WORKING WITH CANCER: HOW THE LAW CAN HELP SURVIVORS MAINTAIN EMPLOYMENT

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Abstract: Advances in cancer treatment are saving lives, but along with the benefits come challenges. Millions of cancer survivors of working age need to support themselves and their families. This Article looks at the impact of cancer on employment starting with the empirical evidence gathered by researchers affiliated with medical centers. This empirical research provides a base, not previously explored in the legal literature, for assessing the existing laws dealing with cancer and employment (or unemployment). Viewing the law through this lens, which reveals the complex relationship between cancer and employment, exposes both the promise and the weakness of existing laws and offers ideas about legal changes that would better meet the needs of cancer survivors and their families.

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INTRODUCTION

Faced with a cancer diagnosis, chemistry teacher Walter White, protagonist of the popular television show *Breaking Bad*, turned to the drug trade to provide financial security for his family.[1] Dramatic potential notwithstanding, most cancer patients do not "break bad." Instead they are more like Sarah.[2] After working ten months for her current employer, Sarah was diagnosed with lung cancer, which requires regular chemotherapy treatments and surgery. Her employer, a hospital, has several hundred employees, many of whom are engaged in shift work. To accommodate her treatment, Sarah has been trading shifts with other employees to avoid working on treatment days, but her supervisor has objected and threatened to fire her for being unable to work her regularly scheduled shift. In addition, the supervisor has begun to

1. *About the Show: Breaking Bad*, AMC, http://www.amc.com/shows/breaking-bad/exclusives/about (last visited Apr. 24, 2015).

2. Sarah is not a real person but a composite of cases handled by a nonprofit organization that assists individuals with cancer and their families with legal issues arising from their cancer. *See infra* note 4 and accompanying text.

criticize her job performance, despite her stellar review after six months of employment. The stress from fear of job loss has compounded the stress from the cancer diagnosis. Like most employees, Sarah's health insurance is through her employer. She is facing surgery and has only accumulated two weeks of paid sick leave, a generous amount considering her short tenure, which she has been saving for the surgery and recovery. She is ineligible for more, either by law or employment policy, because of her length of employment. Although the doctors have offered her hope that treatment will provide a good chance of survival, she is uncertain whether she will be able to return to full-time work within two weeks of the surgery. Sarah needs to support herself and her family now and in the future, and needs continued health insurance to pay for treatment. Sarah's situation is typical of many cancer patients.

Cancer is no longer a death sentence. As a result of significant advances in cancer treatment, individuals with cancer are living longer. In many cases, cancer is now a chronic disease rather than a fatal one. These advances in medicine, however positive, come with costs for the survivors and society. The treatments that preserve lives are often expensive. In addition to paying for treatment, individuals with cancer must continue to support themselves and their families during and after treatment. Indeed, as former Justice Sandra Day O'Connor discovered during her own cancer treatment, maintaining employment can assist in battling cancer: "As tired and stressed out as I was, I had a job that was hard and important and was always there for me to do."[3]

Despite the need to maintain employment and the benefits of doing so, many individuals with cancer or a history of cancer are either unemployed or underemployed. Because health insurance is tied to employment for many in the United States, the lack of employment may lead to inability to pay for treatment and necessary follow-up. Not surprisingly, unemployment leads to credit problems and bankruptcy. Accordingly, the changing face of cancer imposes both individual and societal costs.

Not all cancers fit this picture, however. Cancer ranges from the basal cell carcinoma that is treated in one or two doctor visits to advanced liver cancer that is rapidly fatal. Moreover, even within cancer types, researchers are discovering that cancer is not one, but many different diseases. The treatment and effects vary widely. What unites most

3. Jess Bravin et al., *For Some Justices, the Bush-Gore Case Has a Personal Angle—Scalia and Thomas Were Campaign Flashpoints; Two Owe Jobs to Clinton—A Son at Bush's Law Firm*, WALL ST. J., Dec. 12, 2000, at A1, A14.1. Thanks to Louis P. Pfeffer for bringing this quote to my attention.

cancers, however, is the long-term and life-changing consequences of the disease. Survivors live with continual follow-up, lasting effects of treatment, and the possibility and reality of recurrence and further treatment.

