

THE LAW OF INTENDED CONSEQUENCES: DID THE AMERICANS WITH DISABILITIES ACT AMENDMENTS ACT MAKE IT EASIER FOR CANCER SURVIVORS TO PROVE DISABILITY STATUS?

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Parent of Student (seeking to fire his daughter's coach): "Nobody is talking about the elephant in the room. The fact is you have cancer. How are you going to coach when you are in and out of hospitals? I mean, who knows what else is gonna go wrong with you this year. . . ."

Cathy Jamison (teacher and coach who has melanoma): "If you try to fire the lady with cancer, you better hire a damn good lawyer."¹

ABSTRACT

When Congress passed the Americans with Disabilities Act of 1990 ("ADA"), cancer survivors had reason to believe that the Act prohibited cancer-based employment discrimination. Federal courts, however, failed to apply the ADA to cancer-based discrimi-

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Additional information about legal services for cancer survivors is available from the National Cancer Legal Services Network, a coalition of legal services providers and cancer advocacy organizations that provides resources to improve access to free legal services programs for cancer survivors:

National Cancer Legal Services Network
New York Legal Assistance Group
7 Hanover Square, 18th Floor
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1. *The Big C: The Little C* (Showtime television broadcast Aug. 1, 2011). Cathy Jamison is the protagonist of the Showtime series *The Big C*, a fictional television series that chronicles the personal and work life of a woman who has melanoma. The author is grateful to Darlene Hunt, creator and producer of *The Big C*, for dramatizing the employment concerns of cancer survivors.

nation consistently and denied standing to many plaintiffs. Although some courts recognized that cancer was a disability covered by the ADA, other courts precluded relief for cancer survivors by holding that they did not have a disability as defined by the ADA. In response, Congress attempted to expand employees' access to courts with the Americans with Disabilities Act Amendments Act ("ADAAA").

The first part of this Article reviews cases filed under Title I of the ADA by employees who claimed they were discriminated against, in part, because of their cancer history. The discussion focuses on cases in which courts considered whether a cancer survivor was a "qualified individual with a disability" under Title I at the summary judgment stage. The second half of the Article compares these results to plaintiffs' outcomes after the passage of the ADAAA. It concludes that the ADAAA has fulfilled its legislative goal in that it has significantly improved the ability of cancer survivors to prove disability status under the ADA. The Article concludes by providing suggestions for plaintiffs' attorneys to preserve Title I claims.

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INTRODUCTION

Disabilities rights advocates cheered² on July 26, 1990, when President George H.W. Bush signed the Americans with Disabilities Act (“ADA”) into law.³ Cancer advocates in particular heralded the law as an end to a history of employment discrimination⁴ against

2. See e.g., 135 Cong. Rec. 19,807 (1989) (statement of Sen. Edward Kennedy) (“The Americans with Disabilities Act . . . has the potential to become one of the great civil rights laws of our generation.”); Steven A. Holmes, *Rights Bill for Disabled Is Sent to Bush*, N.Y. TIMES, July 14, 1990, available at <http://www.nytimes.com/1990/07/14/us/rights-bill-for-disabled-is-sent-to-bush.html> (“More than 100 supporters of the measure, some in wheelchairs, gathered in a reception room off the Senate chamber and cheered wildly when a security guard announced the final vote. ‘No longer will people with disabilities be second-class citizens,’ said Pat Wright, executive director of the Disability Rights Education and Defense Fund, a lobbying and advocacy group.”).

3. 42 U.S.C. §§ 12101–12213 (2006).

4. In hearings before the House of Representatives, cancer advocates testified that federal legislation was needed to address employment discrimination against cancer survivors who could work, yet faced disparate treatment. See *Employment Discrimination Against Cancer Victims and the Handicapped: Hearings on H.R. 370 and H.R. 1294 Before the Subcomm. on Empl't Opportunities of the H. Comm. on Educ. and Labor*, 99th Cong. 15 (1985) (statement of Robert J. McKenna, M.D., President, American Cancer Society) (reporting that individual misconceptions and social

cancer survivors.⁵ With the passage of the ADA, Congress appeared to create a clear mandate against, and adequate remedies for, employment decisions based on a person's cancer history instead of on his or her individual qualifications.⁶ Or so we thought.

From the very beginning, federal courts seemed confused about how to determine when a cancer survivor was a "person with a disability" as defined by the ADA.⁷ Some courts recognized that cancer was a disability covered by the ADA and thus focused on whether the plaintiff proved that he or she was qualified for the job in question.⁸ Other courts, however, forced plaintiffs into a Catch-22 in dismissing survivors' claims prior to trial.⁹ These decisions held that survivors who could work did not have an "impairment that substantially limits . . . [a] major life activity" precisely because they could work, while survivors whose cancer limited their ability to work were not "qualified" to perform the essential functions of

attitudes contributed to employment discrimination against cancer survivors). Dr. McKenna identified three classifications of work-related discrimination: (1) dismissal, demotion, and reduction or elimination of work-related benefits; (2) problems arising from coworkers' attitudes; and (3) problems related to the cancer survivors' attitudes about how they should be perceived by coworkers resulting in alienation and avoidance by others. *Id.* at 19.

5. The term "cancer survivor" is now widely recognized to refer to "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., 2014); see also *FROM CANCER PATIENT TO CANCER SURVIVOR: LOST IN TRANSITION* 23–24 (Maria Hewitt et. al. eds., 2006) [hereinafter *LOST IN TRANSITION*].

6. The purpose of the Americans with Disabilities Act of 1990 was:

- (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) (2006).

7. See discussion *infra* Part III.

8. See Barbara Hoffman, *Between a Disability and a Hard Place: The Cancer Survivors' Catch-22 of Proving Disability Status Under the Americans with Disabilities Act*, 59 MD. L. REV. 352, 394–407 (2000) [hereinafter Hoffman, *The Cancer Survivors' Catch-22*].

9. See *id.* at 353.

their jobs.¹⁰ The United States Supreme Court further diluted the ADA by rejecting the Equal Employment Opportunities Commission (“EEOC”) regulations that determined which employees stated a claim under the ADA.¹¹ As a result, the very plaintiffs the ADA was designed to protect found their claims cut short by motions to dismiss and motions for summary judgment.¹² Cancer survivors and other Title I claimants faced long odds to secure a trial on the merits.¹³

The ADA, a historical civil rights law, was broken. The National Council on Disability voiced the concern of the disability rights community that Congress needed to restore employees’ access to

10. *Id.*

11. The Court rejected the EEOC regulations that explicitly stated 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.” *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 480, 482 (1999) (quoting 29 C.F.R. § 1630, app. §1630.2(j) (1998)). For a further discussion of *Sutton* and *Murphy v. United Parcel Service, Inc.*, 527 U.S. 516 (1999), see Hoffman, *The Cancer Survivors’ Catch-22*, *supra* note 8, at 420–26.

12. See Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99, 108, 125–26 (1999) (“My investigation of the cases in which courts of appeals have affirmed summary judgment decisions in favor of defendant-employers suggests that courts may be too quick to take cases from juries as well as too willing to render judgments in favor of defendants in ADA cases.”); Louis S. Rulli & Jason A. Leckerman, *Unfinished Business: The Fading Promise of ADA Enforcement in the Federal Courts Under Title I and Its Impact on the Poor*, 8 J. GENDER RACE & JUST. 595, 616 (2005) (arguing that federal court hostility towards plaintiffs’ Title claims are driving lawyers away from filing cases); Melanie D. Winegar, Note, *Big Talk, Broken Promises: How Title I of the Americans with Disabilities Act Failed Disabled Workers*, 34 HOFSTRA L. REV. 1267, 1317 (2006) (concluding that the promise of the ADA to provide remedies for individuals with disabilities “has largely proven untrue”).

13. See Hoffman, *The Cancer Survivors’ Catch-22*, *supra* note 8, at 376 n.121; Jane Byeff Korn, *Cancer and the ADA: Rethinking Disability*, 74 S. CAL. L. REV. 399, 415–16 (2001) (reporting that Title I cases are often dismissed when a question is raised regarding the claimant’s inclusion in the protected class of “disability”). But see Sharona Hoffman, *Setting the Matter: Does Title I of the ADA Work?*, 59 ALA. L. REV. 305, 343 (2008) (arguing that “the Title I environment is less bleak than suggested by previously published studies. It is undeniable that plaintiffs rarely win in cases that are resolved through judicial opinion and that there has been no apparent increase in employment rates for those with disabilities since the ADA’s enactment. However, ADA plaintiffs do not fare poorly with respect to EEOC merit resolutions, and evidence suggests that they also obtain meaningful relief through case settlements and requests for workplace accommodation that are granted by employers. These successes may explain the continued employee-initiated activity under Title I of the ADA.” (citations omitted)).

court.¹⁴ Congress finally responded in 2008 with the Americans with Disabilities Act Amendments Act (“ADAAA”).¹⁵ Did Congress and the EEOC finally craft a statute and regulations that federal courts could apply uniformly? Unlike the ADA, did the ADAAA fulfill its intended consequences for cancer survivors?

This Article reviews cases filed under Title I of the ADA by employees who claimed they were discriminated against, in part, because of their cancer history. The discussion focuses on cases in which courts considered whether a cancer survivor was a “qualified individual with a disability”¹⁶ under Title I. The Article then compares plaintiffs’ outcomes before and after the passage of the ADAAA, and concludes that the ADAAA has significantly improved cancer survivors’ ability to obtain favorable judgments under the statute. The Article concludes by summarizing the lessons learned from this analysis.

I. CANCER SURVIVORS AND WORK

Of the more than 13.7 million cancer survivors in the United States, roughly one-half are of working age.¹⁷ The majority of these individuals are willing and able to work.¹⁸ Due to significant improvements in cancer care, most working-aged adults can work dur-

14. NATIONAL COUNCIL ON DISABILITY, RIGHTING THE AMERICANS WITH DISABILITIES ACT (2004), available at <http://www.ncd.gov/publications/2004/Dec12004> (criticizing restrictive judicial interpretation of the definition of disability under the ADA); NATIONAL COUNCIL ON DISABILITY, THE AMERICANS WITH DISABILITIES ACT POLICY BRIEF SERIES: RIGHTING THE ADA, NO. 6, DEFINING “DISABILITY” IN A CIVIL RIGHTS CONTEXT: THE COURT’S FOCUS ON EXTENT OF LIMITATIONS AS OPPOSED TO FAIR TREATMENT AND EQUAL OPPORTUNITY (2003), available at <http://www.ncd.gov/publications/2003/Feb242003>.

15. ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (codified at 42 U.S.C. §§ 12101–12213 (Supp. V 2011)).

16. The statute only protects “qualified individuals.” See 42 U.S.C. § 12112(a) (2006).

17. On January 1, 2012, approximately 3,195,640 men and 4,170,340 women in the United States between the ages of twenty and sixty-nine had been diagnosed with cancer. *Cancer Treatment and Survivorship Statistics 2012*, 62 CA: A CANCER J. FOR CLINICIANS 220, 222–23 (2012). The population of cancer survivors grows significantly each year. For example, approximately 1.6 million Americans were expected to be diagnosed with cancer in 2013. *Cancer Statistics 2013*, 63 CA: A CANCER J. FOR CLINICIANS 11, 16 (2013).

18. See Barbara Hoffman, *Cancer and Work: Protections Under the Americans with Disabilities Act*, 24 ONCOLOGY: NURSE EDITION, Apr. 2010, at 15 [hereinafter *Cancer and Work*].

ing and after cancer treatment.¹⁹ For example, one survey of ten studies that assessed return-to-work rates of 1,904 survivors from 1986 to 1999 found that a mean of 62% returned to work.²⁰

Nonetheless, cancer can be a devastating disease. Some survivors experience significant physical or mental limitations that affect their ability to work.²¹

Whether a cancer survivor continues to work during treatment or returns to work after treatment—and if so, whether that survivor’s diagnosis or treatment will result in work limitations—depends on medical and socioeconomic factors.

Table 1: Factors that Affect a Cancer Survivor’s Ability to Work²²

Medical Factors	Socioeconomic Factors
Age	Financial Status
Type of Cancer	Education
Stage of Cancer	Access to Health Insurance
Side Effects ²³	Access to Transportation
Late Effects ²⁴	Access to Quality Cancer Care
Other Chronic Health Conditions	Essential Job Functions

19. *Id.* at 15–16 (discussing studies of cancer survivors’ work experiences); see also Michael Feuerstein et al., *Work in Cancer Survivors: A Model for Practice and Research*, 4 JOURNAL OF CANCER SURVIVORSHIP 415, 416 (2010) (discussing the results of a meta-analysis of cancer and employment in both the United States and Europe that noted an increased risk of unemployment and cancer survivors).

20. See Evelien Spelten et al., *Factors Reported to Influence the Return to Work of Cancer Survivors: A Literature Review*, 11 PSYCHO-ONCOLOGY 124, 131 (2002).

21. See Cathy J. Bradley & Heather L. Bednarek, *Employment Patterns of Long-Term Cancer Survivors*, 11 PSYCHO-ONCOLOGY 188, 194–96 (2002); Pamela Farley Short et al., *Employment Pathways in a Large Cohort of Adult Cancer Survivors*, 103 CANCER 1292, 1293 (2005); Betty R. Ferrell et al., “Bone Tired”: *The Experience of Fatigue and Its Impact on Quality of Life*, 23 ONCOLOGY NURSING FORUM 1539 (1996).

22. “For example, survivors in physically demanding jobs have higher disability rates than those in more sedentary jobs; survivors with advanced education have higher return to work rates than those with less education. Medical treatment decisions that consider quality of life and the shift towards providing cancer treatment in outpatient settings have contributed to the increasing number of survivors who can work during their treatment.” Hoffman, *Cancer and Work*, *supra* note 18, at 16 (citations omitted).

23. A short-term side effect is a “problem that is caused by treatment of a disease but usually goes away after treatment. Short-term side effects of cancer treatment include nausea, vomiting, diarrhea, hair loss, fatigue, and mouth sores.” *NCI Dictionary of Cancer Terms: Short-Term Side Effect*, NATIONAL CANCER INSTITUTE, <http://www.cancer.gov/dictionary?CdrID=730423> (last visited Feb. 14, 2014).

