that substantial limitations on major life activities need not arise to the level of "utter inabilities" to satisfy this definition. In contrast to Justice Rehnquist's dissent, Justice Kennedy found that although "[c]onception and childbirth are not impossible for an HIV victim," they are sufficiently dangerous to the public health to be a substantial limitation on reproductive activity.

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442. See id. at 658 (Rehnquist, J., dissenting in part, concurring in part) (stating that "there is not a shred of record evidence indicating that, prior to becoming infected with HIV, respondent's major life activities included reproduction").

443. See Bragdon, 524 U.S. at 637-39 (concluding that reproduction is a major life activity without discussing the respondent's personal ambitions). The Court also remarked that "[f]rom the outset, however, the case has been treated as one in which reproduction was the major life activity limited by the impairment." Id. at 638.

444. Id. (internal citation omitted).

445. Id. at 639.

446. Id. The Court reviewed the factual record to answer this question because it found "the Rehabilitation Act regulations provide no additional guidance." Id.

Our evaluation of the medical evidence leads us to conclude that respondent's infection substantially limited her ability to reproduce in two independent ways. First, a woman infected with HIV who tries to conceive a child imposes on the man a significant risk of becoming infected.

... Second, an infected woman risks infecting her child during gestation and childbirth, i.e., perinatal transmission.

Id. at 638-39.

447. See id. at 641 (noting that "the definition is met even if the difficulties are not insurmountable").

448. Id.
The majority concluded its opinion with a clear message to lower courts to consider relevant agency guidelines and regulations in applying definitions in the ADA. Justice Kennedy cautioned that trial and appellate courts should not substitute their own interpretations of the ADA for that of the Justice Department and of the Equal Employment Opportunities Commission. The Court stated:

Our holding is confirmed by a consistent course of agency interpretation before and after enactment of the ADA. . . . It is enough to observe that the well-reasoned views of the agencies implementing a statute “constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.”

The majority held that “the administrative guidance issued by the Justice Department to implement the public accommodation provisions of Title III” and presumably by agencies such as the Equal Employment Opportunities Commission, which are “authorized to administer . . . the ADA,” “are entitled to deference.”

In his dissent, Justice Rehnquist maintained that Abbott’s impairment did not substantially limit one or more of her major life activities because Abbott failed to offer evidence that, absent the HIV, she would have considered having children. Justice Rehnquist rejected Abbott’s argument “that reproduction must be a major life activity because regulations issued under the ADA define the term ‘physical impairment’ to include physiological disorders affecting the reproductive system.” The ability to bear a child, he reasoned, is not the type of “day-to-day” activity “of a normally functioning individual” envisioned in the definition of “substantially limits a major life activity.” Moreover, Justice Rehnquist disagreed with the majority’s conclusion that “the disability definition does not turn on personal choice.”

Despite his restrictive interpretation of the ADA, even Justice Rehnquist acknowledged that cancer is an impairment that can substantially limit a major life activity. Although rejecting the majority’s

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449. Id. at 642 (quoting Skidmore v. Swift & Co., 323 U.S. 134, 139-40 (1944)).
450. Id. at 646 (emphasis added) (internal citations omitted).
452. See id. at 658-59 (stating “there is absolutely no evidence that, absent the HIV, respondent would have had or was even considering having children”).
453. Id. at 660 (citing 28 C.F.R. § 36.104 (1997)).
454. Id. at 660-61.
455. Id. at 661-62.
finding that reproduction itself is a major life activity, Justice Rehnquist acknowledged that "numerous disorders of the reproductive system . . . are so painful that they limit a woman's ability to engage in major life activities such as walking and working. And, obviously, cancer of the various reproductive organs limits one's ability to engage in numerous activities other than reproduction." This statement marks the first time a member of the Supreme Court has suggested that it is obvious that an individual, whose cancer is so painful that it limits his or her ability to engage in major life activities such as walking and working, has an impairment that substantially limits a major life activity as defined by the ADA.

3. Sutton v. United Air Lines, Inc.—In *Sutton v. United Air Lines, Inc.*, the Court held that myopic twin sisters are not “disabled” because “the determination of whether an individual is disabled should be made with reference to measures that mitigate the individual’s impairment, including, in this instance, eyeglasses and contact lenses.” The Court neglected to defer to the EEOC regulations that explicitly state that the “determination of whether an individual is substantially limited in a major life activity must be made on a case by case basis, without regard to mitigating measures such as medicines, or assistive or prosthetic devices.”

The Court explained that Congress explicitly gave the EEOC authority to implement Title I of the ADA, but not to implement section 12102, which defines the term disability. Although the Court conceded that the “EEOC has, nonetheless, issued regulations to provide additional guidance” to define “disability,” it declined “to consider what deference” the regulations “are due, if any.” Justice Breyer's dissent, which Justice O'Connor ironically characterized as an "imaginative interpretation," correctly points out the illogic of the majority's support for its failure to defer to the regulations' unequivocal position:

456. Id. at 660 (emphasis added).
458. Id. at 2143.
459. Id. at 2145 (quoting 29 C.F.R. app. § 1630.2(j) (1998)).
460. See id. at 2144 (providing in a parenthetical that § 2116 states that “[n]ot later than 1 year after [the date of enactment of the ADA] the Commission shall issue regulations . . . to carry out this subchapter”).
461. See id. at 2145 (asserting that “no agency has been delegated authority to interpret the term ‘disability’” (quoting 42 U.S.C. § 12102(2))).
462. Id.
463. Id.
There is no reason to believe that Congress would have wanted to deny the EEOC the power to issue such a regulation, at least if the regulation is consistent with the earlier statutory definition and with the relevant interpretations by other enforcement agencies. The physical location of the definitional section seems to reflect only drafting or stylistic, not substantive, objectives.\(^4\)

The Court then relied on three provisions of the ADA to further support its narrow reading of the Act. First, the Court reasoned that because the phrase “substantially limits” in the first prong of the definition of disability is “in the present indicative verb form,” this requires “that a person be presently—not potentially or hypothetically—substantially limited . . . to demonstrate a disability.”\(^5\) In his dissent, Justice Stevens correctly suggested that the Court’s emphasis on present disability applies only to a consideration of whether one has a disability under the first prong, and not whether one has a record of an impairment or is regarded as having an impairment.\(^6\)

Second, the Court reemphasized its holding in *Bragdon* that “whether a person has a disability under the ADA is an individualized inquiry.”\(^7\) It then concluded that this individualized inquiry “runs directly counter” to assessing an individual in his or her uncorrected or unmitigated state because it would require “courts and employers to speculate about a person’s condition and would, in many cases, force them to make a disability determination based on general information about how an uncorrected impairment usually affects individuals, rather than on the individual’s actual condition.”\(^8\) Yet, as Justice Stevens explained, the Court’s reasoning is circular:

\(^{464}\) *Id.* at 2162 (Breyer, J., dissenting).