As the medical profession has advanced in cancer treatment, the law has fallen behind in addressing the needs of cancer survivors. When cancer patients almost inevitably died, and rather quickly, the major intersection of law and cancer was in providing for the patient's survivors after death. As survival becomes the norm, issues of health insurance coverage, employment, and disability benefits for the cancer survivor come to the fore. While the law addresses each of these issues in various ways, none are precisely tailored to the evolving needs of cancer survivors.

Because cancer affects millions of Americans, this Article seeks to begin a dialogue about the best way for the law to address the needs of survivors and their families. The focus on cancer derives from extensive personal experience with the legal needs of cancer patients.[4] Focusing on cancer is also appropriate because of the sheer number of individuals affected, the substantial anticipated growth in the number of survivors in the future, and the staggering cost of lost productivity resulting from cancer.[5] But in many ways the issues discussed in this Article are not unique to cancer, as survival rates have increased for other chronic diseases such as HIV,[6] diabetes, and heart disease, raising similar public policy issues at the intersection of law and medicine.[7] Thus, this examination of cancer and law may provide lessons for other illnesses as well.

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4. The author co-founded LINC, an organization designed to meet the legal needs of cancer patients. *The Founders: Who Started LINC?*, CANCERLINC, http://www.cancerlinc.org/?page_id=2025 (last visited May 21, 2015).

5. *See infra* notes 11–33.

6. Although the number of individuals with HIV is much smaller than those with cancer, individuals with HIV have seen similar increases in survival rates and face some similar issues in employment. *See* Brent Braveman et al., *HIV/AIDS and Return to Work: A Literature Review One-Decade Post-Introduction of Combination Therapy (HAART)*, 27 WORK 295, 295, 299–301 (2006) (noting the approximately 850,000–950,000 individuals living with HIV in the United States and various barriers limiting their return to work); Caroline Palmer & Lynn Mickelson, *Many Rivers to Cross: Evolving and Emerging Legal Issues in the Third Decade of the HIV/AIDS Epidemic*, 28 WM. MITCHELL L. REV. 455, 477–79 (2001) (identifying discrimination and the need for accommodation as issues for individuals with HIV and noting the importance of the Americans with Disabilities Act, Family Medical Leave Act, Rehabilitation Act, and similar state laws in dealing with those problems).

7. *See* Elizabeth Pendo, *Working Sick: Lessons of Chronic Illness for Health Care Reform*, 9 YALE J. HEALTH POL'Y L. & ETHICS 453, 455 (2009) (identifying the need to address chronic illness in proposals for health care reform).

This Article begins with a discussion of the scope of the issue, examining the prevalence of cancer, the increases in survival rates, and the impact of cancer on employment, as well as the effects of unemployment and underemployment of cancer survivors.[8] Having explored the problem, this Article then moves to the normative goals that the law should seek to achieve for cancer patients. Finally, this Article focuses on two laws that are designed to preserve and promote employment of individuals with health conditions such as cancer: the Americans with Disabilities Act ("ADA")[9] and the Family Medical Leave Act ("FMLA").[10] As the Article considers the effects of these laws, it will apply them to Sarah, the hypothetical but typical cancer patient, as an example of their impact.

After analyzing these laws, this Article concludes that while recent amendments to the ADA benefit cancer survivors, neither the ADA nor the FMLA as currently constituted is sufficient to provide the protection needed by individuals with cancer to enable them to maintain and obtain employment. Recommendations for legal changes that might provide better support follow. This is only the first step in an analysis of the variety of laws that impact the ability of survivors to support themselves and their families and maintain the health insurance coverage required to obtain the continuing treatment they need.