24. A late effect is a “health problem that occurs months or years after a disease is diagnosed or after treatment has ended. Late effects may be caused by

Prior to the passage of state and federal employment rights laws, employment discrimination against cancer survivors was common.²⁵ Such discrimination imposed devastating physical, emotional, and financial consequences.²⁶ After the passage of the ADA and comparable state laws, survivors reported decreasing incidences of work problems attributable to their cancer.²⁷ Most employers accommodate survivors and their caregivers.²⁸ In a 2006 survey, “three out of five survivors reported receiving co-worker support, such as help with work or random acts of kindness.”²⁹ Survivors and their caregivers also experienced “low incidences of negative reactions from their employers and coworkers.”³⁰

Over the past generation, enforcement of laws like the ADA, improvements in cancer treatment, and a sea change in perceptions about living with and beyond cancer have greatly enhanced the employment opportunities of cancer survivors. Although incidences of cancer-based employment discrimination have decreased, some survivors still face disparate treatment and seek legal redress. Between 1997 and 2011, 2.3% to 3.9% of claims brought under Title I of the ADA alleged “cancer” as a disability.³¹ The most common problems survivors experience at work are receiving less work and responsibility after their diagnoses, “being fired or laid off,” being “denied a raise or promotion,” and being “denied health insurance benefits.”³² Court confusion as to the proper interpretation of the ADA has prevented these survivors from obtaining the relief that the statute was intended to provide.

cancer or cancer treatment. They may include physical . . . problems and second cancers.” *NCI Dictionary of Cancer Terms: Late Effect*, NATIONAL CANCER INSTITUTE, <http://www.cancer.gov/dictionary?CdrID=390292> (last visited Feb. 14, 2014).

25. See Hoffman, *The Cancer Survivors’ Catch-22*, *supra* note 8, at 356–60.

26. Brad Zebrack, *Cancer and Job Loss*, 24 *ONCOLOGY: NURSE EDITION*, Apr. 2010, at 19.

27. See Hoffman, *Cancer and Work*, *supra* note 18, at 16; Barbara Hoffman, *Cancer Survivors at Work: A Generation of Progress*, 55 *CA: A CANCER J. FOR CLINICIANS*, 271, 273 (2005) (discussing studies of cancer survivors’ work experiences).

28. Hoffman, *Cancer and Work*, *supra* note 18, at 16 (citing Fleishman-Hillard Research, *Breakaway from Cancer Survey* (2006) (unpublished survey results) (on file with author)).

29. *Id.*

30. *Id.*

31. EQUAL EMP. OPPORTUNITY COMM’N, *ADA Changes Data by Impairment/Base Receipts, FY 1997–FY 2013*, available at <http://www.eeoc.gov/eeoc/statistics/enforcement/ada-receipts.cfm> (last visited Feb. 15, 2014) [hereinafter *EEOC, ADA Receipts*].

32. Hoffman, *Cancer and Work*, *supra* note 18, at 16 (citing Fleishman-Hillard Research, *Breakaway from Cancer Survey* (2006) (unpublished survey results) (on file with author)).

II. THE AMERICANS WITH DISABILITIES ACT OF 1990

A. *Title I of the ADA*

The ADA was the first federal law to prohibit discrimination by large private employers against individuals with disabilities.³³ Title I of the ADA, which prohibits employment discrimination, provided 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.”³⁴ It defined a “qualified individual with a disability” as a person “who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.”³⁵ The ADA provided three separate 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.”³⁶

Key terms in the ADA definition of “disability” were defined by EEOC regulations as follows:

“**Substantially limits**” means “(i) [u]nable to perform a major life activity that the average person in the general population can perform” or “(ii) [s]ignificantly 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 activity.”³⁷

“**Physical . . . impairment**” means “any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological,

33. Prior to the ADA, the only federal law that prohibited employment discrimination based on disability was the Federal Rehabilitation Act of 1973. The Federal Rehabilitation Act prohibited employment discrimination only by programs that received federal financial assistance or by public employers. 29 U.S.C. § 794(a). The ADA covers employers that have “15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person.” 42 U.S.C. § 12111(5)(A) (2006).

34. § 12112(a).

35. § 12111(8).

36. § 12102(2).

37. 29 C.F.R. § 1630.2(j)(1) (1992).

musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, hemic and lymphatic, skin, and endocrine.”³⁸

“Major Life Activities” means “functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.”³⁹

To pursue an employment discrimination claim in federal court, a plaintiff must first file a complaint with the EEOC within 180 days of the alleged discrimination.⁴⁰ Most Title I claims are resolved at the administrative level. The EEOC finds that approximately 60% of all claims have no reasonable cause and the charging party withdraws approximately 6% of all claims.⁴¹ Only 20–25% of claims result in a favorable outcome to the charging party.⁴²

Cancer survivors experience outcomes similar to those of other claimants. Approximately one in four claims alleging cancer as an impairment are resolved favorably to the charging party.⁴³ Like all disability-based claims, most cancer-based employment discrimination claims are resolved prior to formal litigation.⁴⁴

Table 2: Cancer-Based Employment Discrimination Claims Filed with the EEOC Between 1997 and 2011

	FY 1997	FY 1998	FY 1999	FY 2000	FY 2001	FY 2002	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011
1	448	460	396	434	454	455	442	427	407	493	578	707	799	978	951
2	2.5	2.6	2.3	2.7	2.8	2.9	2.9	2.8	2.7	3.2	3.3	3.6	3.7	3.9	3.7
3	81	102	103	162	124	121	103	115	103	127	135	173	161	232	257
4	18.1	25.1	26.0	37.3	27.3	26.6	23.3	26.9	25.3	25.8	23.4	24.5	20.2	23.7	27.0
5	16.3	19.1	23.3	30.5	30.9	25.8	23.9	23.1	22.8	22.7	21.9	20.9	19.8	20.8	22.7

38. § 1630.2(h).

39. § 1630.2(i).

40. See 42 U.S.C. § 2000e-5(e)(1) (2006).

41. See EQUAL EMP. OPPORTUNITY COMM’N, *Americans with Disabilities Act of 1990 (ADA) Charges (Includes Concurrent Charges with Title VII, ADEA, and EPA) FY 1997-FY 2012*, <http://www.eeoc.gov/eeoc/statistics/enforcement/ada-charges.cfm> (last visited Feb. 14, 2014) [hereinafter EEOC, *ADA Charges*].

42. See *id.*

43. See *infra* Table 2.

44. As a result, most Title I claims do not generate a reported decision because they are resolved at the administrative level, through settlements, or in unpublished judicial decisions. See Sharona Hoffman, *supra* note 13, at 312–13.

Key to Table 2

1	Total Number of Charges Filed with the EEOC Under Title I of the ADA Claiming Cancer as an Impairment ⁴⁵
2	Cancer Charges as a Percentage of Total Number of Charges Filed ⁴⁶
3	Total Number of Cancer 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) ⁴⁷
4	Percentage of Cancer Charges with Outcomes Favorable to Charging Parties and/or Charges with Meritorious Allegations
5	Percentage of All Impairment Charges with Outcomes Favorable to Charging Parties and/or with Meritorious Allegations ⁴⁸

Although the EEOC has the authority to file a lawsuit,⁴⁹ most ADA lawsuits are initiated by the charging party. For example, the EEOC filed only eighty merit-based lawsuits out of 25,742 Title I claims in Fiscal Year 2011.⁵⁰ Like many civil rights claimants, Title I plaintiffs must first exhaust administrative remedies to avoid flooding federal courts with claims that could be addressed in a more

45. EEOC, *ADA Receipts*, *supra* note 31.

46. *Id.*

47. EQUAL EMP. OPPORTUNITY COMM'N, *ADA Charge Data by Impairments/Bases - Merit Factor Resolutions FY 1997-FY 2012*, <http://www.eeoc.gov/eeoc/statistics/enforcement/ada-merit.cfm> (last visited Feb. 14, 2014) [hereinafter EEOC, *ADA Merit*].

48. *See* EQUAL EMP. OPPORTUNITY COMM'N, *supra* note 41. To date, the percentage of EEOC claims resolved favorably for the charging party has increased, though not significantly, since the passage of the ADAAA. *See supra*, Table 2. The reason cancer survivors may not yet see significant improvement in outcomes at the administrative level may be due to many factors, including: (1) one purpose of the EEOC is to screen out nonmeritorious claims, see Laura M. Hyer, *Is Cooperation with the EEOC an Implied Requirement for Exhaustion of Administrative Remedies?*, 98 IOWA L. REV. 1351, 1356 (2013); (2) some claimants and defendants are not represented by attorneys in EEOC proceedings, see Kathryn Moss et al., *Unfunded Mandate: An Empirical Study of the Implementation of the Americans with Disabilities Act by the Equal Employment Opportunity Commission*, 50 U. KAN. L. REV. 1, 105-06 (2001); and (3) some cases, especially those with attorney representation, are withdrawn voluntarily to proceed in court, *id.* at 105.

49. 42 U.S.C. § 2000e-5(e)(1) (2006).

50. *See* Barry A. Hartstein, *EEOC Receives a Record Number of Private Sector Discrimination Charges and Secures Highest Amount in Damages in FY 2011*, WASHINGTON D.C. EMP. L. UPDATE (Nov. 18, 2011), <http://www.dcmplemploymentlawupdate.com/2011/11/articles/eeoc-1/eeoc-receives-a-record-number-of-private-sector-discrimination-charges-and-secures-highest-amount-in-damages-in-fy-2011/> (last visited Feb. 14, 2014); EEOC, *ADA Receipts*, *supra* note 41.

efficient setting.⁵¹ Typically, fewer than one in ten complainants resolve their claims in federal court.⁵²

B. References to Cancer as a Disability in the ADA Regulations and Legislative History

Nowhere in the ADA itself does the word “cancer” appear. The original EEOC regulations to Title I and the legislative history of the ADA, however, suggest that Congress intended the statute to prohibit cancer-based employment discrimination.

1. Compliance Manual to the Original EEOC Regulations

The ADA authorized the EEOC to issue regulations explaining how Title I should apply to specific circumstances.⁵³ The EEOC Compliance Manual (“Manual”), first issued in January 1992 to supplement the federal regulations, specifically illustrated how the EEOC intended the ADA to apply to cancer-based discrimination through eight references:⁵⁴

1. The ADA protects not only individuals with a visible disability, but also those who have “hidden disabilities, such as . . . cancer.”⁵⁵

51. See Sharon Hoffman, *supra* note 13, at 314.

52. In a typical month in 2011, approximately 150 Title I cases were filed in federal court compared with 2145 complaints filed with the EEOC. *Compare Increase in Employment Discrimination Lawsuits under the Americans with Disabilities Act*, TRAC REPORTS, <http://trac.syr.edu/tracreports/civil/282/> (last visited Feb. 14, 2014), with EEOC, *ADA Charges*, *supra* note 41.

53. See 42 U.S.C. § 12116 (2006) (stating that “the [EEOC] shall issue regulations in an accessible format to carry out this subchapter”); see also *Bragdon v. Abbott*, 524 U.S. 624, 647 (1998) (noting in a parenthetical that 42 U.S.C. § 12116 authorizes the “EEOC to issue regulations implementing Title I”).

54. The EEOC issued the Technical Assistance Manual “to help employers . . . and persons with disabilities learn about their obligations and rights under the employment provisions of the Americans with Disabilities Act,” providing “guidance on the practical application of legal requirements established in the statute and EEOC regulations.” EQUAL EMP. OPPORTUNITY COMM’N, A TECHNICAL ASSISTANCE MANUAL ON THE EMPLOYMENT PROVISIONS (TITLE I) OF THE AMERICANS WITH DISABILITIES ACT, at i (1992), *reprinted in* EQUAL EMP. OPPORTUNITY COMM’N, ADA COMPLIANCE GUIDE app. IV (2013), *available at* 2005 WL 4899269.

55. 2 EQUAL EMP. OPPORTUNITY COMM’N, NO. 130, A TECHNICAL ASSISTANCE MANUAL ON THE EMPLOYMENT PROVISIONS (TITLE I) OF THE AMERICANS WITH DISABILITIES ACT § 902 (1995) [hereinafter 1995 TECHNICAL ASSISTANCE MANUAL], *cited in The Cancer Survivors’ Catch-22*, *supra* note 8, at 368 n.83.

2. “Most forms of heart disease and cancer” are types of medical conditions that may substantially limit a major life activity.⁵⁶
3. The ADA “protects former cancer patients from discrimination based on their prior medical history” as individuals with a “record of a substantially limiting condition.”⁵⁷
4. An individual with a genetic marker for cancer is covered by the ADA as they are “regarded as having a substantially limiting impairment.”⁵⁸
5. Employers may not use “medical inquiries or medical examinations before making a conditional job offer” to screen out individuals with a “hidden disability such as . . . cancer.”⁵⁹
6. How an individual develops an impairment, such as whether an individual “develops lung cancer as a result of smoking,” is irrelevant to ADA standing.⁶⁰
7. In an illustration of flex-time as a reasonable accommodation, the Manual states that cancer survivors are entitled to reasonable modifications in their work schedules to accommodate the side effects of cancer treatment.⁶¹
8. In an example of the impact of coworkers’ attitudes toward individuals with disabilities, the Manual instructs that an employer may not discriminate against an employee on the

56. *Id.* at § 902.4, cited in *The Cancer Survivors’ Catch-22*, *supra* note 8, at 368 n.84.

57. See 29 C.F.R. § 1630.2(k) (1992) (stating that “a record of such an impairment [meant 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”). The Manual states that this language refers to “people with a history of cancer . . . or other debilitating illness whose illnesses are either cured, controlled or in remission.” EQUAL EMP. OPPORTUNITY COMM’N, EEOC-M-1A, EEOC COMPLIANCE MANUAL: A TECHNICAL ASSISTANCE MANUAL ON THE EMPLOYMENT PROVISIONS (TITLE I) OF THE AMERICANS WITH DISABILITIES ACT, pt. 2, § 2.2(b), at II-8 (1992), available at http://ia700504.us.archive.org/21/items/technicalassista00unse/technicalassista00unse_bw.pdf [hereinafter 1992 TECHNICAL ASSISTANCE MANUAL].

58. See, e.g., 1995 TECHNICAL ASSISTANCE MANUAL, *supra* note 55, at § 902.8 (giving as an example that a person with a genetic marker for colon cancer will be covered by the ADA).

59. 1992 TECHNICAL ASSISTANCE MANUAL pt. 6, §6.3, at VI-3 to VI-4.

60. 1995 TECHNICAL ASSISTANCE MANUAL, *supra* note 55, at § 902.2.