\(^{465}\) *Sutton,* 119 S. Ct. at 2146.

\(^{466}\) See *id.* at 2154 (Stevens, J., dissenting). Justice Stevens noted that if the majority is “correct that [a] “disability” exists only where’ a person’s ‘present’ or ‘actual’ condition is substantially impaired, there would be no reason to include in the protected class those who were once disabled but who are not fully recovered.” *Id.* (quoting *Sutton,* 119 S. Ct. at 2146-47).

\(^{467}\) *Sutton,* 119 S. Ct. at 2147 (citing *Bragdon* v. Abbott, 524 U.S. 624 (1998); 29 C.F.R. app. § 1630.2(j)).

\(^{468}\) *Id.* The Court rejected the “mitigating measures” language because it conflicts with the individualized inquiry mandated by the ADA and creates a system in which persons often must be treated as members of a group of people with similar impairments, rather than as individuals. This is contrary to both the letter and spirit of the ADA. *Id.* Without directly relying on *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837 (1984), the Court’s reasoning appears to invoke the spirit of the *Chevron* rule. This rule provides that where a statute is silent as to the precise issue before a court, the court should defer to agency interpretation of the statute. *See id.* at 843. If the regulations are arbitrary,
The Court's mantra regarding the Act's "individualized approach," however, fails to support its holding. I agree that the letter and spirit of the ADA is designed to deter decision making based on group stereotypes, but the agencies' interpretation of the Act does not lead to this result. Nor does it require courts to "speculate" about people's "hypothetical" conditions. Viewing a person in her "unmitigated" state simply requires examining that individual's abilities in a different state, not the abilities of every person who shares a similar condition. It is just as easy individually to test petitioners' eyesight with their glasses on as with their glasses off.469

Justice Stevens illustrated the irony in the Court's position.470 The majority "seem[s] to allow an employer to refuse to hire every person who has epilepsy or diabetes that is controlled by medication, or every person who functions efficiently with a prosthetic limb."471 Moreover, considering that "the purpose of the ADA is to dismantle employment barriers based on society's accumulated myths and fears, it is especially ironic to deny protection for persons with substantially limiting impairments that, when corrected, render them fully able and employable."472

Additionally, although the Court correctly recognized that a lower court must consider how the negative side effects of a condition or its treatment limit an individual's abilities,473 the Court incorrectly claimed that the EEOC guidelines precludes consideration of the side effects, both negative and positive, of mitigating measures.474 Justice Stevens suggested that this position is "misplaced" because "most individuals who take medication that itself substantially limits a major life
capricious, or manifestly contrary to the statute, however, a court is free to reject them. Id. at 844.

469. Sutton, 119 S. Ct. at 2159 (Stevens, J., dissenting) (citation omitted).

470. See id. at 2154. Justice Stevens exposed the Court's "counterintuitive conclusion that the ADA's safeguards vanish when individuals make themselves more employable by ascertaining ways to overcome their physical or mental limitations." Id.

471. Id. at 2159.

472. Id. (internal citations omitted).

473. See Sutton, 119 S. Ct. at 2146 (noting that "the effects of [corrective] measures—both positive and negative—must be taken into account when judging whether that person is 'substantially limited' in a major life activity and thus 'disabled' under the Act").

474. See id. at 2147 (concluding that "[t]he guidelines approach could . . . lead to the anomalous result that in determining whether an individual is disabled, courts and employers could not consider any negative side effects suffered by an individual resulting from the use of mitigating measures, even when those side effects are very severe").
activity would be substantially limited in some other way if they did not take the medication."\(^{475}\)

Third, the Court gave great weight to the "findings and purposes" introduction to the ADA, which states that Congress found that 43 million Americans had a disability.\(^{476}\) The Court reasoned that this number could not possibly include "those whose impairments are largely corrected by medication or other devices" because "[h]ad Congress intended to include all persons with corrected physical limitations among those covered by the Act, it undoubtedly would have cited a much higher number of disabled persons in the findings."\(^{477}\) As Justice Stevens noted, however, the Court has previously criticized reliance on a "'statement of congressional findings [as] a rather thin reed upon which to base' a statutory construction."\(^{478}\) Additionally, Justice Stevens demonstrated that the 43 million Americans refer to persons with actual disabilities, not those individuals also protected by the Act because they are regarded as having a disability or have a record of a disability.\(^{479}\)

Once the Court concluded that the plaintiffs did not have a disability under section 12102(2)(A),\(^{480}\) the Court should have ended its analysis and affirmed the lower court's order dismissing plaintiffs' complaint.\(^{481}\) Instead, the Court, which so often rails against judicial activism,\(^{482}\) unnecessarily addressed the two other provisions of the ADA.

\(^{475}\) Id. at 2159 n.5 (Stevens, J., dissenting).
\(^{476}\) Sutton, 119 S. Ct. at 2147 (citing 42 U.S.C. § 12101(a)(1)); see 42 U.S.C. § 12101(a)(1) (stating that "some 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is getting older").
\(^{477}\) Id. at 2148-49.
\(^{478}\) Id. at 2160 (Stevens, J., dissenting) (quoting National Org. for Women, Inc. v. Scheidler, 510 U.S. 249 (1994)).
\(^{479}\) See id. (noting that "by including the 'record of' and 'regarded as' categories, Congress fully expected the Act to protect individuals who lack, in the court's words, 'actual disabilities' and therefore are not counted in that number [43 million]").
\(^{480}\) See Sutton, 119 S. Ct. at 2149.
\(^{481}\) Even had the Court correctly interpreted the ADA and held that the plaintiffs had a disability under the ADA, it could have affirmed the Tenth Circuit's decision by finding that the plaintiffs were not "otherwise qualified" to be commercial airline pilots because they did not meet legitimate, safety-necessitated vision criteria. See 42 U.S.C. § 12111(8) (1994) (stating "qualified individual with a disability' means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position").
\(^{482}\) Ironically, this unnecessary section of Justice O'Connor's opinion is peppered with lip service to her professed judicial minimalism by claiming that the Court need not consider what deference EEOC regulations and legislative history are due. See id. at 2145 ("Because both parties accept these regulations as valid, and determining their validity is not
First, the Court considered whether the defendant regarded the plaintiffs' myopia as a disability.\textsuperscript{483} The Court irrationally restricted the scope of this provision, which Congress included to address "society's accumulated myths and fears about disability and disease,"\textsuperscript{484} to two circumstances:

(1) a covered entity mistakenly believes that a person has a physical impairment that substantially limits one or more major life activities, or (2) a covered entity mistakenly believes that an actual, nonlimiting impairment substantially limits one or more major life activities. In both cases, it is necessary that a covered entity entertain misperceptions about the individual—it must believe either that one has a substantially limiting impairment that one does not have or that one has a substantially limiting impairment when, in fact, the impairment is not so limiting.\textsuperscript{485}

Without explanation, the Court excluded another class of individuals that the regulations expressly consider as protected by this third prong: individuals who have an impairment that "is only substantially limiting because of the attitudes of others toward the impairment."\textsuperscript{486} By ignoring this category, the Court gave employers freedom "to decide that physical characteristics or medical conditions that do not rise to the level of an impairment . . . are preferable to others, just as [they are] free to decide that some limiting, but not substantially limiting, impairments make individuals less than ideally suited for a job."\textsuperscript{487} This restricted view of the "regarded as" prong allows employers to evade the ADA by artfully crafting job criteria that, in fact, screen out

\textsuperscript{483} See \textit{id.} at 2146 ("Because we decide that, by its terms, the ADA cannot be read in this manner, we have no reason to consider the ADA's legislative history."). See also \textit{id.} at 2147 ("Because we decide that, by its terms, the ADA cannot be read in this manner, we have no reason to consider the ADA's legislative history.").

\textsuperscript{484} School Bd. of Nassau County v. Arline, 480 U.S. 273, 284 (1987) (citation omitted).

\textsuperscript{485} Sutton, 119 S. Ct. at 2149-50.

\textsuperscript{486} See id. at 2150 (failing to recognize this aspect of the definition of disability); 29 C.F.R. app. § 1630.2(2) (1999) ("The individual may have an impairment which is only substantially limiting because of the attitudes of others toward the impairment."). The EEOC Interpretive Guidelines suggest that discriminatory action by an employer, which is solely the result of the attitudes of third parties toward an individual’s impairment, may satisfy the "regarded as" definition of a disability.

For example, an individual may have a prominent facial scar or disfigurement, or may have a condition that periodically causes an involuntary jerk of the head but does not limit the individual’s major life activities. If an employer discriminates against such an individual because of the negative reactions of customers, the employer would be regarding the individual as disabled and acting on the basis of that perceived disability.

\textsuperscript{487} Sutton, 119 S. Ct. at 2150.
individuals with disabilities. Such a loophole undermines the ADA's express prohibition against employers' use of "qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless" the employer proves that the criteria are "job-related for the position in question and [are] consistent with business necessity."\textsuperscript{488}

Second, the Court took a tangential swipe at the inclusion of "work" as a major life activity. Although the Court assumed that "working is a major life activity,"\textsuperscript{489} it noted "that there may be some conceptual difficulty in defining ‘major life activities’ to include work."\textsuperscript{490}

4. Murphy v. United Parcel Service, Inc.—The same seven Justices who denied the Suttons' claim ruled that United Parcel Service could fire Vaughn Murphy when it learned that he did not meet the Department of Transportation regulations that required truck drivers to have controlled blood pressure.\textsuperscript{491} The Court affirmed the Tenth Circuit's conclusion that Murphy was not a person with a disability under the ADA because when he took medication, his "high blood pressure [did] not substantially limit him in any major life activity."\textsuperscript{492} The Court also affirmed the Tenth Circuit's finding that the United Parcel Service did not regard Murphy as disabled because it regarded him as unable to meet DOT safety regulations.\textsuperscript{493} Justice Stevens, with whom Justice Breyer joined dissenting, asserted that Murphy had a disability because his severe hypertension, without medication, substantially limited his ability to perform major life activities.\textsuperscript{494}

\textsuperscript{488} 42 U.S.C. § 12112(b)(6).
\textsuperscript{489} Sutton, 119 S. Ct. at 2151. Because both parties accepted the proposition that "working is a major life activity," the Court did not address whether "working" could be a valid "major life activity." \textit{Id}. Indeed, in his dissent in \textit{Bragdon}, Justice Rehnquist lists "working" as a major life activity. \textit{See} Bragdon v. Abbott, 524 U.S. 624, 659 (1998) (Rehnquist, J., dissenting).
\textsuperscript{490} Sutton, 119 S. Ct. at 2151.
\textsuperscript{491} See Murphy v. United Parcel Serv., Inc., 119 S. Ct. 2133 (1999).
\textsuperscript{492} \textit{Id.} at 2136. Although the Court discounted the EEOC regulations in \textit{Sutton}, the Court relied on the regulations in \textit{Murphy} to determine the meaning of "substantially limits" and to justify its conclusion that Murphy was not substantially limited in a major life activity. \textit{See id.} at 2138 (citing 29 C.F.R. § 1630.2(j)(3)(i) (1998)) (discussing the EEOC's definition of "substantially limits").
\textsuperscript{493} \textit{See id.} at 2139 (finding that the evidence that United Parcel Service regarded Murphy as unable to perform his particular job "is insufficient, as a matter of law, to prove that petitioner is regarded as substantially limited in the major life activity of working" (citing \textit{Sutton}, 119 S. Ct. at 2151-52)).
\textsuperscript{494} \textit{See id.} at 2139 (Stevens, J., dissenting) (noting that "[w]ithout medication, petitioner would likely be hospitalized" (citation omitted)).
5. Albertsons, Inc. v. Kirkingburg.—In *Albertsons, Inc. v. Kirkingburg*, the Court unanimously ruled that a truck driver who had monocular vision did not have a disability as defined by the ADA. Albertsons refused to rehire Kirkingburg as a truck driver when it learned that he could not meet the vision standard set by the Department of Transportation regulations. The Court affirmed the Ninth Circuit's conclusion "that the ADA allowed Albertsons to establish a reasonable job-related vision standard as a prerequisite for hiring and that Albertsons could rely on Government regulations as a basis for setting its standard." On the one hand, the Court took a broader view of the ADA's scope than in did in *Sutton* by acknowledging that some impairments may be per se disabilities. On the other hand, the Court extended *Sutton* 's restrictions by finding that mitigating measures that "must be taken into account in judging whether an individual possesses a disability" include not only "artificial aids, like medications and devices," but also include "measures undertaken, whether consciously or not, with the body's own systems."