I. THE NEW FACE OF CANCER

In the United States alone, there are nearly 14.5 million cancer survivors.[11] Almost 1.7 million people will be diagnosed with cancer in 2015.[12] Estimates are that the number of cancer survivors will double between 2010 and 2020.[13] These increasing numbers result from

8. Definitions of "cancer survivor" and determinations of when a cancer patient becomes a survivor vary. *See* INST. OF MED., FROM CANCER PATIENT TO CANCER SURVIVOR: LOST IN TRANSITION 23–30 (Maria Hewitt et al. eds., 2006) [hereinafter IOM REPORT]. For simplicity, this Article will use the National Cancer Institute's Office of Cancer Survivorship definition, adopted from the National Coalition of Cancer Survivors: "An individual is considered a cancer survivor from the time of diagnosis, through the balance of his or her life." *Id.* at 29.

9. 42 U.S.C. §§ 12101–12213 (2012).

10. 29 U.S.C. §§ 2601–2654 (2012).

11. AM. CANCER SOC., CANCER FACTS AND FIGURES 2015, at 1 (2015) [hereinafter FACTS AND FIGURES], *available at* http://www.cancer.org/acs/groups/content/@editorial/documents/document/acspc-044552.pdf.

12. *Id.*

13. Michael P. Markowski, Three Essays on Cancer Survivorship and Labor Supply 6 (Dec. 2010) (unpublished Ph.D. dissertation, Pennsylvania State University) (on file with author). Other estimates vary, with one suggesting a more than thirty percent increase to eighteen million

improvements in the relative survival rate[14] of many cancers. For all cancers diagnosed between 2004 and 2010, the five-year survival rate was about two-thirds.[15]As recently as 1960, only one quarter of those diagnosed survived for five years,[16] and by 1975–77, it remained less than half.[17] For some cancers the increase in survival rates is dramatic, while for a few the rate is relatively flat or even slightly decreasing.[18] Overall, however, the number of cancer survivors is growing rapidly because the most common cancers—breast, colorectal and prostate[19]—have increased survival rates.[20] Indeed, these cancers account for half of all survivors.[21] These improved survival rates result from both earlier diagnosis and more effective treatments.[22] Not only is the survival rate increasing, but the number of individuals diagnosed with cancer is also increasing. In the United States alone, new cancer cases exceed one million per year, and are expected to increase to more than two million per year by 2050.[23]

As the number of individuals diagnosed and the survival rate increase, there are more cancer survivors of working age. Current estimates are that about forty percent of cancer survivors are between the ages of

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American survivors. Donatus U. Ekwueme et al., *Medical Costs and Productivity Losses of Cancer Survivors—United States, 2008–2011*, 63 MORBIDITY & MORTALITY WKLY. REP. 505, 505 (2013) (reporting on Centers for Disease Control research). Regardless of the exact number it is clearly significant, affecting millions of Americans.

14. This rate compares the survival of individuals with cancer to others of similar age, race, and sex without a cancer diagnosis. FACTS AND FIGURES, *supra* note 11, at 51.

15. *Id.* at 18.

16. Guy Maytal & John Peteet, *The Meaning of Work*, *in* WORK AND CANCER SURVIVORS 105, 105 (Michael Feuerstein ed., 2009).

17. FACTS AND FIGURES, *supra* note 11, at 18.

18. For example, the survival rate of prostate cancer increased from sixty-eight percent in 1975–77 to greater than ninety-nine percent in 2004–10 and for non-Hodgkins lymphoma from forty-seven percent to seventy-one percent for the same time period. *Id.* For pancreatic cancer, the survival rate increased from three percent to seven percent, statistically significant but still very low. *Id.* For uterine corpus cancer the rate actually declined from eighty-seven percent to eighty-three percent. *Id.*

19. IOM REPORT, *supra* note 8, at 49, 54, 57.

20. The increases in survival rates between 1975–77 and 2004–10 for these cancers are as follows: (1) Breast: seventy-five to ninety-one percent; (2) Colon: fifty-one to sixty-five percent; (3) Rectum: forty-eight to sixty-eight percent; and (4) Prostate: sixty-eight to over ninety-nine percent. FACTS AND FIGURES, *supra* note 11, at 18.