61. See EEOC COMPLIANCE MANUAL (1999), reprinted from EQUAL EMP. OPPORTUNITY COMM’N, No. 915.002, ENFORCEMENT GUIDANCE: REASONABLE ACCOMMODATION AND UNDUE HARDSHIP UNDER THE AMERICANS WITH DISABILITIES ACT (Mar. 1, 1999), available at 1999 WL 33305876, at *26.

basis that other employees react negatively to the employee because of the employee's cancer history.⁶²

2. Legislative History

The House and Senate subcommittees considered the testimony of cancer advocates during hearings on the ADA.⁶³ The final reports of the subcommittees illustrated that cancer-based employment discrimination should fall within the scope of the ADA.⁶⁴ The reports recognized that although the ADA could not include an exhaustive, comprehensive list of every disorder that could be covered, the term "disability" includes "such conditions, diseases and infections as: . . . cancer."⁶⁵ The reports also confirmed that "persons with histories of . . . cancer" had a record of an impairment.⁶⁶

Despite favorable language in the ADA, EEOC regulations, and legislative history, federal courts often dismissed cancer survivors' employment discrimination claims between 1992 and 2008.

III. HOW CANCER SURVIVORS FARED IN EMPLOYMENT DISCRIMINATION CASES UNDER THE ADA

A. *Judgments for Employers*

Like many ADA plaintiffs,⁶⁷ cancer survivors often found themselves on the losing end of motions for summary judgment. As noted above, plaintiffs could prove disability status under the ADA in three ways: by demonstrating (1) a physical or mental impairment that substantially limits one or more of their major life activi-

62. *See id.*

63. For a detailed description of this testimony, see *The Cancer Survivors' Catch-22*, *supra* note 8, at 371–73.

64. *See* H.R. REP. NO. 101-485, pt. 3, at 53, *reprinted in* 1990 U.S.C.C.A.N. 303, 334–35; S. REP. NO. 101-116, at 23, *reprinted in* 1 LEGISLATIVE HISTORY OF PUBLIC LAW 101-336, THE AMERICANS WITH DISABILITIES ACT, at 120 (1990).

65. H.R. REP. NO. 101-485, pt. 2, at 51, *reprinted in* 1990 U.S.C.C.A.N. 303, 333; S. REP. NO. 101-116, at 22, *reprinted in* 1 LEGISLATIVE HISTORY OF PUBLIC LAW 101-336, THE AMERICANS WITH DISABILITIES ACT, at 120 (1990).

66. H.R. REP. NO. 101-485, pt. 2, at 52–53, *reprinted in* 1990 U.S.C.C.A.N. 303, 334–35; S. REP. NO. 101-116, at 23, *reprinted in* 1 LEGISLATIVE HISTORY OF PUBLIC LAW 101-336, THE AMERICANS WITH DISABILITIES ACT, at 121 (1990).

67. *See* Colker, *The Americans with Disabilities Act*, *supra* note 12, at 109. Colker also notes that in the first few years of the ADA, "defendants prevail[ed] 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 [were] appealed, defendants prevail[ed] in eight-four percent of reported cases." *Id.* at 100.

ties; (2) a record of such an impairment; or (3) being regarded as having such an impairment. At the summary judgment stage, however, federal courts were quick to find that cancer rendered plaintiffs either too sick to be qualified for their jobs or not sufficiently impaired to be disabled.⁶⁸ As discussed below, courts routinely held that survivors whose cancers were treated successfully, despite the survivors' records of hospitalization and grueling treatments, were not substantially limited in major life activities because their cancer did not have a "permanent or long-term impact."⁶⁹ Similarly, courts often granted summary judgment to employers under the second and third prongs. As a result, survivors were unable to defeat motions for summary judgment.

1. Plaintiffs Did Not Have a Disability Because They Were Not Substantially Limited in the Major Life Activity of Working

Few appellate decisions set back survivors' rights more than the Fifth Circuit's narrow reading of the ADA in *Ellison v. Software Spectrum, Inc.*⁷⁰ Phyllis Ellison was diagnosed with breast cancer in August 1993, nineteen months after becoming a full-time buyer for Software Spectrum.⁷¹ To accommodate her treatment and recovery, Ellison worked a modified schedule from September 1993 through February 1994.⁷² The following month, Software Spectrum fired Ellison and three other employees as part of an alleged downsizing.⁷³

The Fifth Circuit affirmed the lower court's grant of summary judgment to Software Spectrum on the ground that Ellison's breast cancer was not a disability.⁷⁴ Noting that Ellison never missed a day of work during her cancer treatment, the Fifth Circuit affirmed the lower court's finding that Ellison was not substantially limited in her ability to work.⁷⁵ Relying on Ellison's admission that, although her treatment left her feeling sick and fatigued, she was able to perform her job with the reasonable accommodation of a modified work schedule, the Fifth Circuit concluded that she was not suffi-

68. See *The Cancer Survivors' Catch-22*, *supra* note 8, at 375–94 (discussing cancer-based employment discrimination cases pre-*Sutton*).

69. 29 C.F.R. 1630, app. 1630.2(j)(4) (2012); see *infra* Part III.A.

70. 85 F.3d 187 (5th Cir. 1996).

71. *Id.* at 189.

72. *Id.*

73. *Id.* Ellison was subsequently rehired to a different position several weeks later. The Fifth Circuit relied in part upon Ellison's paucity of harm to conclude that she failed to raise a genuine issue of material fact. *Id.* at 193.

74. *Id.* at 193.

75. *Id.* at 191.

ciently limited in her ability to work to establish standing under the ADA.⁷⁶

Thus, *Ellison* sent a halting message to cancer survivors bringing Title I claims: employees who find a way to work during and after cancer treatment are not disabled within the meaning of the ADA. This decision effectively imposed a Catch-22 on plaintiffs who alleged that their cancer substantially limited the major life activity of working. Under this reasoning, had Ellison chosen to take medical leave instead of working a modified schedule during her treatment, her cancer would have substantially limited her major life activity of working.⁷⁷ This logic ironically punishes employees for seeking and taking reasonable accommodations to help them perform their essential job functions, a fundamental goal of the ADA.

For nearly fifteen years, the tidal effects of *Ellison* capsized survivors' claims. Courts in almost every circuit adopted the Fifth Circuit's analysis to conclude that cancer survivors who were healthy enough to work were not sufficiently impaired to be considered disabled under the ADA.⁷⁸ The unfortunate result was that plaintiffs who failed to allege that their cancer substantially limited a major life activity besides working rarely made it past the summary judgment stage.

a. First Circuit

Ellen Whitney worked as an executive assistant in an accounting firm when she was diagnosed with ovarian cancer.⁷⁹ She claimed that dementia caused by chemotherapy for ovarian cancer substantially limited her ability to work and learn.⁸⁰ "Chemobrain" is a common side effect of some chemotherapies that manifests as cognitive dysfunction, such as problems with memory and concen-

76. *Id.*

77. See *The Cancer Survivors' Catch-22*, *supra* note 8, at 380.

78. See, e.g., *Cook v. Robert G. Waters, Inc.*, 980 F. Supp. 1463, 1469 (M.D. Fla. 1997) (granting summary judgment to the employer of a brain tumor patient who the court held was not substantially limited in her ability to work because "except for during doctor appointments and during Plaintiff's headaches, Plaintiff state[d] that she could fulfill the essential requirements of the job . . . until she was terminated"); *Madjlessi v. Macy's W., Inc.*, 993 F. Supp. 736, 741 (N.D. Cal. 1997) (finding that a breast cancer survivor who relied on an accommodation of flex-time to perform her job was not protected by the ADA because her "breast cancer did not substantially limit her ability to work"); *Hirsch v. National Mall & Serv., Inc.*, 989 F. Supp. 977, 981-82 (N.D. Ill. 1997) (noting that Hirsch continued to work, although he indicated that it was difficult to do so).

79. *Whitney v. Greenberg, Rosenblatt, Kull, & Bitsoli, P.C.*, 258 F.3d 30, 31 (1st Cir. 2001).

80. *Id.* at 31-32.

tration.⁸¹ A psychologist's testimony that Whitney's condition was "mild yet significant"⁸² was precisely the type of factual allegation that begs a trial, as "mild" suggests her impairment was not substantially limiting, yet "significant" suggests the opposite. Nevertheless, the trial court granted summary judgment for the accounting firm, holding that Whitney did not allege "sufficient evidence to demonstrate that her cognitive disability was severe or lengthy enough to substantially limit her ability to work or to learn."⁸³ The First Circuit affirmed summary judgment for her employer, finding that Whitney was not substantially limited in her ability to work or learn because her "cognitive impairment was mild, reversible, and short lived."⁸⁴

b. Second Circuit

The Second Circuit affirmed summary judgment for an employer who failed to accommodate a cancer survivor.⁸⁵ Steven Thomsen claimed that he had a disability because he had to take three medical leaves for surgery for bowel cancer.⁸⁶ Even though Thomsen could not work for six weeks after each surgery, the court held that Thomsen "produced no evidence that his impairments—whatever they might have been during his medical leaves of absence—were significantly restrictive, persistent or permanent."⁸⁷ The court relied on Thomsen's testimony that he was not limited in any major life activity, including working, and that at the time he was fired, "he was cancer-free."⁸⁸

c. Sixth Circuit

Rick Stokes took a three-month leave of absence from his job as a county emergency medical technician to receive treatment for kidney cancer.⁸⁹ He alleged that he was subsequently fired because

81. See *LOST IN TRANSITION*, *supra* note 5, at 101.

82. 258 F.3d at 31.

83. *Id.* at 32.

84. *Id.* at 34.

85. *Thomsen v. Stantec, Inc.*, 785 F. Supp. 2d 20, 23 (W.D.N.Y. 2011), *aff'd*, 483 F. App'x 620 (2d Cir. 2012), *cert. denied*, 133 S. Ct. 931 (2013).

86. *Id.*

87. *Id.* ("'[S]ubstantially limits' means '[s]ignificantly 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.'") (quoting 29 C.F.R. § 1630.2(j)(1)(ii)).

88. *Id.*

89. *Stokes v. Hamilton Cty.*, 113 Fed. App'x 680, 682 (6th Cir. 2004).

the county feared that it would have to pay for his medical care if his cancer recurred.⁹⁰ The Sixth Circuit rejected this argument, holding that Stokes had failed to prove that he had an actual disability because his kidney cancer did not impose a long-term burden on his ability to work.⁹¹ Like Thomsen, Stokes was essentially punished for returning to work after successful cancer treatments.

d. Seventh Circuit

Paul Hirsch was fired after working for several years while receiving treatment for non-Hodgkin's lymphoma.⁹² The District Court for the Northern District of Illinois granted his employer summary judgment.⁹³ The court held that Hirsch's cancer did not substantially limit his ability to work because he "continue[d] to work,"⁹⁴ even though his illness forced him to work part-time from home and to be occasionally absent.⁹⁵ The court failed to reconcile how Hirsch could not be substantially limited in his ability to work, yet was so ill that he "asked to work at home part-time"⁹⁶ and "was forced to be occasionally absent from work."⁹⁷ He ultimately died from his lymphoma seventeen months after he was fired.⁹⁸

e. Eighth Circuit

Susan Treiber was a breast cancer survivor who was denied re-appointment as a school teacher.⁹⁹ Although the court recognized that Treiber's breast cancer was an impairment, it held that her

90. *Id.*

91. *Id.* at 684. The Sixth Circuit also rejected his claim that the county had discriminated against him based on a perceived disability. *Id.* However, much of the court's reasoning was impermissibly based on a case that correctly held that "perceived disability" claims do not apply to employers who discriminate to reduce worker compensation payments. *See Mahon v. Crowell*, 295 F.3d 585, 593 (6th Cir. 2002). The purpose of the ADA is to prohibit disability-based employment discrimination, not discrimination against employees who file workers' compensation claims to recover for job-related injuries.

92. *Hirsch v. National Mall & Serv., Inc.*, 989 F. Supp. 977, 981–82 (N.D. Ill. 1997).

93. *Id.* at 983.

94. *Id.* at 981 (noting that Hirsch continued to work, although he indicated that it was difficult to do so).

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.* at 978–79.

99. *Treiber v. Lindbergh Sch. Dist.*, 199 F. Supp. 2d 949, 953–54 (E.D. Mo. 2002).

cancer did not substantially limit any major life activities, including her ability to work:

Rather than evidence that her cancer and its treatment caused substantial limitations, Plaintiff has introduced evidence to the contrary. She returned to work after approved leave for surgery, scheduled her chemotherapy treatments so that her recovery time would primarily fall on the weekends, and underwent radiation therapy in the summer. There is no testimony that the cancer or treatment adversely affected her ability to perform her teaching duties.¹⁰⁰

Like Susan Treiber, Joan Rickert was caught in the Catch-22. She successfully scheduled her breast cancer treatment during the summer when the college was not in session to avoid missing work, and the “volleyball team changed the practice schedule to accommodate Rickert’s medical appointments.”¹⁰¹ Rickert then sued Midland Lutheran College for failing to promote her from a part-time to a full-time volleyball coach because she had breast cancer.¹⁰² The court granted Midland summary judgment, finding that Rickert was not substantially limited in her ability to work because she never missed a day of work.¹⁰³

f. Ninth Circuit

Virginia Madjlessi unknowingly undermined her subsequent Title I claim by working during grueling breast cancer treatment.¹⁰⁴ In granting summary judgment to her employer, the court relied on *Ellison* and on Madjlessi’s evidence that she was qualified for her job to support its conclusion that she was not substantially limited in her ability to work.¹⁰⁵ It recognized that she was not only qualified for her job, but “that she worked even harder to move herself up the career path. Her coworkers praise her ability to work through adversity.”¹⁰⁶ In essence, the court punished Madjlessi for working “while suffering the side effects of vomiting, weakness and nausea,” because by doing so, she proved she was not substantially

100. *Id.* at 961.

101. Rickert v. Midland Lutheran Coll., No. 8:07CV334, 2009 WL 2840528, at *3 (D. Neb. Sept. 2, 2009).

102. *Id.* at *1.

103. *Id.* at *14.