**B. The Supreme Court's Mandate to Federal Courts**

The Supreme Court's five ADA decisions provide detailed, albeit somewhat conflicting and illogical, instruction to lower federal courts on how to interpret the ADA. These opinions are likely to make it more difficult for many individuals who have physical and mental impairments to prove that they have a disability under the ADA. Most cancer survivors, however, will probably not face an adverse impact on their efforts to prove that their claim of cancer-based employment discrimination is covered by the ADA.

1. **Whether an Individual has a Disability Must be Determined by Individualized Inquiry.**—The Court correctly stressed that whether an individual has a disability must be determined on a case-by-case basis.


496. *See id.* at 2165; *see also id.* at 2169 (explaining that "[w]hile some impairments may invariably cause a substantial limitation of a major life activity, we cannot say that monocular vision does" (internal citation omitted)).

497. *See id.* at 2166.

498. *Id.* at 2167 (construing Kirkingburg v. Albertsons Inc., 143 F.3d 1228 (9th Cir. 1998)).

499. *See id.* at 2169 (noting that although the determination of a disability requires a case-by-case analysis, "some impairments may invariably cause a substantial limitation of a major life activity").

500. *Id.*

501. *See Sutton*, 119 S. Ct. 2159, 2147 (1999) (stating that "whether a person has a disability under the ADA is an individualized inquiry" (citing *Bragdon v. Abbott*, 524 U.S. 624 (1998))); *Bragdon*, 524 U.S. at 638, 641 (noting that there is "no general principle major
Although it rejected the notion of per se disabilities,\textsuperscript{502} the Court acknowledged that "some impairments may invariably cause a substantial limitation of a major life activity."\textsuperscript{503} Most cancer survivors should be able to prove that they have a disability because, at some point during the disease and its treatment, most cancers result in a substantial limitation of a major life activity. The Supreme Court's recognition that some medical conditions are inherently far more limiting than others is consistent with the EEOC's statements that "most forms of . . . cancer" are medical conditions that may substantially limit a major life activity.\textsuperscript{504}

The Court's decision in \textit{Cleveland}, that an individual who sought or received Social Security Disability Insurance (SSDI) benefits is not automatically estopped from pursuing an ADA claim,\textsuperscript{505} is perhaps the Court's most dramatic admission that an individualized inquiry is essential to determine whether a plaintiff is a qualified individual under the ADA. Although the SSDI and the ADA appear to conflict,\textsuperscript{506} the Court acknowledged that an individual who was disabled under the SSA could allege sufficient evidence to prove that he or she "could nonetheless 'perform the essential functions' of her job, with or without 'reasonable accommodation'"\textsuperscript{507} and therefore prevail in an ADA claim. Some cancer survivors who successfully apply for SSDI benefits are also able to prove that they can perform the essential functions of their job.

\textsuperscript{502}The Court declined to decide whether HIV infection is a per se disability. \textit{Bragdon}, 118 S. Ct. at 2207 ("In view of our holding, we need not address the second question presented, \textit{i.e.}, whether HIV infection is a per se disability under the ADA."); \textit{see also supra} note 444 and accompanying text.

\textsuperscript{503}Kirkingburg, 119 S. Ct. at 2169.

\textsuperscript{504}1995 EEOC TECHNICAL ASSISTANCE MANUAL, \textit{supra} note 83, at II-$\S$ 902.4.


\textsuperscript{506}\textit{See id.} at 1602 (noting that there is an "appearance of conflict that arises from the language of the two statutes"); \textit{see also supra} notes 417-420 (explaining the apparent conflict between the SSDI and the ADA).

\textsuperscript{507}\textit{Id.} at 1604.
2. The Individualized Inquiry of Whether an Individual is Substantially Limited Must Consider Mitigating and Corrective Measures.—The Supreme Court clearly stated that "the determination of whether an individual is disabled should be made with reference to measures that mitigate the individual's impairment."\(^{508}\) Although this position severely restricts the ability of individuals with relatively minor impairments that are easily correctable, such as myopia and relatively minor medical conditions that are easily controlled by medication, such as hypertension, it has less impact on most cancer survivors. Most cancers are not easily controlled by medication or by corrective devices. With the exception of relatively benign, early-stage cancers, most malignancies require extensive medical treatment, such as surgery, radiation, and chemotherapy.\(^{509}\)

The Court acknowledged that, even with corrective measures that are able to reduce the degree of an individual's impairment, the individual may, nonetheless, remain substantially limited in a major life activity.\(^{510}\) Many cancer survivors take such corrective measures, the most common of which are radiation and chemotherapy,\(^{511}\) which, in some situations, do not sufficiently improve the survivors' health to alleviate the substantial limits imposed by cancer.

*Sutton* correctly requires lower federal courts to consider negative, as well as positive consequences of mitigating measures.\(^{512}\) Cancer survivors encounter many side effects of the cancer itself, as well as of cancer treatment.\(^{513}\) The most common symptoms and side effects of cancer and its treatment are pain, fatigue, problems related to nutrition and weight management, hair loss, low blood counts, skin con-


\(^{509}\) See Ganz, *supra* note 57, in Cancer Survivor's Almanac, *supra* note 2, at 9 ("Traditionally, cancer has been treated with surgery, radiation, chemotherapy, or combinations of the three.").

\(^{510}\) See Sutton, 119 S. Ct. at 2149 (noting that "one has a disability under [42 U.S.C. § 12102(2)(A)] if, notwithstanding the use of a corrective device, that individual is substantially limited in a major life activity").


\(^{512}\) See Sutton, 119 S. Ct. at 2146 (explaining that the effects of mitigating measures "both positive and negative—must be taken into account when judging whether [an ADA claimant] is 'substantially limited' in a major life activity").