21. IOM REPORT, *supra* note 8, at 45.

22. FACTS AND FIGURES, *supra* note 11, at 2.

23. Richard J. Butler et al., *Economic Burden*, *in* WORK AND CANCER SURVIVORS, *supra* note 16, at 25. This estimate is based on both the increase in population and the aging of the population. *Id.*

twenty and sixty-four.[24] As diagnosis and treatment continue to improve, the number of cancer survivors of prime working age will grow as well. This Article focuses on this growing population of survivors.

II. CANCER AND WORK

A. The Relationship of Cancer and Work

The changing nature of cancer has focused the interest of health care providers and policy makers on survivorship.[25] As aptly stated in the Institute of Medicine's major report on survivorship, survivorship is "a medical and social condition with major economic implications."[26]A recent study of cancer survivors by the Centers for Disease Control found the average productivity losses and medical costs per person were significantly higher for cancer survivors than for individuals without a history of cancer.[27] A major component of the survivorship focus is work, for reasons impacting both individual survivors and the economy. The National Institutes of Health estimates the national cost of cancer at $263.8 billion, with more than half of that due to lost productivity resulting from both the effects of the illness and premature death.[28] Billions of work days are lost or affected by cancer.[29] Additionally, employees may be deterred from job changes because of fears about the impact on health insurance, creating an economically inefficient result that prevents the best use of employee talents.[30] Loss of income due to illness is a major contributor to bankruptcy in the United States.[31] A

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24. Markowski, *supra* note 13, at 7; *see also* IOM REPORT, *supra* note 8, at 32 (indicating that in 2002 thirty-eight percent of cancer survivors were between the ages of twenty and sixty-four).

25. IOM REPORT, *supra* note 8, at 23–30 (describing the development of advocacy groups and establishment of the Office of Cancer Survivorship in the National Cancer Institute to focus research on survivorship as a result of the increase in survivors).

26. *Id.* at 20.

27. Ekwueme et al., *supra* note 13, at 506.

28. Markowski, *supra* note 13, at 7. A study by Butler, Johnson, and Gubler reached similar results, finding that productivity losses from cancer, about $145 billion per year, were twice the direct cost of cancer treatment, about $74 billion per year. Butler et al., *supra* note 23, at 25, 69.

29. Markowski, *supra* note 13, at 7.

30. STEPHEN F. BEFORT & JOHN W. BUDD, INVISIBLE HANDS, INVISIBLE OBJECTIVES: BRINGING WORKPLACE LAW AND PUBLIC POLICY INTO FOCUS 60 (2009) (describing the deterrent effect of fear of loss of health insurance coverage in general as a "market failure that decreases the efficiency of the U.S. economy").

31. David U. Himmelstein et al., *Medical Bankruptcy in the United States, 2007: Results of a National Study*, 122 AM. J. MED. 741, 741 (2009), *available at* http://www.amjmed.com/article/S0002-9343%2809%2900404-5/fulltext?refuid=S0002-9343%2809%2900525-7&refissn=0002-9343 (finding that sixty-two percent of bankruptcies in 2007 were caused by medical reasons,

cancer diagnosis significantly increases the likelihood of bankruptcy.[32] Additionally, the likelihood of home foreclosure increases significantly in the five years following a cancer diagnosis.[33] These bankruptcies and foreclosures impose both individual and societal costs.