104. Madjlessi v. Macy’s W., Inc., 993 F. Supp. 736, 741 (N.D. Cal. 1997) (granting summary judgment to employer). Madjlessi took only four days off from work every month for cancer treatment. *Id.*

105. *Id.*

106. *Id.*

limited.¹⁰⁷ In granting summary judgment to her employer, the court concluded that Madjlessi failed to prove that she had a disability.¹⁰⁸

g. Eleventh Circuit

Donna Dalton experienced long-term lingering arm pain and swelling caused by lymphedema resulting from breast cancer treatment.¹⁰⁹ She produced medical evidence that although she needed some time off for pain treatment, when she was at work she could perform all of her responsibilities.¹¹⁰ Seeking an accommodation, she asked to work part-time or to transfer to a less stressful position, but her employer denied her requests.¹¹¹ Her employer then fired her, claiming that she failed to meet her job's performance standards.¹¹² Instead of allowing this factual dispute to be resolved by a jury, the court granted summary judgment to her employer.¹¹³ Although the court recognized that Dalton's cancer-related pain, fatigue, and depression were impairments,¹¹⁴ it determined that she was able to work, and thus not protected by the ADA.¹¹⁵

107. *Id.* (citing *Ellison v. Software Spectrum, Inc.*, 85 F.3d 187, 191 (5th Cir. 1996) (“Obviously, her ability to work was affected [by breast cancer]; but as reflected in the above quoted statutes and regulations, far more is required to trigger coverage under § 12102(2)(A).”).

108. 933 F. Supp. at 740–41.

109. *Dalton v. Geico Annuity & Ins. Co.*, Civil Action No. 7:08–CV–130 (HL), 2010 WL 2640097, at *7 (M.D. Ga. June 28, 2010).

110. *Id.* at *2.

111. *Id.*

112. *Id.* at *4.

113. *Id.* at *9.

114. *Id.* at *6.

115. *Id.* at *7 (finding that, absent taking short medical leaves, Dalton was cleared by her physicians to work).

Many other Eleventh Circuit cases granted summary judgment to employers under the ADA. *See also* *Schwertfager v. City of Boynton Beach*, 42 F. Supp. 2d 1347, 1360 (S.D. Fla. 1999) (granting summary judgment to employer because plaintiff's breast cancer treatment did not render her “incapacitated”—a standard unsupported by the statutory language—and despite the court's concession that plaintiff's breast cancer limited her ability to perform, other major life activities including her ability to care for herself, dress, and cook); *Cook v. Robert G. Waters, Inc.*, 980 F. Supp. 1463, 1469 (M.D. Fla. 1997) (holding that plaintiff was not substantially limited in her ability to work despite her severe headaches and diminished ability to concentrate caused by plaintiff's brain tumor); *Gordon v. E.L. Hamm & Assocs., Inc.* 100 F.3d 907, 912 (11th Cir. 1996) (rejecting plaintiff's claim that his lymphoma was a disability because “except for a couple of days of medical testing and a [ten-day] leave of absence . . . Gordon was fully capable of working”).

By concluding that a survivor who is healthy enough to perform essential job functions does not have standing under the ADA, the courts precluded a determination of whether the employer discriminated against the employee because of his or her cancer. These decisions illustrate how courts erected pretrial barriers to employees who claimed that their cancer substantially limited their ability to work. Survivors who demonstrated that they were “qualified individuals”¹¹⁶ were trapped in a Catch-22 of being unable to prove that they were substantially limited in the major life activity of working. Thus, these decisions prevented survivors from having the opportunity to argue the merits of their claims.

2. Plaintiffs Did Not Have a Disability Because They Could Not Establish a Record of a Disability

Some cancer survivors claimed that they had standing under the ADA’s “record” of a disability prong because they were hospitalized for surgery and/or treatment.¹¹⁷ The EEOC Compliance Manual to the ADA stated that “people with a history of cancer . . . or other debilitating illness, whose illnesses are either cured, controlled or in remission” have a “[r]ecord of a substantially limiting condition.”¹¹⁸ The EEOC specifically noted that “this provision protects former cancer patients from discrimination based on their prior medical history.”¹¹⁹ Moreover, the Supreme Court recognized in *School Board of Nassau County v. Arline* that hospitalization is evidence of a record of a disability.¹²⁰

116. 42 U.S.C. § 12111(8) (2006).

117. See § 12102(2)(B); see *infra* text accompanying notes 122–28.

118. 1992 TECHNICAL ASSISTANCE MANUAL, pt. 2, §2.2(b), at II-8.

119. 29 C.F.R. § 1630, app. § 1630.2(k) (1992).

120. Because the “ADA’s definition of disability is drawn almost verbatim from the definition of ‘handicapped individual’ included in the Rehabilitation Act of 1973,” courts have relied on Rehabilitation Act cases to interpret the ADA. *Bragdon v. Abbott*, 524 U.S. 624, 631–32 (1998).

In interpreting identical language in the Rehabilitation Act, the Supreme Court held that a school teacher with tuberculosis had a record of an impairment because she was hospitalized. *Sch. Bd. of Nassau Cty. v. Arline*, 480 U.S. 273, 281 (1987) (“This impairment was serious enough to require hospitalization, *a fact more than sufficient to establish that one or more of her major life activities were substantially limited by her impairment*. Thus, Arline’s hospitalization for tuberculosis in 1957 suffices to establish that she has a ‘record of . . . impairment’ within the meaning of 29 U.S.C. § 706(7)(B)(ii), and is therefore a handicapped individual.”) (emphasis added). *But see* EEOC v. Gallagher, 181 F.3d 645, 655 (5th Cir. 1999) (holding that because the ADA requires an individualized inquiry, “it is not enough for an ADA plaintiff to simply show that he has a record of a cancer diagnosis” because he was hospitalized; he must prove that he was substantially limited in a major life activity).

Despite the *Arline* decision, most courts rejected the argument that hospitalization alone proved a record of a disability. Courts were also reluctant to find a record of a disability if the duration of the cancer was short or temporary, thus creating another barrier to recovery for ADA plaintiffs.¹²¹

Silvia Day returned to work following surgery and chemotherapy for breast cancer.¹²² Day was hospitalized for *four months*, yet the Fifth Circuit concluded that her impairment was “temporary.”¹²³ The Fifth Circuit affirmed summary judgment for her employer, finding that, although Day’s “cancer may have been severe, its duration was short and its long-term impact minimal.”¹²⁴ Thus she did not have a “record of an impairment that substantially limited a major life activity.”¹²⁵

Several courts applied the same reasoning to deny survivors standing under the “record of an impairment” prong. The District Court for the Eastern District of Missouri held that the fact that Susan Treiber was hospitalized for breast cancer surgery “in and of itself” did not prove she had a record of a disability.¹²⁶ The District Court for the Northern District of California rejected Madjlessi’s claim that her extensive cancer treatment proved she had a history of a disability.¹²⁷ And the Second Circuit explicitly rejected the argument that hospitalization alone is sufficient to prove a record of a substantially limiting impairment because the “ADA requires an in-

121. *See, e.g.*, *Schwertfager v. City of Boynton Beach*, 42 F. Supp. 2d 1347, 1359–60 & n.10 (S.D. Fla. 1999) (“Merely having a record of hospitalization is insufficient to establish that Schwertfager had a record of a substantially limiting impairment.”). *But see* *Mark v. Burke Rehabilitation Hosp.*, No. 94 Civ. 3596 RLC, 1997 WL 189124, at *4 (S.D.N.Y. Apr. 16, 1997) (denying summary judgment to employer because employee’s hospitalization for cancer surgery created a record of a substantially limiting impairment).

122. *Day v. Earthgrains, Co.*, 211 F.3d 124 (5th Cir. 2000) (unpublished table decision), *available at* 2000 WL 309415, at *1.

123. *Id.*

124. *Id.*

125. *Id.*; *see also* *Ellison v. Software Spectrum, Inc.*, 85 F.3d 187, 192 (5th Cir. 1996) (affirming summary judgment for the employer because, in part, “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”).

126. *Treiber v. Lindbergh Sch. Dist.*, 199 F. Supp. 2d 949, 961–62 (E.D. Mo. 2002).

127. *Madjlessi v. Macy’s W., Inc.*, 993 F. Supp. 736, 742 (N.D. Cal. 1977) (“[T]he 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.”).

dividualized inquiry beyond the mere existence of a hospital stay.”¹²⁸

Other survivors unsuccessfully argued that having cancer in remission creates a history of a disability.¹²⁹ For example, Rene Olmeda claimed that the New York State Department of Civil Service failed to hire him as a parole officer because he had been diagnosed with and successfully treated for leukemia seven years earlier.¹³⁰ The trial court dismissed his complaint, holding that he did not have standing under the ADA solely because Olmeda “testified that his leukemia has been in remission since 1987 and asserted that he is not limited in any way.”¹³¹

3. Plaintiffs Did Not Have a Disability Because Their Employers Did Not Regard Their Cancer as a Disability

Cancer survivors who allege that their employers regarded their cancer as a disability¹³² also face significant pretrial hurdles because this alternate prong requires evidence of an employer’s beliefs.¹³³ This third prong is intended “to combat the effects of ‘archaic attitudes,’ erroneous perceptions, and myths that work to the disadvantage of persons with or regarded as having disabilities.”¹³⁴ Under the original ADA, many courts did little to further the purpose of this prong—“to combat the effects of ‘archaic attitudes,’ erroneous perceptions, and myths”¹³⁵—because they required uncontroverted evidence that an employer regarded the plaintiff’s cancer as a disability. Plaintiffs could not rely on evidence that their employers knew they had cancer or that their employers made general statements linking their cancer with their inability to

128. *Colwell v. Suffolk Cty. Police Dep’t*, 158 F.3d 635, 646 (2d Cir. 1998) (citing *Burch v. Coca-Cola, Inc.*, 119 F.3d 305, 317 (5th Cir. 1997)).

129. *See, e.g., Thomsen v. Stantec, Inc.*, 785 F. Supp. 2d 20, 23 (W.D.N.Y. 2011) (despite acknowledging that plaintiff was cancer-free, court declined to address whether he proved he had a record of a disability), *aff’d*, 483 F. App’x 620 (2d Cir. 2012), *cert. denied*, 133 S. Ct. 931 (2013).

130. *Olmeda v. N.Y. State Dep’t of Civil Serv.*, No. 96 Civ. 7557(HB), 1998 WL 17729, at *1–2 (S.D.N.Y. Jan. 16, 1998).

131. *Id.* at *2.

132. *See* 42 U.S.C. § 12102(2)(C) (2006); *infra* notes 138–49 and accompanying text.

133. *See* 29 C.F.R. § 1630.2(l) (2012) (defining an individual as “‘regarded as having such an impairment’ if the individual is subjected to a prohibited action because of a . . . perceived . . . impairment”); *cf. Olds v. United Parcel Serv.*, 127 Fed. App’x 779, 782 (6th Cir. 2005) (holding that plaintiff raised a genuine issue of material fact as to whether his employer regarded his cancer as disabling).

134. *Wooten v. Farmland Foods*, 58 F.3d 382, 385 (8th Cir. 1995).

135. *Id.*

work.¹³⁶ Even direct admissions by employers that they doubted their employees could perform their jobs because they had cancer proved insufficient.¹³⁷

For example, James McElroy claimed that he was fired because his employer mistakenly assumed his prostate and colon cancers were disabilities that rendered him unfit for his job.¹³⁸ The Sixth Circuit held that to prevail under the “regarded as” prong, McElroy had to prove “not only that his employer thought he was disabled, but also that his employer thought his disability would prevent him from performing a broad class of jobs.”¹³⁹ Although McElroy presented evidence that his supervisor referred to his past “serious health problems” as the reason that he needed to “rekindle his skills,”¹⁴⁰ the Sixth Circuit held that this evidence fell short of McElroy’s burden of proof.¹⁴¹ In affirming summary judgment for his employer, the court stated, “taking the evidence together and in the light most favorable to plaintiff, there is, at best, a weak inference that Wyatt may have believed McElroy’s past health problems had affected his performance as an account manager.”¹⁴²

The Fifth Circuit took an even tougher stance, holding in *Paulsen v. Beyond, Inc.* that a plaintiff must not only prove that the employer discriminated against the employee based upon a perceived disability, but also that the employer perceived the disability to have substantially limited a major life activity. Lynn Paulsen had been successfully treated for cancer ten years before she became a sales

136. See, e.g., *Stokes v. Hamilton Cty.*, 113 Fed. App’x at 680, 864 (6th Cir. 2004) (affirming summary judgment, in part, because plaintiff failed to allege how his employer “entertain[ed] misperceptions’ about Stokes’s past battle with cancer which related to his ability to perform his job.”); *Trieber v. Lindbergh Sch. Dist.*, 199 F. Supp. 2d 949, 962 (E.D. Mo. 2002) (granting summary judgment to employer, in part, because plaintiff failed to prove that her employer perceived her breast cancer as a disability).

137. See, e.g., *Pikoris v. Mount Sinai Med. Ctr.*, No. 96 CIV. 1403(JFK), 2000 WL 702987, at *13 (S.D.N.Y. May 30, 2000) (finding that the plaintiff, who had been diagnosed with and treated for breast cancer, had not established that she was perceived as having a disabling impairment based on her supervisor’s two comments expressing concern that the plaintiff could not perform her job as a medical resident because she could not handle the stress of cancer).

138. *McElroy v. Philips Med. Sys.*, 127 Fed. App’x 161, 168–69 (6th Cir. 2005) (summarizing plaintiff’s claims that his employer terminated him to retaliate against his EEOC claims alleging he was regarded as having a disability).

139. *Id.* at 168.

140. *Id.* at 169.

141. *Id.*

142. *Id.*

manager for a software company.¹⁴³ She subsequently took off several weeks to have surgery to remove scar tissue caused by her earlier cancer treatment.¹⁴⁴ When she informed the software company that she was ready to return to work, she was fired.¹⁴⁵ Paulsen alleged that when she sought to return to work, one supervisor inquired, “You used to have cancer, didn’t you? Aren’t you afraid it’s going to come back?” and another supervisor questioned whether her current medical problems were related to her prior cancer.¹⁴⁶ Paulsen alleged that she was protected by the ADA because her employer regarded her cancer history as a disability.¹⁴⁷ The Fifth Circuit affirmed judgment for the software company, ruling that Paulsen failed to present evidence that her employer “treated her as if the supposed cancer substantially limited a major life activity.”¹⁴⁸ The Fifth Circuit discounted Paulsen’s evidence of how her cancer history in fact substantially limited major life activities, including reproduction, as well as Paulsen’s evidence of her supervisors’ concerns about her cancer history.¹⁴⁹

B. *Judgments for Employees*

Unlike the majority of cancer-survivor plaintiffs, some cancer survivors prevailed in pretrial motions by proving that they had a disability, a record of a disability, or were regarded as having a disability. These survivors avoided the Catch-22 by pleading that their cancer substantially limited a major life activity other than work or that they had standing under the “record of” or “regarded as” prongs.