\(^{513}\) The EEOC Manual contemplates the negative side effects of cancer. It explicitly states that cancer survivors are entitled to reasonable modifications in their work schedules to accommodate negative side effects of cancer treatment. Only employees who have a disability are entitled to accommodations. The Manual states that a modified work schedule is an example of an accommodation appropriate for a cancer survivor who requires medical leave because of the negative side effects of chemotherapy. *See* EEOC Compliance Manual, § 915.002.
ditions, nerve damage, memory and concentration loss, respiratory problems, sexual dysfunction, and fertility problems. Long-term and late-effects include heart muscle injury, coronary artery disease, lung tissue injury, kidney damage, nervous system injury, blood and immune system problems, early menopause, endocrine problems, infertility, and secondary cancers. Courts should consider as disabled survivors who experience these types of negative side effects.

Some cancer survivors, however, have no substantial limitations during or after treatment. A cancer survivor who is successfully treated without substantial limitation, such as long-term effects, or who is in treatment but the side effects of treatment do not substantially limit, does not have a disability. Such an individual must argue that he or she has a record of a disability or is regarded as being disabled.

3. The EEOC Regulations are Down, but Not Out.—In its five ADA cases, the Supreme Court has expressed a love/hate relationship with the EEOC regulations that implement the ADA. The Court apparently sees no contradiction between its holdings in Bragdon and in Sutton, just as it has allowed its seemingly conflicting opinions in Bowers v. Hardwick and Romers v. Evans to “co-exist side-by-side.” Essentially, the Court relied upon the regulations when they supported the Court’s conclusion and dismissed the regulations as “an impermissible interpretation of the ADA” when they conflicted with the Court’s desired outcome. In Bragdon, the Court explained the importance of agency regulations and found that the Justice Department’s regula-

514. See Ganz, supra note 57, in Cancer Survivor’s Almanac, supra note 2, at 12-23 (listing common side effects most often associated with cancer and its treatment).

515. See id. at 23 (defining long-term effects as “known or expected problems that may occur with some frequency in individuals who have received certain treatments: for example, the risk of infection after splenectomy or infertility after certain chemotherapy drugs”).

516. See id. at 23-24 (defining late effects as “secondary conditions that arise as a result of having received certain cancer treatments: for example, leukemia secondary to alkylating agent therapy or congestive heart failure many years after treatment with anthracycline chemotherapy”).

517. See id. at 24-27 (listing possible long-term and late-effects of cancer treatment).


tions to implement the public accommodation provisions of Title III of the ADA, which support the Court’s holding, “are entitled to defer-
ence.” 522 Indeed, the Court cited to its long-standing principle that
administrative regulations “constitute a body of experience and in-
formed judgment to which courts and litigants may properly result for
guidance.” 523 Exactly one year later, however, the Court, in Sutton ex-
plicitly rejected the EEOC and the Justice Department guidelines that
require a determination of disability to be made without regard to
mitigating measures, and declined to consider what deference other
EEOC guidelines are due. 524

Lower federal courts should defer to regulations where appropri-
ate to resolve individual determinations of disability because the
Court explicitly struck only the “mitigating measures” language of the
regulations, while it endorsed or discussed without endorsement
other sections of the regulations. The Court’s rejection of the “miti-
gating measures” language, however, invites lower federal courts to
examine more closely whether the specific regulatory language at is-
ue in an individual case survives Chevron scrutiny. 525 For example, in
a post-Sutton decision, the Fifth Circuit rejected the language in the
EEOC’s Interpretive Guidance that describes “former cancer patients”
as a group of individuals who have a record of impairment because
the language conflicts with the individualized inquiry mandate:

The EEOC relies on its interpretive regulation, 29 C.F.R.
§ 1620.2, for its position that the ADA “protects former can-
cer patients from discrimination on the basis of their prior
medical history.” The broad position obviously cannot be
the rule in the wake of Sutton, which emphasizes both the
ADA’s requirement of individualized inquiry and a focus on
the actual effects of the impairment. In other words, it is not
enough for an ADA plaintiff to simply show that he has a
record of a cancer diagnosis; in order to establish the exis-
tence of a “disability” under § 12102(2)(B), there must be a
record of an impairment that substantially limits one or
more of the ADA plaintiff’s major life activities. 526

523. Id. at 642 (quoting Skidmore v. Swift & Co., 323 U.S. 134, 139-40 (1944)).
524. See Sutton, 119 S. Ct. at 2146 (declining to decide what deference the EEOC regula-
tions are due because both parties accepted the validity of the regulations).
525. See supra note 468 (discussing Chevron U.S.A., Inc. v. Natural Resources Defense
Council, Inc., 467 U.S. 837 (1984)).
526. EEOC v. R.J. Gallagher Co., 181 F.3d 645, 655 (5th Cir. 1999). For a more com-
plete discussion of the viability of the EEOC regulations to the ADA after Sutton, see Bar-
bara Hoffman, Reports of Its Death Were Greatly Exaggerated: The EEOC Regulations That Define
4. An Individual is Regarded as Having an Impairment if an Employee Misperceives the Employee's Impairment.—The Court has made it more difficult for individuals to prove that their employers regard them as disabled. The Court ruled that the "regarded as" prong requires that the employer has a misperception about the employee's impairment. In reasoning that invites employers to discriminate, the Court then further restricted this prong by holding that the employer does not have a misperception if its decision is based on a legitimate job criteria that is merely a limitation, but not a "substantial limitation." This logic does little to alleviate the Catch-22 because it allows employers to select hiring criteria based on "limiting, but not substantially limiting, impairments [that] make individuals less than ideally suited for a job." This loophole will allow employers to restrict job opportunities to cancer survivors by imposing employment criteria that safely falls within these cracks.

5. The Court's Hostility to the ADA Invites Summary Judgment Abuse.—Perhaps the most damaging aspect of the Supreme Court's ADA opinions is the majority's contempt for the ADA and its regulations when they fail to support the Court's goals. The Court blurs the line between determining whether an individual has a disability and determining whether one is qualified. In an effort to reach a seemingly reasonable conclusion—that airlines and trucking companies may exclude pilots and drivers who do not meet safety-justified vision standards—the Court is too eager to find that these plaintiffs do not have a disability. Instead, the Court should have conceded that


527. See Sutton, 119 S. Ct. at 2149-50 (stating that for individuals to satisfy the "regarded as" definition of a disability it is necessary that "a covered entity [who] entertain[s] misperceptions about the individual... must believe either that one has a substantially limiting impairment that one does not have or that one has a substantially limiting impairment when, in fact, the impairment is not so limiting").