While these productivity and financial losses are important to society, from an individual and family perspective, cancer and employment have a complex relationship. For some, work may be a source of normality and distraction from the disease, providing a psycho-social benefit to the patient.[34] For others, work may be a necessity to maintain financial resources and the health insurance that provides access to essential treatment.[35] But the security provided by continuing work may be unavailable to those whose cancer and its effects make working difficult or impossible.[36] Among the effects of cancer and cancer treatment that may limit the ability to work are: the immune suppression effects of certain therapies that require avoiding close contact with people who might carry infectious bacteria; physical limitations, such as difficulty speaking, lifting, walking, or standing; cognitive or other mental limitations due to either brain cancers, metastases, or chemotherapy effects; depression; and fatigue.[37]

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including significant medical costs, loss of income, and/or mortgaging a home to pay medical bills). The study found that most of the debtors were middle class, well-educated and homeowners and most had health insurance at the beginning of their illness. *Id.* More than a third of the families impacted suffered job loss, either the patient or a caregiver. *Id.*

32. Scott Ramsey et al., *Washington State Cancer Patients Found to Be at Greater Risk of Bankruptcy Than People Without a Cancer Diagnosis*, 32 HEALTH AFFAIRS 1143, 1143 (2013) (finding that cancer patients were 2.65 times more likely to file for bankruptcy than those without cancer and younger patients were more likely to file than older patients, perhaps because the latter had access to Social Security and Medicare benefits).

33. Arpit Gupta et al., *Cancer Diagnoses and Household Debt Overhang* 4 (Columbia Law & Econ. Working Paper No. 514, 2015), *available at* http://ssrn.com/abstract=2583975 (finding a sixty-five percent increase in the likelihood of foreclosure in the five years post-diagnosis). Those with more advanced cancers had an even greater risk of foreclosure. *Id.* The authors found that those with substantial equity in their homes did not have an increase in foreclosure rates, however. *Id.*

34. *See* V.S. Blinder et al., *Employment After a Breast Cancer Diagnosis: A Qualitative Study of Ethnically Diverse Urban Women*, 37 J. COMMUNITY HEALTH 763, 763 (2011); Maytal & Peteet, *supra* note 16, at 113; Corine Tiedtke et al., *Experiences and Concerns About 'Returning to Work' for Women Breast Cancer Survivors: A Literature Review*, 19 PSYCHO-ONCOLOGY 677, 680 (2010) (meta-analysis of six studies from three countries); *supra* note 3 and accompanying text (quoting Justice O'Connor's statement regarding how her ability to continue her important work on the Court helped her cope with cancer).

35. Maytal & Peteet, *supra* note 16, at 113; Tiedtke et al., *supra* note 34, at 680.

36. *See* Pamela Farley Short et al., *Employment Pathways in a Large Cohort of Adult Cancer Survivors*, 103 CANCER 1292, 1292 (2005) (showing long-term effects of cancer on ability to work).

37. Ekuweme et al., *supra* note 13, at 507; Maytal & Peteet, *supra* note 16, at 115.

Many of these effects last long after treatment is completed.[38] And today some drug therapies for cancer continue for extended periods of time, prolonging the effects of treatment.[39] For some patients, continuing work during treatment may make recovery more difficult by interfering with treatment protocols, while for others returning to work too quickly may exacerbate the effects of treatment, such as fatigue, impairing long term recovery.[40] On the other hand, some patients may alter their preferences for time allocation as a result of cancer, preferring more leisure time to work where economically feasible, or changing to a more desirable job.[41]

Patients who continue to work during treatment may gain more than income and insurance. Their commitment may solidify their employment relationship, making retention and promotion more likely in the future.[42] Ceasing to work, even temporarily, may alter an employee's career trajectory, making it more difficult to get desirable future employment.[43] Working patients also may enjoy the social support of fellow employees.[44]

This complex set of factors results in several possible employment outcomes for cancer patients and survivors. The individual may continue to work throughout treatment, recovery, and post-treatment survival. Alternatively, the individual may voluntarily cease employment at any point during this trajectory of survivorship, either as a result of problems in maintaining employment due to the cancer or in order to spend time on alternative pursuits deemed of higher value. The third alternative is that the employee is involuntarily terminated as a result of the cancer, for some unrelated reason, or a combination of the two. Finally, because cancer incidence increases with age, some employees may choose to retire, either because it has become a more attractive choice as a result of the illness or because of the difficulty of working combined with eligibility for retirement benefits to provide income.