1. Major Life Activity Other Than Work

Survivors who argued that the major life activity affected by their cancer was a quality of life issue fared better than survivors who argued that their cancer substantially limited only their ability to work. For example, Nancy DeMarah claimed that her supervisor harassed her because she was receiving treatment for breast can-

143. Paulsen v. Beyond, Inc., 91 F.3d 140 (5th Cir.1996) (unpublished table decision) (No. 95-40107), available at 1996 WL 40029, at *1.

144. *Id.*

145. *Id.* at *2.

146. *Id.* at *1-2.

147. *Id.* at *4.

148. *Id.* at *5.

149. *Id.* at *5-6. Paulsen alleged that she had many reproductive organs removed and that she was subsequently unable to have children. *Id.*

cer.¹⁵⁰ She alleged that her cancer affected her major life activities of walking and caring for herself.¹⁵¹ The trial court denied summary judgment to her employer and found that DeMarah was disabled because, after she had a mastectomy, reconstructive surgery, and chemotherapy, she could walk only short distances and could not care for herself or her youngest son.¹⁵²

Judith Keller, who was fired from her job as a school superintendent, proved that her breast cancer treatment substantially limited her ability to have sexual relations.¹⁵³ Recognizing that sexual intercourse and reproduction are major life activities,¹⁵⁴ the court denied her employer's motion for summary judgment.¹⁵⁵ It relied on a short, but comprehensive list of cancer survivors who had proven that their cancer was a disability under the ADA.¹⁵⁶ Similarly, Claudia Berk successfully alleged that her breast cancer substantially limited her major life activity of reproduction because her

150. *DeMarah v. Texaco Grp., Inc.*, 88 F. Supp. 2d 1150, 1151 (D. Colo. 2000).

151. *Id.* at 1155.

152. *Id.*

153. *Keller v. Board of Educ.*, 182 F. Supp. 2d 1148, 1154 (D.N.M. 2001).

154. *Id.* at 1155.

155. *Id.* at 1164.

156. *Id.* at 1155. The trial court cited to nine cases where the court recognized that the plaintiff's allegation that his or her cancer was a disability was sufficient to survive summary judgment:

Furthermore, many courts have found that cancer is a disability, or at a minimum that such a determination is a question of fact, not law. *Demarah v. Texaco*, 88 F. Supp. 2d 1150 (D. Colo. 2000) (finding genuine issues of material fact as to whether former employee whose breast cancer was in remission was substantially limited in the life activities of working, walking, and caring for herself for a sufficient duration so as to be considered disabled, precluded summary judgment on employee's ADA claim); *Wilson v. Md.-Nat'l Capital Park & Planning Comm'n*, 178 F.3d 1289 (4th Cir.1999) (accepting district court assumption that bladder cancer is a disability); *Berk v. Bates Adver. USA, Inc.*, 25 F.Supp.2d 265 (S.D.N.Y.1998) (holding breast cancer is a disability); *Olbrot v. Denny's, Inc.*, 1998 WL 525174 (N.D.Ill. Aug.19, 1998) (holding issue of whether breast cancer is a disability is a question of fact); *Bizelli v. Amchem*, 981 F.Supp. 1254 (E.D.Mo.1997) (holding testicular cancer is a disability); *Mark v. Burke Rehab. Hosp.*, 1997 WL 189124 (S.D.N.Y. Apr.17, 1997) (holding lymphoma is a disability); *Wojciechowski v. Emergency Technical Servs. Corp.*, 1997 WL 164004 (N.D.Ill. Mar.27, 1997) (accepting breast cancer in deceased plaintiff as a disability); *Milton v. Bob Maddox Chrysler Plymouth, Inc.*, 868 F.Supp. 320 (S.D.Ga.1994) (finding summary judgment inappropriate in case involving bronchial cancer); *Braverman v. Penobscot Shoe Co.*, 859 F.Supp. 596 (D.Me.1994) (finding summary judgment inappropriate in case alleging prostate cancer as a disability).

Id.

physicians testified “that her particular type of breast cancer would put her life at risk if she became pregnant.”¹⁵⁷

2. Record of Having an Impairment That Substantially Limits a Major Life Activity

At least one appellate court recognized that cancer treatment can create a record of having an impairment that substantially limits a major life activity by correctly applying the EEOC regulations to the evidence.¹⁵⁸ Joan Eshelman was diagnosed with breast cancer after working for the same company for seventeen years.¹⁵⁹ She took six months of medical leave for treatment, including chemotherapy, and then returned to work part-time.¹⁶⁰ Like many survivors, Eshelman suffered from “chemo brain” in the form of short-term memory loss.¹⁶¹ Initially, her employer agreed that Eshelman could perform the essential functions of her job.¹⁶² In light of her memory loss, however, she sought reasonable accommodations, including the ability to telecommute at times.¹⁶³ After she requested accommodations, Eshelman was laid off in a staff reduction.¹⁶⁴ The court allowed Eshelman to proceed to trial where a jury awarded Eshelman \$170,000 in back pay and \$30,000 in compensatory damages.¹⁶⁵

The Third Circuit affirmed, finding that Eshelman’s cancer treatment established a record of impairment upon which her employer relied in deciding to terminate her employment.¹⁶⁶ It rejected the argument that Eshelman’s work limitations were too temporary to be covered by the ADA based on three factors:¹⁶⁷ First, the court held that “Eshelman was, unquestionably, substantially impaired in the major life activity of working during her six-month absence for cancer treatment.”¹⁶⁸ Second, her employer knew about her cancer, chemotherapy, and surgery.¹⁶⁹ Third, Eshelman’s cancer affected her ability to work beyond “a relatively

157. Berk v. Bates Adver. USA, Inc., 25 F. Supp. 2d 265, 268 (S.D.N.Y. 1998).

158. Eshelman v. Agere Sys., Inc., 554 F.3d 426, 438–39 (3d Cir. 2009).

159. *Id.* at 430.

160. *Id.*

161. *Id.* at 430–31; *see also supra* note 21.

162. 554 F.3d 426 at 431.

163. *Id.*

164. *Id.*

165. *Id.* at 432.

166. *Id.* at 436.

167. *Id.* at 437.

168. *Id.*

169. *Id.*

short-term absence from work”¹⁷⁰ because she received cancer-related care before and after her medical leave, experienced cognitive problems when she returned to work, and her supervisors knew about her medical care and its side effects.¹⁷¹ “Paired with Eshelman’s six-month absence and [her employer’s] knowledge of her condition, this cognitive dysfunction permitted the jury to conclude that Eshelman had demonstrated a record of impairment that substantially limited her ability to think and work” and had shown that her employer impermissibly relied upon her cancer experience as a factor in deciding to lay her off.¹⁷²

Another appellate case recognized that cancer in remission can establish a record of a substantially limiting impairment.¹⁷³ The Fifth Circuit, which typically embraces the cancer survivor’s Catch-22, reversed summary judgment for an employer in a case that egregiously ignored the purpose of the ADA.¹⁷⁴ After working his way up from salesman to president of a company over twenty years, Michael Boyle was diagnosed with leukemia.¹⁷⁵ He was hospitalized for thirty days to receive chemotherapy.¹⁷⁶ His doctor then declared his cancer to be in remission and gave him permission to return to work without limitations.¹⁷⁷ When Boyle returned to work the next week, his employer demoted him and reduced his salary.¹⁷⁸ The trial court granted Boyle’s employer summary judgment, concluding that he was not disabled, did not have a record of a disability, and was not perceived as having a disability.¹⁷⁹ The court held that Boyle’s month-long hospitalization for chemotherapy did not raise a question of material fact as to whether he had a record of a disability.¹⁸⁰ The Fifth Circuit reversed and remanded, instructing the trial court “to determine whether the record of Boyle’s impairment includes a substantial effect on a major life activity.”¹⁸¹ Quoting the EEOC’s interpretative regulations that the

170. *Id.*

171. *Id.* at 438.

172. *Id.*

173. EEOC v. Gallagher, 181 F.3d 645, 656–57 (5th Cir. 1999).

174. *Id.* at 656–57 (reversing summary judgment for employer because whether an employee whose blood cancer was in remission had a record of a substantial limitations on any major life activities was a question for the jury).

175. EEOC v. Gallagher, 959 F. Supp. 405, 406–407 (S.D. Tex. 1997), *aff’d in part, vacated in part*, 181 F.3d 645 (5th Cir. 1999).

176. *Id.* at 407.

177. *Id.*

178. *Id.*

179. *Id.* at 409.

180. *Id.*

181. EEOC v. Gallagher, 181 F.3d 645, 656 (5th Cir. 1999).

ADA “protects former cancer patients from discrimination on the basis of their prior medical history,” the Fifth Circuit concluded that although a cancer history does not per se prove discrimination based on a record of a disability, the trial court erroneously failed to consider whether Boyle’s cancer history established a record of a disability.¹⁸²

Finally, at least one trial court case correctly held that hospitalization constitutes evidence of a record of a disability. Although most courts declined to hold that hospitalization alone could prove a record of a disability, the District Court for the Eastern District of Missouri found that John Bizelli’s hospitalization for cancer surgery raised sufficient evidence of a record of a disability to preclude summary judgment.¹⁸³ Bizelli took six months of medical leave for testicular cancer treatment.¹⁸⁴ After his physician cleared him to work with lifting restrictions, his employer refused to allow him to return to work unless he successfully completed a physical examination to which no other employee was subject.¹⁸⁵ The trial court held that Bizelli’s cancer history established a record of an impairment,¹⁸⁶ and that the ADA “[p]lainly . . . intended to ensure that former cancer patients are not discriminated against on the basis of their prior medical history.”¹⁸⁷ The trial court appropriately permitted a jury to consider whether Bizelli was discriminated against because of his cancer.¹⁸⁸

3. Regarded as Having an Impairment That Substantially Limits a Major Life Activity

Only those survivors who provided very strong evidence of an employer’s misconceptions about how their cancer affected major life activities survived pretrial motions on whether their employer

182. *Id.* at 655–56.

183. *Bizelli v. Amchem*, 981 F. Supp. 1254, 1257 (E.D. Mo. 1997) (recognizing that Bizelli’s surgery and treatment for testicular cancer established a record of a disability).

184. *Id.* at 1255–56.

185. *Id.* at 1256.

186. *Id.* at 1257.

187. *Id.*

188. *Id.* The jury found that Bizelli’s employer breached its duty to accommodate Bizelli’s return to work with a temporary lifting restriction and that he was fired because of his testicular cancer history. *Bizelli v. Parker Amchem*, 17 F. Supp. 2d 949, 951 (E.D. Mo. 1998). It awarded him lost wages and compensatory damages. *Id.*

regarded their cancer as substantially limiting a major life activity.¹⁸⁹

In *Eshelman v. Agere Systems, Inc.*, the Third Circuit affirmed the jury's determination that Eshelman's employer discriminated against her because it regarded her breast cancer treatment as substantially limiting a major life activity.¹⁹⁰ The Third Circuit agreed with Eshelman's argument that the jury had sufficient evidence upon which to conclude "that although she had excelled at her job and was a highly valued employee," her employer "nonetheless erroneously viewed her memory impairment caused by her chemotherapy treatment as substantially limiting two major life activities; namely, Eshelman's ability to think and her ability to work."¹⁹¹

Similarly, a trial court in the Western District of New York denied summary judgment for an employer who fired a cancer survivor because she raised a material dispute concerning whether her employer regarded her cancer treatment as substantially limiting her ability to do her job.¹⁹² Donna Shandrew worked as a phlebotomist for Quest Diagnostics for twenty-three years; she was fired two months after completing chemotherapy.¹⁹³ The trial court held that Shandrew alleged sufficient evidence for a jury to consider "that Quest mistakenly believed her cancer and/or treatment substantially limited her in the major life activity of working"¹⁹⁴ by preventing her from working in "a broad class of jobs."¹⁹⁵ The court found that Shandrew raised a genuine issue of material fact that her supervisor "treated her differently when she returned from her medical leave, making twenty or more comments to her in regards to her chemotherapy treatment making her slow and forgetful, and suggesting she should stay home and rest and/or take pain medica-

189. See *Eshelman v. Agere Sys., Inc.*, 554 F.3d 426, 436 (3d Cir. 2009) (affirming jury verdict for cancer survivor on the grounds that her employer regarded her memory problems caused by chemotherapy as substantially limiting her ability to think).

190. *Id.* (finding that plaintiff presented sufficient evidence for a reasonable fact finder to conclude that the employer regarded her as substantially limited in a major life activity). The court also held that Eshelman's employer discriminated against her because of her record of an impairment. See *id.* at 439.

191. *Id.* at 434, 436 (finding that the jury had reasonable evidence to conclude that Eshelman's employer perceived that her cancer-related memory problems created substantial limitations in her ability to work).

192. *Shandrew v. Quest Diagnostics Inc.*, 819 F. Supp. 2d 181, 188 (W.D.N.Y. 2011).

193. *Id.* at 183–184.

194. *Id.* at 187.

195. *Id.*

tion.”¹⁹⁶ Considered in the light most favorable to Shandrew, these allegations indicated that her supervisor may have believed that she was unable to adequately perform her job duties because of her cancer treatment.¹⁹⁷

Similarly, at least one appellate court held that an employer can regard cancer in remission as a disability.¹⁹⁸ Mark Olds worked as a UPS driver for sixteen years when he was diagnosed with multiple myeloma.¹⁹⁹ UPS denied his request to return to work with weight-lifting restrictions after his cancer treatment.²⁰⁰ In granting summary judgment to UPS, the trial court held that UPS did not regard Olds’s cancer history as an impairment because it denied his accommodation requests, even though his restrictions resulted from his cancer treatment.²⁰¹ The Sixth Circuit correctly reversed, finding that Olds presented evidence as to how UPS perceived his cancer history to affect his job qualifications.²⁰² Thus, a “reasonable jury could infer that UPS believed that Olds’[s] condition was significantly more disabling than it actually was, and for that reason UPS did not want to reinstate him.”²⁰³

IV.