528. See id. at 2150 (noting that, similarly, "an employer is free to decide that physical characteristics or medical conditions that do not rise to the level of an impairment... are preferable to others" because characteristics that do not rise to the level of an impairment are not covered by the ADA).

529. Id.

530. This is the same misapplication of ADA procedures that the Eleventh Circuit made in Gordon v. Hamm in that Court's eagerness to reverse a jury verdict for the plaintiff. See supra notes 156-173 (discussing the Gordon decision).

531. To succeed under an ADA claim, a plaintiff must be a "qualified individual with a disability." 42 U.S.C. § 12112 (1994) (emphasis added). The ADA defines a qualified individual with a disability as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8). Furthermore, for the purpose of determining whether an individual is qualified, the ADA requires courts to give consideration
they have a disability, but found them to be unqualified based on legitimate hiring criteria. The Court's approach tempts lower federal courts to abuse summary judgment to block legitimate ADA claims by cancer survivors, as well as other individuals with disabilities.

V. HOW TO AVOID THE CATCH-22: LESSONS FOR PLAINTIFFS

The results of ADA claims brought by cancer survivors, as well as the Supreme Court's five ADA opinions, offer other potential plaintiffs lessons to increase their chances of surviving defendants' inevitable summary judgment motions. Plaintiffs who plead all of the relevant parts of the definition of disability and who demonstrate how the regulations and legislative history of the ADA relate to their individual circumstances are more likely to convince a court that their cancer is a disability under the ADA.

A. Plead Three-Part Definition of Disability

The ADA defines disability with three alternative definitions: "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such impairment; or (C) being regarded as having such an impairment."
1. Disability.—Cancer survivors whose cancer substantially limits a major life activity should plead that they have a disability. This task is easiest for survivors who can demonstrate how their cancer substantially limits a major life activity other than work, such as walking or reproduction, because those plaintiffs who plead that their disability limits only their work seldom prevail.

A complaint should detail how that individual’s cancer specifically limits a major life activity to educate a court that may itself misunderstand the plaintiff's abilities because of its own ignorance or misconceptions about cancer. Plaintiffs should claim that their cancer itself, or the negative side effects of treatment, limits as many major life activities as possible other than work as can be supported by the evidence.

For those who have little choice but to claim that their cancer limits their ability to work, their dilemma is to avoid the Catch-22 by showing that the cancer substantially limits "the ability to perform a class of jobs or a broad range of jobs in various classes," while still

534. Although many cancer survivors consider themselves “too healthy” to be disabled, plaintiffs’ attorneys should not allow the semantics of personal advocacy and self-esteem to hamstring litigation strategy.

535. C.f. 29 C.F.R. app. § 1630.2(j) (1999) (“If an individual is substantially limited in any other major life activity, no determination should be made as to whether the individual is substantially limited in working.”).

536. See 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, 135 (1997) (noting that “claims in which plaintiffs have only alleged a substantial limitation in the major life activity of working have been almost universally rejected”). For example, “working” was the only major life activity for which Phyllis Ellison claimed a substantial limitation. See Ellison v. Software Spectrum, Inc., 85 F.3d 187, 190 (5th Cir. 1996); supra notes 124-155 and accompanying text. Moreover, the Supreme Court has expressed its contempt to including “work” as a major life activity. See Sutton v. United Air Lines, Inc., 119 S. Ct. 2139, 2151 (noting that there may be conceptual difficulties with including work as a major life activity); supra notes 457-490 and accompanying text.

537. For example, Paul Hirsch’s claim failed, in part, because he did not sufficiently illustrate how his cancer substantially impaired a major life activity. See Hirsch v. National Mall & Serv., Inc., 989 F. Supp. 977, 981-82 (N.D. Ill. 1997); supra note 182 and accompanying text.

538. Major life activities include “caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.” 29 C.F.R. § 1630.2(i). The Supreme Court expressly held that reproduction is a major life activity. See Bragdon, 524 U.S. at 638 (stating that “[r]eproduction falls well within the phrase ‘major life activity’” (citation omitted)). Because fertility problems are a significant side effect of many cancers and their treatments, survivors should allege that their fertility is substantially limited where the evidence supports such a claim.

maintaining that they are "qualified" to perform their jobs. A cancer survivor need not show that he or she is totally unable to work in order to be considered substantially limited in the major life activity of working. An individual is substantially limited in working if the individual is significantly restricted in the ability to perform a class of jobs or a broad range of jobs in various classes, when compared with the ability of the average person with comparable qualifications to perform those same jobs.

Thus, for example, a cancer survivor whose job requires lifting, among other duties, objects above her head and who, because of lymphedema resulting from a mastectomy, can no longer lift heavy objects above her head, has a disability because she is restricted in the ability to perform the class of jobs that require certain types of lifting. She is "otherwise qualified" for her job, however, because she can still perform the essential functions of her job.

2. Record of a Disability.—Most cancer survivors can establish that they have a record of a disability. The Supreme Court has unequivocally held that hospitalization is sufficient to establish substantial limitation of a major life activity.

Furthermore, the regulations explicitly protect "former cancer patients from discrimination based on their history of cancer."

A "qualified individual" is one who "satisfies the prerequisites for the position" and who "can perform the essential functions of the position held or desired, with or without reasonable accommodation." 29 C.F.R. app. § 1630.2(m).

29 C.F.R. app. § 1630.2(j).

29 C.F.R. app. § 1630.2(m).

"See School Bd. of Nassau County v. Arline, 480 U.S. 273, 281 (1987) (concluding that the plaintiff's impairment, which "was serious enough to require hospitalization," is "more than sufficient [under the Rehabilitation Act of 1973] to establish that one or more of her major life activities were substantially limited by her impairment"). Some courts, however, have declined to interpret Arline to mean that any record of hospitalization is sufficient to establish a record of a substantially limiting impairment because the Supreme Court did not specify how long or serious the hospitalization must be to satisfy this term. See Elizabeth Crawford, Comment, The Court's Interpretations of a Disability Under the Americans with Disabilities Act: Are They Keeping Our Promise to the Disabled?, 35 Hous. L. Rev. 1207, 1236-37 (1998) (noting that, because the Supreme Court offered no details regarding the length of plaintiff's stay in the hospital or the severity of her condition, the "Sixth and Seventh Circuits have held that it would be absurd to interpret Arline as holding that any hospital stay creates a record of an impairment and thereby qualifies the individual for ADA... coverage").