As is evident from the prior description of alternatives, the

38. Kathleen Oberst et al., *Work Task Disability in Employed Breast and Prostate Cancer Patients*, 4 J. CANCER SURVIVORSHIP 322, 323 (2010).

39. IOM REPORT, *supra* note 8, at 17.

40. Joanna Pryce et al., *Cancer Survivorship and Work: Symptoms, Supervisor Response, Co-Worker Disclosure and Work Adjustment*, 17 J. OCCUPATIONAL REHABILITATION 83, 90–91 (2006); Tiedtke et al., *supra* note 34, at 680–81.

41. IOM REPORT, *supra* note 8, at 364; Tiedtke et al., *supra* note 34, at 681.

42. Markowski, *supra* note 13, at 24.

43. Cathy J. Bradley et al., *Breast Cancer Survival Work and Earnings*, 21 J. HEALTH ECON. 757, 777 (2002) [hereinafter *Breast Cancer Survival*].

44. IOM REPORT, *supra* note 8, at 364.

employment status of the patient/survivor may vary over time as the cancer status changes. Other than binary employment outcomes, cancer may reduce voluntary job changes by employees because of concerns about insurance or discrimination or cause on the job employment problems such as harassment or discrimination.[45] Additionally, employees may reduce or increase work hours or change jobs because of cancer and its effects.[46]

The relationship of cancer and work may change based on the employee's stage of survivorship. Like cancer, which is staged based on the individual's medical condition,[47] survivorship has stages or "seasons."[48] "Acute survival" starts with diagnosis and continues with treatment.[49] This stage is characterized by fear and anxiety.[50] The second season, "extended survival," is the period of remission or the end of the initial, intensive course of treatment.[51] During this phase, the individual is monitored closely and may have some additional treatment, depending on the cancer and its medical stage at diagnosis.[52] The survivor is dealing with fear of recurrence and any residual physical effects of treatment such as fatigue, loss of strength, and perhaps loss of some part of the body.[53] At the same time, the survivor is integrating back into daily life.[54] The final season is "permanent survival," which is considered a cure, but the mental and physical effects of cancer often remain with the survivor during this stage.[55] Any recurrence of cancer

45. *Id.* at 369–70.

46. Cathy J. Bradley et al., *Breast Cancer and Women's Labor Supply*, 37 HEALTH SERV. RES. 1309, 1320–23 (2002) [hereinafter *Breast Cancer and Women's Labor*] (finding that women working after a breast cancer diagnosis work more hours per week than those without breast cancer); Anja Mehnert, *Employment and Work-Related Issues in Cancer Survivors*, 77 CRITICAL REV. ONCOLOGY/HEMATOLOGY 106, 124 (2011) (finding most studies in meta-analysis that analyzed work hours showed reduction in hours by cancer survivors with some studies showing significant job changes as well). Possible explanations for the increase in hours may be an effort to recover savings depleted by treatment or a renewed commitment to work as a result of the cancer. *Id.* at 1325.

47. For a description of cancer staging, see FACTS AND FIGURES, *supra* note 11, at 2–3, 17.

48. IOM REPORT, *supra* note 8, at 28. These "seasons" were first described by Fitzhugh Mullan, a founder of the National Coalition of Cancer Survivors in an article in the New England Journal of Medicine. *Id.* at 27–28.

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

will begin the seasons anew. Employment may be affected by the physical or mental and emotional impacts of the particular stage of survivorship. One who ceased working voluntarily or involuntarily may choose to return to employment at a later stage of survival. This relationship is reflected in the research on the determinants of employment, which is addressed in the next section.