HOW CANCER SURVIVORS FARED IN EMPLOYMENT DISCRIMINATION CASES UNDER THE ADA AMENDMENTS ACT

A. *Congress Attempts to Plug Holes in the ADA with the Americans with Disabilities Act Amendments Act*

The often dismal results Title I complainants experienced in federal court prompted Congress to reject and repair the Supreme Court’s narrow construction that emasculated the ADA.²⁰⁴ In hear-

196. *Id.*

197. *Id.*

198. *Olds v. United Parcel Serv.*, 127 Fed. App’x 779, 782 (6th Cir. 2005) (holding that the plaintiff raised a genuine issue of material fact as to whether his employer regarded his post-cancer condition as disabling).

199. *Id.* at 780–81.

200. *Id.*

201. *Id.* at 781.

202. *Id.* at 783.

203. *Id.* Olds presented evidence that a UPS “lawyer said that Olds should not be reinstated because he had cancer” and that a UPS employee admitted that “‘we didn’t want to come right out and say that because of Mark’s condition, his cancerous condition, that he couldn’t do the job.’” *Id.*

204. For evidence that the Supreme Court narrowly interpreted the ADA, see *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 482–84 (1999) (rejecting EEOC regulations that instructed courts to determine whether an individual had a disa-

ings on the ADAAA, the House Committee on Education and Labor declared that it intended “to lessen the standard of establishing whether an individual has a disability for purposes of coverage under the ADA, and to refocus the question on whether discrimination on the basis of disability occurred.”²⁰⁵ The Committee illustrated why congressional action was needed to ease the burden of proving standing under the ADA with the story of a cancer survivor whose case was dismissed on summary judgment:

The Committee expects that the bill will affect cases such as . . . *Pimental v. Dartmouth-Hitchcock Clinic*, 236 F. Supp. 2d 177 (D.N.H. 2002) in which the court concluded that the plaintiff’s stage three breast cancer did not substantially limit her ability to care for herself, sleep, or concentrate.²⁰⁶ The Committee expects that the plaintiffs in each of these cases could establish a material restriction on major bodily functions that would qualify them for protection under the ADA.²⁰⁷

The ADAAA, which took effect on January 1, 2009, retained the three alternate definitions for the term “disability,”²⁰⁸ but lowered the threshold for determining whether a person is “disabled” under the first and second alternatives. Congress explicitly stated that one purpose of the ADAAA was:

bility without regard to mitigating measures); *Albertsons, Inc. v. Kirkinburg*, 527 U.S. 555, 556 (1999) (holding that mitigating measures “must be taken into account in judging whether an individual possesses a disability”).

205. H. REP. NO. 110-730, pt. 1, at 7 (2008).

206. The court trapped *Pimental* in a Catch-22 because she did not claim that her cancer substantially limited her ability to work. It held that *Pimental*’s “own assertions that the cancer did not substantially impair her ability to perform various tasks associated with her employment tend[ed] to undermine her claim that it did substantially affect her ability to, for example, care for herself on a long-term basis. *See, e.g.*, Memorandum of Law in Support of Plaintiff’s Objection to Defendant’s Motion for Summary Judgement, *Pimenta v. Dartmouth-Hitchcock Clinic*, 236 F. Supp. 2d 177 (2002) (No. C.01-292-M) (stating that, upon her return from medical leave, plaintiff “had no problems performing her duties as a nurse”). Thus, she has failed to demonstrate that her illness substantially affected her ability to care for herself, sleep, or to concentrate on a permanent or long-term basis.” 236 F. Supp. 2d at 183–84.

207. H. REP. NO. 110-730, pt. 1, at 12 (footnote 206 added).

208. “The term ‘disability’ means, with respect to an individual—(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.” ADA Amendments Act of 2008, Pub. L. No. 110-325, sec. 4(a), § 3(1), 122 Stat. 3553 (codified at 42 U.S.C. § 12102(1) (Supp. V 2011)). The ADAAA further added a statutory definition of “being regarded as having such an impairment.” *Id.* at sec. 4(a), § 3(1)(C).

[T]o convey congressional intent that the standard created by the Supreme Court in the case of *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002) for “substantially limits,” and applied by lower courts in numerous decisions, has created an inappropriately high level of limitation necessary to obtain coverage under the ADA, to convey that it is the intent of Congress that the primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations, and to convey that the question of whether an individual’s impairment is a disability under the ADA should not demand extensive analysis.²⁰⁹

The ADAAA made four key changes to the plaintiff’s burden of proof. First, the ADAAA expands the list of “major life activities” covered. In an end-run around the Supreme Court’s unwillingness to defer to the EEOC regulations,²¹⁰ Congress added the definition of “major life activities” to the statute itself.²¹¹ The ADAAA broadens the definition of “major life activity” to include “the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.”²¹² Almost all cancers substantially limit one or more of those major bodily functions.²¹³ Additionally, the ADAAA supplements the nonexhaustive list of “major life activities” by adding “eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating and working.”²¹⁴ This far more expansive definition of “major life activities” should allow practically all cancer survivors to identify a major life activity affected by their cancer.

Second, the ADAAA explicitly renounced the Supreme Court’s decision that a court must consider whether an individual used mitigating measures, such as taking medication, in determining

209. *Id.* at sec. 2(b)(5).

210. *See* *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 482–84 (1999).

211. ADA Amendments Act, sec. 4(a), § 3(2) (codified at 42 U.S.C. § 12102(2) (Supp. V 2011)).

212. *Id.* at sec. 4(a), § 3(2)(B) (codified at 42 U.S.C. § 12102(2)(B) (Supp. V 2011)).

213. *See* 29 C.F.R. § 1630, app. § 1630.2(i) (2011) (“Because impairments, by definition, affect the functioning of body systems, they will generally affect major bodily functions. For example, cancer affects an individual’s normal cell growth . . .”).

214. *Id.* at sec. 4(a), § 3(2)(A) (codified at 42 U.S.C. § 12102(2)(A) (Supp. V 2011)).

whether he or she had a disability:²¹⁵ “The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures such as . . . medication . . . or prosthetics.”²¹⁶ Under this language, a court may no longer consider how cancer treatment mitigated the effects of cancer on an individual. For example, a sarcoma survivor whose leg was amputated, but who can walk with the use of a prosthetic leg, has a disability because her leg was amputated. A court may no longer consider how well the survivor could walk with the prosthesis. Similarly, antiemetics may help a survivor whose chemotherapy-induced nausea substantially limits his ability to eat. A court may no longer consider how well the survivor could eat while taking anti-nausea medication.

Third, prior to the ADAAA, a person whose impairment was episodic or in remission would be unlikely to prove that it substantially limited a major life activity.²¹⁷ Thus, a survivor whose cancer was in remission or whose cancer only occasionally affected a major life activity may not have been covered under the ADA.²¹⁸ The ADAAA addresses this obstacle by specifying that an “impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.”²¹⁹ This language will benefit the large numbers of cancer survivors whose cancer is chronic, but often managed.²²⁰ Many survivors live for years or decades with

215. The ADAAA explicitly “reject[s] the requirement enunciated by the Supreme Court in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999) and its companion cases that whether an impairment substantially limits a major life activity is to be determined with reference to the ameliorative effects of mitigating measures.” ADA Amendments Act, sec. 2(b)(2).

216. *Id.* at sec. 4(a), § 3(4)(E)(i) (codified at 42 U.S.C. § 12102(4)(E)(i) (Supp. V 2011)).

217. The Supreme Court held that, under the original ADA, “[to] be substantially limited . . . an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people’s daily lives. The impairment’s impact must also be permanent or long term.” *Toyota Motor Mfg., Kentucky, Inc. v. Williams*, 534 U.S. 184, 198 (2002) (citing 29 C.F.R. §§ 1630.2(j)(2)(ii)–(iii) (2001)).

218. *See, e.g.*, *Olmeda v. N.Y. State Dep’t of Civil Serv.*, No. 96 Civ. 7557(HB), 1998 WL 17729, at *2 (S.D.N.Y. Jan. 16, 1998).

219. ADA Amendments Act, sec. 4(a), § 3(4)(D) (codified at 42 U.S.C. § 12102(4)(D) (Supp. V 2011)). *See also* discussion *infra* text accompanying notes 254–62 (discussing cases applying this provision).

220. For example, some cancers, like certain lymphomas, are not curable, yet many individuals live for years or decades with these cancers as a chronic condition. *See, e.g.*, *Bradley & Bednarck*, *supra* note 21 at 188 (“[C]ertain types of cancer are no longer perceived as terminal illnesses, but instead, chronic diseases that require regular monitoring . . . treatment . . . and life style modification.”).

their cancer, and at times are not substantially limited by their diagnoses. Now even those survivors whose cancer is successfully treated in fewer than six months are covered by the ADAAA.²²¹

Fourth, under the original ADA, an employee could be covered if his or her employer “regarded” him or her as having a disability that affected a major life activity.²²² The ADAAA no longer requires that the employer actually believe that the employee is substantially limited in a major life activity; a burden of proof few plaintiffs could meet. Now the employee need only prove that “he or she has been subjected to an action prohibited under [the ADA] because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.”²²³ Thus, cancer survivors who prove that they are treated differently because of their cancer, regardless of whether their cancer substantially limits any major life activity, may be protected under the ADAAA.

B. *The EEOC Regulations to Title I of the ADAAA*

As exemplified by the Sutton trilogy,²²⁴ federal courts often ignored the EEOC regulations and interpretive guidance when determining whether a plaintiff has a disability.²²⁵ Yet, as a practical matter, Congress generally outlines major policy goals in statutes and defers to the expertise of administrative agencies like the EEOC to provide detailed definitions and illustrations for judicial guidance.²²⁶ Accordingly, the EEOC issued extensive regulations to further define the ADAAA.²²⁷ The ADAAA regulations take direct

221. The EEOC regulations to the ADAAA instruct that “[t]he effects of an impairment lasting or expected to last fewer than six months can be substantially limiting.” 29 C.F.R. § 1630.2(j)(1)(ix) (2012). The ADAAA overturns the Supreme Court’s holding in *Toyota Motor Manufacturing Kentucky, Inc.* that “the impairment’s impact must also be permanent or long term.” *Compare id., with Toyota Motor Mfg. Ky., Inc. v. Williams*, 534 U.S. 184, 198 (2002).

222. 42 U.S.C. § 12102(2)(C) (2006).

223. ADA Amendments Act, sec. 4(a), § 3(3)(A) (codified at 42 U.S.C. § 12102(3)(A) (Supp. V 2011)).

224. The *Sutton* trilogy is composed of three cases. *Cf. Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999); *Murphy v. United Parcel Service, Inc.*, 527 U.S. 516 (1999); *Albertson’s, Inc. v. Kirkingburg*, 527 U.S. 555 (1999).

225. See Evan Sauer, *The ADA Amendments Act of 2008: The Mitigating Measures Issues, No Longer A Catch-22*, 36 OHIO N.U. L. REV. 215, 233–34 (2010).

226. *See id.* at 234.

227. The EEOC regulations to Title I of the ADAAA were issued on March 25, 2011, and took effect on May 24, 2011. 29 C.F.R. § 1630.1(a)(c)(4) (2011).

Instead of redefining “substantially limits” in the ADAAA, Congress added “rules of construction” to the statute to instruct courts that they should interpret

aim at the federal court decisions that restricted a plaintiff's ability to prove that he or she has a disability as defined by Title I:²²⁸

Broad coverage. The primary purpose of the ADAAA is to make it easier for people with disabilities to obtain protection under the ADA. Consistent with the Amendments Act's purpose of reinstating a broad scope of protection under the ADA, the definition of "disability" in this part shall be construed broadly in favor of expansive coverage to the maximum extent permitted by the terms of the ADA. The primary object of attention in cases brought under the ADA should be whether covered entities have complied with their obligations and whether discrimination has occurred, not whether the individual meets the definition of disability. The question of whether an individual meets the definition of disability under this part should not demand extensive analysis.²²⁹

The EEOC also expressly recognized that cancer survivors are individuals with a disability. In a clear message to federal courts that Congress intended cancer survivors to have standing under the ADA, the regulations direct that "it should easily be concluded that the following types of impairments will, at a minimum, substantially limit the major life activities indicated: . . . cancer substantially limits normal cell growth."²³⁰

the term "disability" broadly. ADA Amendments Act, sec. 4(a), § 3(4) (codified at 42 U.S.C. § 12102(4) (Supp. V 2011)). Congress then gave the EEOC the authority to interpret and illustrate these rules to provide further guidance to the courts and litigants. *Id.* at sec. 6(a)(2), § 506 (codified at 42 U.S.C. § 12205a (Supp. V 2011)); see also E. Pierce Blue, *Arguing Disability Under the ADA Amendments Act: Where Do We Stand?*, FED. LAW, Dec. 2012, at 38, 39–41 (describing the rules of construction adopted by the EEOC that "provide a fuller picture of the relationship between the changes made in the law, the repudiation of *Sutton* and *Toyota*, and the broad interpretation of 'substantially limits'"). Although the regulations list conditions that presumptively prove disability, the ADAAA and its regulations retain a court's obligation to assess whether a particular plaintiff has a disability on an individualized basis. 29 C.F.R. § 1630.2(j)(1)(iv) (2012) ("The determination of whether an impairment substantially limits a major life activity requires an individualized assessment.").

228. For a discussion of the Supreme Court's weakening of employee rights under the ADA, see *The Cancer Survivors' Catch-22*, *supra* note 8, at 413–32.

229. 29 C.F.R. § 1630.1(c)(4) (2012).

230. 29 C.F.R. § 1630.2(j)(3)(iii) (2012). "The determination of whether an impairment substantially limits a major life activity requires an individualized assessment. However, in making this assessment, the term 'substantially limits' shall be interpreted and applied to require a degree of functional limitation that is lower than the standard for 'substantially limits' applied prior to the ADAAA." § 1630.2(j)(1)(iv).

The Appendix to the EEOC regulations is replete with examples of how Congress intended to cover cancer survivors under Title I of the revised statute.