Ironically, the often ADA-hostile Fifth Circuit relied on Sutton to recognize that a thirty-day hospital stay for cancer treatment could establish a record of an impairment that substantially limits a major life activity. See EEOC v. R.J. Gallagher Co., 181 F.3d 645, 655-56 (5th Cir. 1999) (recognizing that during the plaintiff's hospitalization, he "could walk, see, hear, speak, breathe, lift, and learn, and yet his ability to work might still have been substantially affected...; [h]is long hospital stay and his isolation from others, results of
on their prior medical history." Most cancer survivors are hospitalized at some point during their cancer history, either for staging, surgery, chemotherapy, bone marrow transplantation, or other significant medical treatment. Even many of those survivors who have avoided hospitalization throughout their treatment, but have otherwise been substantially limited, can cite to the regulations that, as "former cancer patients," they have a record of a substantially limiting condition.

3. Regarded as Having a Disability.—The third part of the ADA's definition of a disability covers individuals whose employers regard their impairment as limiting a major life activity. Congress intended that this definition include individuals whose impairment "does not substantially limit major life activities" but whose employers treat their impairments as substantially limiting. Unlike the first two parts of the definition of a disability, the "regarded as" language shifts the inquiry from the employee's condition to the employer's perceptions. Post-Sutton, cancer survivors must demonstrate how their employers have a misperception about their cancer or its effects. Furthermore, survivors must show that the employers' alleged discriminatory actions are based on their belief that the survivors' cancer or its effects substantially limit a major life activity.

Cancer survivors should be protected by the "regarded as" language in two situations: (1) the employer "mistakenly believes that" an individual's cancer is "a physical impairment that substantially limits one or more major life activities," and (2) the employer "mistak-

the treatment Boyle undertook to treat his impairment, may also be considered as the cause of such limitation").

544. 29 C.F.R. app. § 1630.2(k).

545. See generally Natalie Davis Spingarn & Nancy H. Chasen, Working with Your Doctor and Hospital System: Becoming a Wise Consumer, in CANCER SURVIVOR'S ALMANAC, supra note 2, at 31, 43 (stating that "most [cancer] survivors do spend some time as inpatients [in hospitals], particularly at the beginning of treatment").

546. See 42 U.S.C. § 12102 (stating that an individual is "disabled" if he or she is "regarded as having . . . a physical or mental impairment that substantially limits one or more of the major life activities of such individual").


548. Congress intended courts to infer that an employer who "cannot articulate a nondiscriminatory reason for the employment action . . . is acting on the basis of 'myth, fear or stereotype.'" 29 C.F.R. app. § 1630.2(l) (1998).

549. See Sutton v. United Air Lines, Inc., 119 S. Ct. 2139, 2150 (1999) (noting that the employer must mistakenly believe (1) that the individual has a substantially limiting impairment that he or she does not in fact have or (2) that the individual's impairment, which is not in fact substantially limiting, is substantially limiting).

550. See 42 U.S.C. § 12112(a) (defining "discrimination" within the context of the ADA).

enly believes that an individual is substantially limited by his or her cancer or its treatment, even though in fact, the survivor is not so limited. Survivors can meet this burden with a variety of evidence that illustrate an employer's stereotypes and fears about cancer. For example, employers or co-workers who make disparaging comments about an employee's cancer history evidence the stereotyping attitude designed to be addressed by this prong. Additionally, employers that have different medical criteria for cancer survivors may erroneously regard all cancers as substantially limiting, without making the necessary individualized assessment of the employee in question. Moreover, where an employer cannot articulate a nondiscriminatory reason for treating a cancer survivor differently from other workers, plaintiffs should allege that "myth, fear or stereotype" motivated the job action.

B. Demonstrate a Link Between the Regulations and the Plaintiff's Situation

Plaintiffs should not assume that courts will understand how their cancer history is protected by the ADA. They should argue that, post-Bragdon, courts must defer to the Justice Department regulations

551. Even with clear evidence that an employer has discriminated against an employee because of a disability, some plaintiffs have struggled to prevail. For a discussion of ADA cases brought under the "regarded as" prong prior to the Supreme Court's decisions, see Arlene B. Mayerson, Restoring Regard for the "Regarded As" Prong: Giving Effect to Congressional Intent, 42 VILL. L. REv. 587 (1997). Mayerson argued that courts have failed to apply this prong correctly for two reasons. Mayerson stated:

First, many courts are, in effect, requiring plaintiffs to prove actual substantial limitation in order to fall under the "regarded as" prong. This approach nullifies the third prong of the "regarded as" definition. Second, courts are allowing an employer to successfully argue that it did not perceive the plaintiff as substantially limited in working, but instead perceived the employee as unable to meet only the employer's particular stringent medical criteria. Courts are putting the often impossible burden on the plaintiff to show that the defendant perceived the plaintiff to be limited in working beyond the job involved in the litigation. Id. at 590 (internal footnotes omitted).

552. See, e.g., Ellison v. Software Spectrum, Inc., 85 F.3d 187, 192-93 (5th Cir. 1996) (noting that Ellison's supervisor made comments about Ellison's breasts as not worth saving and told co-workers to "[f]ollow Phyllis" because she was "glowing").

553. See, e.g., Olmeda v. New York State Dep't of Civil Serv., No. 96 Civ. 7557 (HB), 1998 U.S. Dist. LEXIS 345, at *3 (S.D.N.Y. Jan. 13, 1998) (considering an ADA claim brought by an individual who was denied employment as a parole officer until he could present a letter or certification from his doctor stating that his leukemia was in remission and would not interfere with his ability to work).

554. 29 C.F.R. app. § 1630.2(l).

555. The Supreme Court explicitly held that the Justice Department's regulations to implement the public accommodation provisions of Title III "are entitled to deference."
that interpret Title III of the ADA. Additionally, post-Sutton, courts should consider the guidance of the EEOC guidelines that interpret the employment provisions in Title I, with the sole exception of the "mitigating measures" language. Cancer survivors then must draw an explicit link between the EEOC regulations, as well as the legislative history, and the facts of their cases. They should allege that they are substantially limited in as many different major life activities as can be supported by the evidence.