B. Determinants of Employment

Medical researchers have investigated the determinants of employment for cancer patients and survivors to assess how employment affects, and is affected by, diagnosis and treatment. The goal of this research is to determine how to ensure the best medical outcome for cancer patients. The research also enables an assessment of the current legal protections and benefits for cancer survivors and a determination of whether they are sufficient to ensure that these survivors can support themselves and their families after diagnosis and obtain the necessary medical treatment for their condition. A review of the existing research follows.

Cancer affects employment adversely in every stage of survival. Cancer survivors are less likely to be working than similar individuals without cancer.[56] Such a relationship is not unexpected, given the serious health implications of cancer and cancer treatment.[57] Cancer causes

56. A meta-analysis of a number of studies of cancer and employment found that "cancer survivors were 1.37 times more likely to be unemployed than healthy control participants." Angela G.E.M. de Boer et al., *Cancer Survivors and Unemployment, a Meta-Analysis and Meta-Regression*, 301 J. AM. MED. ASS'N 753, 760 (2009); *see also Breast Cancer and Women's Labor*, *supra* note 46, at 1324–25 (finding that women with breast cancer are less likely to work than women without breast cancer even when controlling for health status); Cathy J. Bradley et al. *Short-Term Effects of Breast Cancer on Labor Market Attachment: Results from a Longitudinal Study*, 24 J. HEALTH ECON. 137, §§ 2, 5.2, 5.3 (2005) [hereinafter *Short-Term Effects*] (finding that women with breast cancer were less likely to work in the six months following diagnosis than a control group. Also, those who continued to work, worked fewer hours than the control group. This Article cites other studies showing declines in work); Butler et al., *supra* note 23, at 59, 67 (finding "cancer survivors on average never fully recover to their pre-cancer levels of employment" and specifically that the employment rate of colon cancer survivors is twenty percent lower than for others of similar age); Mehnert, *supra* note 46, at 122 (conducting a meta-analysis of sixty-four studies and finding that cancer survivors had lower rates of employment, although their employment increased over time after diagnosis. On average 63.5% returned to work).

57. The meta-analysis found based on some of the studies that the disability risk was higher for cancer survivors, which might well explain the difference in employment rates. de Boer, *supra* note 56, at 761. Further, unemployment rates are higher with certain cancer diagnoses, which correlates with the physical effects of the cancer and treatment. *Id.*; *see also* Short et al., *supra* note 36, at 1292–93 (showing twenty percent of 1433 cancer survivors followed over time had cancer-related disabilities at follow-up, with half of those working despite the disability); Oberst et al., *supra* note 38, at 326 (finding cancer-related disability rates in breast and prostate cancer survivors declining

greater work impairment than other serious medical issues.[58] Research has also demonstrated, however, that many survivors return to work over time.[59] The most drastic effects on employment occur in the first year after diagnosis, typically the acute survival stage.[60] Nevertheless, many cancer survivors have some residual disability that affects their ability to work.[61] A study of survivors with a wide variety of cancers showed that functional limitations affected survivors' ability to work.[62] Among the tasks that created some difficulty were heavy lifting, keeping up a pace

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over time but still present for some patients eighteen months after diagnosis and negatively related to employment); Pamela Farley Short et al., *Work Disability Associated with Cancer Survivorship and Other Chronic Conditions*, 17 PSYCHO-ONCOLOGY 91 (2008) (finding cancer survivors had disability rates higher than the general population, but about the same as those with other chronic conditions).

58. IOM REPORT, *supra* note 8, at 370–71.

59. *See* Cathy J. Bradley & Heather L. Bednarek, *Employment Patterns of Long-Term Cancer Survivors*, 11 PSYCHO-ONCOLOGY 188, 193 (2002) (finding that of sixty-seven percent of patients working at their cancer diagnosis were working five-to-seven years later); Mehnert, *supra* note 46, at 122 (conducting a meta-analysis of sixty-four studies which showed steady increase in return to work by survivors over time); Evelien R. Spelten et al., *Factors Reported to Influence the Return to Work of Cancer Survivors: A Literature Review*, 11 PSYCHO-ONCOLOGY 124, 127–28 (2001).