1. Definition of an Individual with a Disability

The Appendix recognizes that most plaintiffs should be able to identify the link between their impairment and the affected bodily functions “because impairments, by definition, affect . . . bodily functions.”²³¹ It illustrates this relationship by acknowledging that “cancer affects an individual’s normal cell growth.”²³² In referencing the legislative history of the ADAAA, the Appendix refers to the House Education and Labor Committee’s intention that the inclusion of major bodily functions would “affect cases such as . . . *Pimental v. Dartmouth–Hitchcock Clinic*, in which the court concluded that the plaintiff’s stage three breast cancer did not substantially limit her ability to care for herself, sleep, or concentrate.”²³³ The Appendix also explains that a plaintiff need not prove that multiple bodily functions are affected by a disability, illustrated by the following example: “An individual whose normal cell growth is substantially limited due to lung cancer need not also show that she is substantially limited in breathing or respiratory function.”²³⁴

2. Impairments in Remission

One of the most beneficial descriptions in the Appendix explains how cancer survivors in remission would be protected by the ADAAA: “An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity in its active state.”²³⁵ The Appendix again refers to Congress’s disapproval of cases like *Pimental v. Dartmouth–Hitchcock Clinic*,²³⁶

where the courts have discounted the impact of an impairment [such as cancer] that may be in remission as too short-lived to be substantially limiting. It is thus expected that individuals with impairments that are episodic or in remission (e.g., epilepsy, multiple sclerosis, cancer) will be able to establish coverage if, when active, the impairment or the manner in which it

231. 29 C.F.R. § 1630, app. § 1630.2(i) (2011).

232. *Id.*

233. *Id.*

234. § 1630, app. § 1630.2(j)(1)(viii).

235. § 1630, app. § 1630.2(j)(1)(vii).

236. 236 F. Supp. 2d 177, 182–83 (D.N.H. 2002).

manifests (e.g., seizures) substantially limits a major life activity.²³⁷

The Appendix also relies on the legislative history of the ADA to support its interpretation of the ADAAA regarding impairments in remission. In quoting the testimony of Representative Steny Hoyer, an original cosponsor of the ADA, the Appendix notes that the ADA drafters “could not have fathomed that people with . . . cancer . . . and other disabilities would have their ADA claims denied because they would be considered too functional to meet the definition of disability.”²³⁸ For example, individuals with cancers that have poor long-term prognoses such as ovarian cancer, metastatic breast cancer, and non-Hodgkin’s lymphoma may be substantially limited in their ability to work or concentrate while suffering the side effects of chemotherapy. But many survivors who have these types of cancer experience long periods of remission when they are not substantially limited in any major life activity, even though their cancers are likely to return. Thus, survivors who experience a remission, regardless of the length or permanency of that remission, have standing under the ADAAA.

3. Record of a Substantially Limiting Impairment

The Appendix describes that the purpose of the second prong of the definition of “disability”—an individual with a record of an impairment that substantially limits or limited a major life activity—is to prohibit discrimination based on a history of a disability. In recognizing that some cancer survivors face discrimination long after their treatment is completed, the Appendix states that “the ‘record of’ provision would protect an individual who was treated for cancer ten years ago but who is now deemed by a doctor to be free of cancer from discrimination based on that prior medical history.”²³⁹ The Appendix also explains that some cancer survivors have standing under both the “disability” prong and the “record of” prong:

This is a consequence of the rule of construction in the ADAAA and the regulations providing that an individual with an impairment that is episodic or in remission can be protected under the first prong if the impairment would be substantially limiting when active. See 42 U.S.C. 12102(4)(D);

237. 29 C.F.R. § 1630, app. § 1630.2(j)(1)(vii) (quoting H. REP. NO. 110-730, pt. 2, at 19–20 (2008)).

238. § 1630, app. § 1630.2(j)(3).

239. § 1630, app. § 1630.2(k).

§ 1630.2(j)(1)(vii). Thus, an individual who has cancer that is currently in remission is an individual with a disability under the “actual disability” prong because he has an impairment that would substantially limit normal cell growth when active. He is also covered by the “record of” prong based on his history of having had an impairment that substantially limited normal cell growth.²⁴⁰

4. Regarded as Having a Substantially Limiting Impairment

Finally, the Appendix provides a cancer example to demonstrate that the amended “regarded as” prong should be applied in a practical, straightforward manner: “[I]f an employer terminates an employee because he has cancer, the employer has regarded the employee as an individual with a disability.”²⁴¹ As noted above, courts should not consider whether the impairment substantially limits a major life activity under the “regarded as” prong, unlike under the first prong.

In sum, the EEOC reforms promulgated under the ADAAA ensure that cancer survivors have standing under the statute. Employers’ defenses to a Title I claim must now properly focus not on whether the plaintiff has a disability, but on whether he or she is qualified to perform the essential functions of the job and on whether the employer offered a reasonable accommodation.²⁴²

C. Cancer Survivors’ Employment Discrimination Cases Under the ADAAA

Because Congress did not intend to apply the ADAAA retroactively,²⁴³ cases involving causes of action that accrued prior to January 1, 2009, applied the original ADA. Once the ADAAA took effect, plaintiffs and their advocates readily tested how the EEOC would apply the statute’s reduced burden of proving disability status. Unsurprisingly, Title I complaints increased by 31.8%, from 19,453 in 2008 to 25,742 in 2011.²⁴⁴ Similarly, the number of cancer-based

240. *Id.*

241. § 1630, app. § 1630.2(l) (2011).

242. The ADA protects only “qualified individuals” with a disability. *See* 42 U.S.C. § 12112(a) (2006) (“No covered entity shall discriminate against a *qualified* individual . . .”) (emphasis added).

243. *See, e.g.,* Melone v. Paul Evert’s RV Country, Inc., 455 Fed. App’x 738, 739 n.1 (9th Cir. 2011); EEOC v. Agro Distrib., LLC, 555 F.3d 462, 469 n.8 (5th Cir. 2009).

244. EEOC, *ADA Receipts*, *supra* note 41.

claims increased by 34.5%, from 707 in 2008 to 951 in 2011.²⁴⁵ The number of cancer-based employment discrimination claims that have been resolved favorably for the plaintiff has nearly doubled since the passage of the ADAAA.²⁴⁶

A significant number of cancer survivors who sued under the ADAAA, in contrast to those who sued under the ADA, have successfully survived pretrial motions so that courts can address the merits of their claims for employment discrimination. Most telling, however, is that no reported case interpreting the ADAAA has imposed a Catch-22 on a plaintiff cancer survivor by holding that the plaintiff is too healthy to be disabled, yet too ill to work.²⁴⁷

As Congress intended,²⁴⁸ judicial review of cancer survivors as Title I plaintiffs has focused more on whether the plaintiff was qualified for his or her job yet faced discrimination because of a disability, than whether the plaintiff had standing under the ADAAA. For example, the District Court for the Northern District of Georgia relied on the ADAAA regulations that the determination of whether a plaintiff has a disability should “be construed broadly in favor of expansive coverage” in finding that a breast cancer survivor had a disability because her cancer substantially limited her normal cell growth.²⁴⁹ Another trial court in the Southern District of New York also relied on the ADAAA regulations to hold that “[c]ancer will ‘virtually always’ be a qualifying disability.”²⁵⁰

245. EEOC, *ADA Charges*, *supra* note 31.

246. The total number of cancer charges with outcomes favorable to the charging parties and/or charges with meritorious allegations increased from 135 in 2007 to 257 in 2011. *See supra* Table 2.

247. This Article surveyed cases reported through January 1, 2013.

248. H. REP. NO. 110-730, pt. 1, at 7.

249. *Coker v. Enhanced Senior Living, Inc.*, 897 F. Supp. 2d 1366, 1374 (N.D. Ga. 2012) (quoting 29 C.F.R. § 1630.2(j)(1)(i) (2012)) (quoting from regulations stating that “cancer substantially limits normal cell growth”).

250. *Katz v. Adecco USA, Inc.*, 845 F. Supp. 2d 539, 548 (S.D.N.Y. 2012) (denying summary judgment to an employer and employment agency that had impermissibly asked a job applicant about her medical history in violation of the ADA, and then failed to offer her a job upon discovering that she was a cancer survivor). The ADAAA regulations provide:

[T]he individualized assessment of some types of impairments will, in virtually all cases, result in a determination of coverage under paragraphs (g)(1)(i) (the “actual disability” prong) or (g)(1)(ii) (the “record of” prong) of this section. Given their inherent nature, these types of impairments will, as a factual matter, virtually always be found to impose a substantial limitation on a major life activity. Therefore, with respect to these types of impairments, the necessary individualized assessment should be particularly simple and straightforward.

29 C.F.R. § 1630.2(j)(3)(ii).

Remarkably, in some ADAAA cases, the parties *agreed* that the plaintiff had a disability,²⁵¹ a rare concession in cases under the ADA.²⁵² Other ADAAA cases did not directly analyze whether the plaintiff had a disability, but instead addressed issues on the assumption that the plaintiff had a disability.²⁵³ Those survivors whose ADAAA claims were dismissed in pretrial motions appropriately lost because they failed to prove that they were qualified for their jobs or were treated differently because of their cancer, not because they failed to prove that they had a disability.²⁵⁴

251. Diehl v. Bank of Am., N.A., 470 Fed. App'x 771, 775 (11th Cir. 2012) (employer did not dispute that plaintiff's breast cancer was a disability); Garity v. APWU Nat'l AFL-CIO, 2:11-CV-01109-PMP-CWH, 2012 WL 2273429, at *6, *8 (D. Nev. June 18, 2012) (denying the employer's motion to dismiss because the parties agreed that the cancer survivor had a disability and because she alleged sufficient facts to show her disability was related to adverse treatment by her employer); Pauling v. Gates, No. 1:10cv1196 (LMB/JFA), 2011 WL 1790137, at *4 n.4 (E.D. Va. May 6, 2011) (parties conceded that the plaintiff, who had been treated for cancer for five years, had a disability).

252. In cases prior to the ADA, defendants often conceded that a plaintiff had an impairment, although they seldom conceded that a plaintiff had a disability.

253. See Shelton v. Bridgestone Metalphi, U.S.A., Inc., 3-11-0001, 2012 WL 1609670, at *5 (M.D. Tenn. May 8, 2012) (denying summary judgment to the employer of a thyroid cancer survivor who claimed her employer did not reasonably accommodate her); Estate of Reed v. Ponder Enterprises, Inc., 1:11cv554-CSC, 2012 WL 1031487, at *7 (M.D. Ala. Mar. 27, 2012) (denying the employer's motion to dismiss in finding that "the complaint reasonably support[s] the inference that Crystal Reed was terminated not for poor job performance, but because of her disability and/or in retaliation for her request for accommodations"); Jacobsen v. Dillon Companies, Inc., 10-CV-01944-LTB-BNB, 2012 WL 638122, at *1, *11 (D. Colo. Feb. 28, 2012) (denying summary judgment to the employer of a breast cancer survivor who was fired while undergoing treatment); Moore v. Md. Dep't of Pub. Safety & Corr. Servs., Civil No. CCB-11-553, 2011 WL 4101139, at *4 (D. Md. Sept. 12, 2011) (denying summary judgment to the employer on the issue of whether an employee who took an eight-month leave of absence for breast cancer treatment was entitled to medical leave as a reasonable accommodation, especially given that she had been cleared to return to work just one day after she lost her job).

254. See, e.g., Valdez v. McGill, 462 F. App'x 814, 818-19 (10th Cir. 2012) (implying that the employee's colon cancer was a disability in granting summary judgment to the employer because the employee failed to "show a reasonable accommodation would allow him to perform the essential functions of his job"); Angell v. Fairmount Fire Prot. Dist., No. 11-cv-03025-CMA-CBS, 2012 WL 5389777, at *4-5 (D. Colo. Nov. 5, 2012) (concluding that the plaintiff cancer survivor had a disability but nevertheless granting summary judgment to the defendant because the plaintiff did not prove that he was discriminated against because of his disability); Haley v. Cohen & Steers Capital Mgmt., Inc., 871 F. Supp. 2d 944, 955-56 (N.D. Cal. 2012) (granting summary judgment to the employer because the employee failed to prove a link between her lymphoma and the alleged adverse employment action).

The ADAAA has been particularly helpful to survivors who can prove they were able to work, in part, because their cancer treatment was successful. Although plaintiffs alleging discrimination based on cancer in remission seldom survived summary judgment under the ADA, several recent decisions have recognized that cancer in remission is a disability under the ADAAA.²⁵⁵

For example, the District Court for the Eastern District of Pennsylvania held that a plaintiff whose cancer is in remission has a disability. Richard Unangst was laid off following his successful treatment for lymphoma.²⁵⁶ Although the parties agreed that Unangst had a disability, the court explained why this conclusion was mandated by the ADAAA:

The ADA was clearly intended by Congress to protect cancer patients from disability discrimination. *See* H. Rep. No. 101-485, pt. 3, at 29 (1990). Cancer is a “paradigmatic example of such an impairment.” *Adams v. Rice*, 531 F.3d 936, 952 (D.C.Cir. 2008). Plaintiff has further demonstrated that his chemotherapy treatment substantially limited his ability to perform major life activities, due largely to the fatigue and nausea he experienced as a result of the treatment. Plaintiff’s cancer

255. The District Court for the Eastern District of Pennsylvania also held that Michael Chalfont stated a claim that he had a disability based on a history of leukemia. *Chalfont v. U.S. Electrodes*, No. 10-2929, 2010 WL 5341846, at *9 (E.D. Pa. Dec. 28, 2010). Chalfont took leave from his job to receive chemotherapy from October 2007 until May 2008. *Id.* at *2. He was fired eight months after he returned to work when his cancer was in remission. *Id.* The court held that Chalfont had a disability because he took a seven-month leave of absence to receive chemotherapy for leukemia, which, though in remission when he was fired, “at times cause[d] him to be fatigued and subject to easy bleeding and bruising” and substantially limited “the major life activity of normal cell growth and circulatory function.” *Id.* at *9.

Other district courts have similarly held that cancer in remission is a disability under the ADAAA. The District Court for the Northern District of Indiana held that Stephen Hoffman’s renal cell carcinoma, which was in remission when he was fired, was a disability under the ADAAA. *Hoffman v. Carefirst of Fort Wayne, Inc.*, 737 F. Supp. 2d 976, 985 (N.D. Ind. 2012). Hoffman claimed that his employer would not accommodate his doctor’s advice that he work no more than forty hours per week. *Id.* at 982. The court rejected his employer’s argument that Hoffman was not disabled because his cancer was in remission and he could work forty hours per week. *Id.* at 984-85. Citing the EEOC regulations, the court held that “under the ADAAA, because Hoffman had cancer in remission (and that cancer would have substantially limited a major life activity when it was active), Hoffman does not need to show that he was substantially limited in a major life activity at the actual time of the alleged adverse employment action.” *Id.* at 985.