Whether cancer is a disability under the ADA must be determined on a case-by-case basis. Although the regulations state that some impairments, "such as HIV infection, are inherently substantially limiting," survivors should not claim that cancer is a per se disability under the ADA.

First, Congress intended the term disability to be defined "with respect to an individual." Second, the regulations re-


556. Congress authorized the Justice Department to issue regulations to implement the public accommodation provisions of Title III. 42 U.S.C. § 12186(b) (1994); see also Bragdon, 524 U.S. at 646 (observing that the Justice Department’s regulations are entitled to deference).

557. The EEOC Interpretive Guidelines state that “[t]he determination of whether an individual is substantially limited in a major life activity must be made on a case by case basis, without regard to mitigating measures such as medicines, or assistive or prosthetic devices.” 29 C.F.R. app. § 1630.2(j). Subsequent to the publication of these guidelines, however, the Supreme Court rejected the EEOC’s interpretation of the ADA. The Court held that “the determination of whether an individual is disabled should be made with reference to measures that mitigate the individual’s impairment.” Sutton v. United Air Lines, Inc., 119 S. Ct. 2139, 2143 (1999).

558. One commentator suggested that “claims in which plaintiffs have only alleged a substantial limitation in the major life activity of working have been almost universally rejected. Thus, some disabling conditions are not recognized because they are only considered in the context of working.” Locke, supra note 536, at 135.

559. See Sutton, 119 S. Ct. at 2147.

560. 29 C.F.R. app. § 1630.2(j). Some argue that certain impairments, such as HIV, should be per se disabilities under the ADA. See, e.g., Carlis & McCabe, supra note 10, at 614 (arguing that “Congress surely did not intend individuals with HIV, symptomatic or asymptomatic, to fall outside the [ADA’s] protection”).

561. The Supreme Court declined to consider whether HIV is a per se disability because it concluded that Sidney Abbott’s HIV infection was a disability. See Bragdon, 524 U.S. at 641-42. Professor Lanctot argued that courts’ failures to reject the concept of per se disabilities results from the ad hoc decision making and prejudice fostered by case-by-case analysis disability under the ADA. See Catherine J. Lanctot, Ad Hoc Decision Making and Per Se Prejudice: How Individualizing the Determination of “Disability” Undermines the ADA, 42 VILL. L. REV. 327, 329 (1997); see also Crawford, supra note 543, at 1211 (noting the inconsistencies inherent in case-by-case analysis of the ADA’s definitions); Michael Puma, Note, Respecting the Plain Language of the ADA: A Textualist Argument Rejecting the EEOC’s Analysis of Controlled Disabilities, 67 GEO. WASH. L. REV. 123, 124 (1998) (characterizing the court’s methods of determining “whether an individual is disabled under the ADA as inconsistent”).

ject a "laundry list" of disabilities because "[t]he determination of whether an individual has a disability is not necessarily based on the name or diagnosis of the impairment the person has, but rather on the effect of that impairment on the life of the individual." Third, cancer is not one impairment, but a term given to more than 100 significantly different diseases, from the relatively minor to the nearly always fatal. "Although most of us think of cancer as a single disease, it is actually a family of more than 100 different types, all characterized by uncontrolled growth and spread of abnormal cells. Its effect on an individual depends on many factors, including the primary site of the cancer, stage of the disease, age and health of the individual, effect of treatment, and the individual’s psychosocial condition. As Professor Colker noted, the term disability is "highly factual in nature and, as such, proper jury fodder," because a fact finder must evaluate how an impairment substantially limits an individual’s major life activities. The Supreme Court, which has yet to recognize a per se disability under the ADA, is unlikely to view such a varying and complex disease as cancer as a per se disability.

CONCLUSION

In 1983, Paul Tsongas was a powerful United States Senator from Massachusetts. Then suddenly, at the age of forty-two and with three young daughters, he was diagnosed with lymphoma. After his doctors told him that he had an average life expectancy of eight years, he decided to quit the Senate and work as an attorney in private practice. The thought of looking for a job, saddled with a medical prognosis that made the evening news, brought Senator Tsongas many restless nights:

563. 29 C.F.R. app. § 1630.2(j).
564. For example, some cancers, such as localized prostate cancer, have a 100% five-year relative survival rate. See Cancer Facts & Figures-1998, supra note 12, at 15.
565. For example, pancreatic cancer is almost always fatal. The one-year relative survival rate for pancreatic cancer is 18%, while the five-year rate is only 4%. See id. at 14.
566. Holleb, supra note 21, at xviii.
567. The most common cancer treatments include surgery, radiation, chemotherapy, hormone therapy, and bone marrow transplantation. See Cancer Facts & Figures-1998, supra note 12, at 8-17.
568. The EEOC’s regulations recognize that diseases like cancer “may be disabling for particular individuals but not for others, depending on the stage of the disease or disorder, the presence of other impairments that combine to make the impairment disabling or any number of other factors.” 29 C.F.R. app. § 1630.2(j).
569. Colker, supra note 121, at 133.
570. See Bragdon, 524 U.S. at 642 (declining to hold that HIV infection is a per se disability).
About three o'clock or so I woke up in a total fright. I had been dreaming that I was wandering along the Beltway outside Washington trying to find the Raytheon plant that was located somewhere in those rolling hills. I was applying for a job after being turned down everywhere else. I had to find the plant to submit my resume, but I was hopelessly lost. My cancer had rendered me unemployable, and my family was going to be destitute.\footnote{Id. at 132.}

Senator Tsongas' nightmare illustrates the employment hurdles cancer survivors face during and after their struggles with cancer. When passed in 1990, the ADA appeared to be survivors' best opportunity to remedy cancer-based employment discrimination. Yet, too many courts have failed to apply the letter and intent of the ADA to cancer-based employment discrimination. Lower federal courts have demonstrated widely divergent abilities to understand the impact of cancer on an individual's major life activities and to assess accurately employers' motivations.

Unfortunately, the Supreme Court's five ADA opinions are unlikely to alleviate the Catch-22 in which some federal courts place cancer survivors. The Supreme Court has strayed afar from the relatively straightforward issues presented in Sutton and unnecessarily nibbled on the ADA's protections with language that invites further summary judgment abuse by lower courts. Only with careful pleading and detailed arguments, can cancer survivors mitigate their chances of being caught in the Catch-22.