256. *Unangst v. Dual Temp Co., Inc.*, No. 10-6811, 2012 WL 931130, at *2 (E.D. Pa. Mar. 19, 2012).

diagnosis in late 2008 qualified him for the protections of the ADA at that time. Plaintiff was cancer-free as of February 2009, and cleared to return to work without restrictions.²⁵⁷

The trial court then correctly held that Unangst's cancer, though in remission when he was laid off, "would substantially limit a major life activity when active."²⁵⁸ Thus, the court held that Unangst had a disability as defined by the ADA.²⁵⁹

Even within the Fifth Circuit, the District Court for the Eastern District of Texas recognized that a plaintiff whose cancer was in remission could be classified as disabled under the ADAAA.²⁶⁰ One month after he returned to work as a sales manager from leave to receive treatment for kidney cancer, Michael Norton was fired.²⁶¹ The court recognized that under the ADAAA, "renal cancer is capable of qualifying as a disability under the ADA" because "when active," it "'substantially limits' the 'major life activity' of 'normal cell growth.'"²⁶² Relying on the EEOC regulations and interpretive guidance, the court found that it was of "no consequence" that plaintiff's cancer was in remission at the time of his alleged discrimination.²⁶³

Simply pleading that the plaintiff is a person with a disability because she had cancer, however, is not sufficient to state a claim under the ADAAA. The plaintiff still must allege sufficient facts to show how her cancer substantially limited a major life activity. Several cancer survivors have failed to earn their day in court because of insufficient pleadings.

LaTanya Brandon alleged that the school where she taught failed to accommodate her fatigue resulting from cancer treat-

257. *Id.* at *4 (citations omitted). In *Adams v. Rice*, the plaintiff alleged that the federal government (U.S. Department of State) denied her a position that required "world-wide availability" because she had been treated for breast cancer, thus the Rehabilitation Act, not the ADA, governed her claim. 531 F.3d 936, 939. The court held that Adams did not have a disability because she was "cancer-free" when she was rejected from the Foreign Service. *Id.* at 944. But it denied summary judgment to the State Department on its argument that Adams did not have a record of a disability. *Id.* at 954. The court found that Adams raised sufficient material facts to show that her breast cancer created a record of an impairment because it substantially limited her major life activity of engaging in sexual relations. *Id.* at 949.

258. *Id.*

259. *Id.*

260. *Norton v. Assisted Living Concepts*, 786 F. Supp. 2d 1173, 1185 (E.D. Tex. 2011).

261. *Id.* at 1178.

262. *Id.* at 1185.

263. *Id.* at 1185–86 (denying employer's motion for summary judgment).

ment.²⁶⁴ Even though the court acknowledged that the ADA lightens the burden of proof on the plaintiff, it held that “it remains the case that ‘not every impairment will constitute a disability’” and the plaintiff must still prove a substantial limitation.²⁶⁵ In dismissing Brandon’s complaint, the court found that Brandon’s vague pleadings were insufficient to prove disability:

Brandon has not alleged any facts other than that, upon returning to work, she “would experience fatigue” and “was not to engage in lifting objects.” The latter allegation seems to suggest an impairment of a “major life activity”—lifting—identified by the ADA as amended. However, without any additional factual detail, it is virtually impossible to determine whether Brandon’s impairment limited her ability to lift objects “as compared to most people in the general population.” . . . But absent any details as to how or why Brandon was limited in lifting—let alone any description of what kind of cancer she had or what kind of treatment she received or for how long—the Court simply cannot determine whether eighteen months after returning from medical leave Brandon was any more impaired in lifting her room supplies than any other teacher or any other person. That is not to say that the Court doubts that Brandon’s cancer proved extremely difficult for her. But to bring a legal claim against the Academy under the ADA, Brandon must provide some minimal details about what her condition was, what treatment she received for it, how long the treatment lasted, and how it affected her. She has not done so.²⁶⁶

In a similar case, the court granted summary judgment to Virginia Larson’s employer because Larson failed to offer any “evidence beyond her bare assertion” that her employer, who fired her four months after she concluded treatment for breast cancer, regarded her breast cancer as a disability.²⁶⁷ Lawson did not dispute her employer’s claim “that he did not know that she had a disability and he did not regard her as having a disability.”²⁶⁸

Finally, Michael O’Connell failed to state a viable claim that his cancer was a disability because he did not claim that his cancer sub-

264. *Brandon v. O’Mara*, 10 Civ. 5174 (RJH), 2011 WL 4478492, at *1 (S.D.N.Y. Sept. 28, 2011).

265. *Id.* at *7 (quoting 29 C.F.R. § 1630.2(j)(1)(ii)(2011)).

266. *Id.* (footnote omitted).

267. *Larson v. Del. Highlands AL Servs. Provider, LLC*, No. 10–2295–KHV, 2012 WL 1415521, at *5 (D. Kan. Apr. 24, 2012).

268. *Id.*

stantially limited any major life activities.²⁶⁹ O’Connell told his employer that he had undergone surgery to remove his testicle and a malignant tumor from his neck.²⁷⁰ O’Connell complained to an owner of the business that one of his supervisors repeatedly made disparaging comments about his surgery.²⁷¹ In his amended complaint, O’Connell alleged that the owner failed for two years to reprimand his supervisor, that the disparaging remarks caused stress that interfered with his ability to work, and that he was ultimately fired for complaining about his supervisor.²⁷² In granting the employer’s motion to dismiss, the court ruled that O’Connell’s amended complaint did “not plausibly allege that O’Connell’s cancer limited any major life activities.”²⁷³

V.

LESSONS FOR PLAINTIFFS’ ATTORNEYS

The introduction to this Article references Cathy Jamison, the protagonist of the television series *The Big C*, cautioning her student’s parent that if he insisted that she be fired because of her melanoma, he “better hire a damn good lawyer.”²⁷⁴ If Jamison were fired and decided to file a Title I complaint, she, too, would need a damn good lawyer to ensure that her claim would survive summary judgment.²⁷⁵ So what lessons have we learned from cancer survivors’ experiences as Title I claimants? How should plaintiffs’ attorneys craft a complaint to maximize the chance that their clients meet their burden of proving they have a disability, are regarded as having a disability, or have a record of a disability as defined by the ADAAA?²⁷⁶

First, plead details.²⁷⁷ For purposes of stating a claim, a court must accept the plaintiff’s factual narrative as true.²⁷⁸ Specify when

269. O’Connell v. Cont’l Elec. Constr. Co., No. 11 C 2291, 2011 WL 4916464, at *3 (N.D. Ill. Oct. 17, 2011) (dismissing the claim that the plaintiff was fired because of a disability).

270. *Id.* at *1.

271. *Id.*

272. *Id.* at *1–2.

273. *Id.* at *3.

274. See *The Big C: The Little C*, *supra* note 1.

275. *Id.*

276. These suggestions are relevant to plaintiffs with most impairments, not exclusively to those with cancer.

277. See *supra* text accompanying notes 264–73 (summarizing cases in which the plaintiff failed to allege sufficient facts to state an ADAAA claim).

278. A court must accept well-pled facts as true, though it can reject a plaintiff’s legal conclusions. *Ashcroft v. Iqbal*, 556 U.S. 662, 677 (2009) (“[T]he tenet

the plaintiff was diagnosed and with what type of cancer, what type of medical care the plaintiff received, how the plaintiff's cancer and its treatment affected the plaintiff's daily life, and every action the employer took that could possibly be related to the plaintiff's cancer history. In pleadings and discovery, flesh out the plaintiff's narrative by including expert testimony regarding the plaintiff's medical care—including prognosis, late effects, and side effects—as well as the plaintiff's posttreatment physical and mental abilities.

Thus, Cathy Jamison's complaint should detail:

- when she was diagnosed with cancer;
- the type of cancer and stage of diagnosis;
- the types of treatment she received;
- her physicians' recommendations for her care;
- the side effects and late effects of her treatment; and
- every employment event that could possibly be related to her cancer.

Second, plead that the plaintiff's cancer substantially limited as many major life activities as are supported by the facts.²⁷⁹ Almost all cancers substantially limit “the operation of a major bodily function, including . . . functions of the immune system [and] normal cell growth.”²⁸⁰ Moreover, during and after cancer treatment, many survivors are substantially limited in “eating, sleeping, standing, lifting, bending, reading, concentrating, thinking, [or] communicating.”²⁸¹ Never focus a complaint solely on how cancer substantially limits the plaintiff's ability to work. Although some survivors may prove that their cancer substantially limits their ability to work, working is the most problematic of the major life activities and should be pled only as an alternative argument.

Thus, Cathy Jamison should allege that her melanoma substantially limited not only her ability to work as a swim coach, but also that it substantially limited:

that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions.”).

279. Where Title I plaintiffs fail to allege which major life activities their cancer has effected, courts typically analyze whether the plaintiff was substantially limited in the major life activity of work. *See, e.g.*, *Burnett v. LFW, Inc.*, 472 F.3d 471, 483–84 (7th Cir. 2006).

280. 29 C.F.R. § 1630.2(i)(1)(ii); *see also* § 1630.2(j)(3)(iii).

281. 42 U.S.C. § 12102(2)(A) (Supp. V 2011); *see also* CANCER CARE FOR THE WHOLE PATIENT: MEETING PSYCHOSOCIAL HEALTH NEEDS 26–29 (Nancy Adler & Ann Page eds., 2008) (summarizing “cancer-induced physical stressors”); Bradley & Bednarek, *supra* note 21, at 196 (noting some cancer survivors had some degree of disability with multiple workplace limitations as a result of cancer and its treatment).

- the functions of her immune system;
- her normal cell growth; and
- her ability to sleep, concentrate, and think.

Third, describe how a survivor is substantially limited “without regard to the ameliorative effects of mitigating measures such as . . . medication . . . or prosthetics.”²⁸² Mitigating measures such as chemotherapy and other medications, radiation therapy, rehabilitation therapy, and prosthetics can improve the quality of a cancer survivor’s life. Their effects are irrelevant, however, in evaluating whether a survivor is disabled. Thus, Cathy Jamison should allege that although medication helped alleviate the nausea and fatigue caused by her treatment, without the mitigating effects of that medication, she would be substantially limited in at least one major life activity.

Fourth, allege that the plaintiff is covered by each potentially relevant, alternate definition of a person with a disability.²⁸³ For example, cancer survivors whose cancer was in remission at the time of the alleged discriminatory job action should claim both that they have a disability and that their cancer history establishes a record of impairment.²⁸⁴ Explain how the plaintiff’s cancer “would substantially limit a major life activity when active.”²⁸⁵ Thus, even if Cathy Jamison’s melanoma were in remission when she was fired as a swim coach, she should allege that her melanoma would have substantially limited a major life activity if it were active.

Fifth, cancer survivors who were cancer-free at the time of the adverse employment action, regardless of when they were initially diagnosed, should plead that their employer regarded them as having a disability.²⁸⁶ Simply put, explain how the employer adversely treated a cancer survivor “because” of his or her cancer.²⁸⁷ Thus, if

282. § 12102(4)(E).

283. See *supra* note 208.

284. See 29 C.F.R. § 1630, app. § 1630.2(k) (2011). See, e.g., *Farrish v. Carolina Commercial Heat Treating, Inc.*, 225 F. Supp. 2d 632, 636 (M.D.N.C. 2002) (holding that the plaintiff failed to show that the cancer in remission substantially limited a major life activity—therefore not proving a disability—while not considering sua sponte whether the plaintiff had a record of a disability); *Alderdice v. Amer. Health Holding, Inc.*, 118 F. Supp. 2d 856, 863 (S.D. Ohio 2000) (granting summary judgment to the employer where the plaintiff, whose cancer was in remission, did not allege that she had a record of a disability).

285. 42 U.S.C. § 12102(4)(D) (Supp. V 2011).

286. See *generally* 29 C.F.R. app. § 1630.2(l) (explaining that through the ADAAA, Congress broadened the application of the “regarded as” prong so a plaintiff need prove only that an employer treated an employee adversely because of an impairment).

287. § 1630, app. § 1630.2(l).

the producers of *The Big C* had cured Cathy Jamison of her melanoma, she could allege that her high school fired her because it capitulated to pressure from parents to replace “the lady with cancer” as their children’s swim coach, despite her coaching skills and successes.

CONCLUSION

Today’s Congress has been called everything from gridlocked to broken to dysfunctional for failing to see beyond intransigent partisanship to pass legislation.²⁸⁸ Congress is often called upon to amend ineffective or judicially emasculated legislation. Yet it seldom answers that call. But when judicial interpretation of the ADA ignored the statute’s purpose to provide remedies to disability-based employment discrimination and created significant barriers for cancer survivors to prove disability status under Title I, plaintiffs’ advocates had no choice but to turn to Congress to amend the statute and to the EEOC to revise Title I regulations. So is the ADAAA a law of intended consequences? Did Congress and the EEOC fix a broken ADA? Remarkably, the early cases suggest that they did.²⁸⁹

288. See, e.g., Ezra Klein, *Fourteen Reasons Why This Is the Worst Congress Ever*, WASHINGTON POST, July 13, 2012, 8:00 AM, <http://www.washingtonpost.com/blogs/wonkblog/wp/2012/07/13/13-reasons-why-this-is-the-worst-congress-ever/>.

Congressional inaction has been ripe fodder for comedians. For example, Jimmy Fallon joked: “Congress was broadcast live on Facebook for the first time in history. Now you can waste time and not get work done by watching Congress waste time and not get work done.” Kevin G. Barks, *Political Jokes of the Week*, KGB REPORT (Jan. 07, 2011, 8:51 AM), <http://www.kgbreport.com/archives/political-jokes-of-the-week/index.shtml>.

289. This Article was drafted less than four years after the passage of the ADAAA and less than two years after issuance of the new EEOC regulations. Commentators are just beginning to assess the effectiveness of the ADAAA for all individuals who face disability-based discrimination. The initial assessments seem to agree with the conclusions drawn in this Article. One commentator suggests that plaintiffs with “impairments that were previously denied coverage have survived the summary judgment phase of litigation [under the ADAAA] and anecdotal evidence indicates that it is now more common for parties to agree that a person is covered under the ADA and move to other issues.” E. Pierce Blue, *supra* note 228, at 38. Similarly, another commentator optimistically predicts that mediators will easily conclude whether the plaintiff has a disability and shift the focus of mediation to which “job functions are essential, whether an accommodation is indeed reasonable, the depth to which the parties engaged in the interactive process, and to what extent the defense of direct threat is applicable.” Mark Travis, *A Change in Focus—Mediation of Claims Under the ADA Amendments Act*, DISP. RESOL. MAG., Spring 2012, at 33, 36.