60. *See* Cathy J. Bradley, *Absenteeism from Work: The Experience of Employed Breast and Prostate Cancer Patients in the Months Following Diagnosis*, 15 PSYCHO-ONCOLOGY 739, 739–40 (2006) [hereinafter *Absenteeism*] (finding thirty percent of breast and prostate cancer patients who were working prior to diagnosis were not working six months after diagnosis and those who continued to work worked fewer hours); Cathy J. Bradley et al., *Employment and Cancer: Findings from a Longitudinal Study of Breast and Prostate Cancer Survivors*, 25 CANCER INVESTIGATION 47, 49– 51 (2007) [hereinafter *Employment and Cancer*] (finding breast and prostate cancer survivors were less likely to be employed six months after diagnosis, but at twelve and eighteen months after diagnosis, many had returned to work and employment was not lower than in a control group); Short et al., *supra* note 36, at 1296 (finding in study of 1433 cancer survivors that forty-one percent of males and thirty-nine percent of females stopped working during treatment but most would return to work within a year of diagnosis); Corné A. Roelen et al., *Sickness Absence and Full Return to Work After Cancer: 2-Year Follow-up of Register Data for Different Cancer Sites*, 20 PSYCHO-ONCOLOGY 1001, 1001 (2011) (finding seventy-three percent of cancer survivors working before diagnosis fully returned to work after a median duration of 290 days and within two years of diagnosis, most had returned to work).

61. Bradley & Bednarek, *supra* note 59, at 193 (finding that twenty-four percent of survivors of lung, colorectal, breast, and prostate cancer who were working at the time of their cancer diagnosis but were not working five-to-seven years later stopped working because of poor health or disability); de Boer et al., *supra* note 56, at 761; *Employment and Cancer*, *supra* note 60, at 51–52 (reporting that breast and prostate cancer survivors indicated that cancer interfered with various physical and cognitive tasks required by their jobs twelve months after diagnosis); Short et al., *supra* note 36, at 1296 (finding twenty percent of survivors in cohort of 1433 reported some residual disability and eleven percent of survivors who returned to work after treatment left work for cancer-related reasons in the next three years while nine percent of survivors who worked through treatment left work for cancer-related reasons within four years of diagnosis).

62. Michal C. Moskowitz et al., *Function and Friction at Work: A Multidimensional Analysis of Work Outcomes in Cancer Survivors*, 8 J. CANCER SURVIVORSHIP 173, 177 (2014).

of work, concentration, learning new tasks, and analyzing data.[63] A residual disability may cause job changes or reductions in hours and may require some accommodation by the employer.

Researchers have analyzed the effects of cancer on employment to determine what factors impact whether survivors maintain employment during and after treatment, and whether survivors reduce or increase hours worked. Some studies have focused on particular cancers—commonly breast and prostate—which have high survival rates,[64] while others have studied all cancer survivors. Studies are often limited to the populations in particular geographic areas surrounding major cancer treatment centers, although a few have aggregated multiple studies. A number of factors appear to affect employment. Among them are the following: (1) type and stage of cancer; (2) physical and mental health during and following treatment, including both the impact of the cancer and the effects of treatment; (3) demographic factors such as race, ethnicity, gender, and age; (4) type of job; (5) source of health insurance; and (6) employer support and accommodation. The following sections analyze the impact of these factors as revealed by various studies.

1. Cancer and Treatment Factors

Not surprisingly, the type and stage of cancer has been shown to affect employment in many studies.[65] Some cancers are more debilitating than others. Later stage cancers are more debilitating than cancers diagnosed at earlier stages. Lung cancer and most head and neck cancers are negatively associated with work, while testicular cancer, melanoma, and thyroid cancer appear to cause few work limitations.[66] Brain, bone, liver, pancreatic, rectal, and blood cancers also significantly reduce employment[67] as do breast cancer, gastrointestinal cancers, and female reproductive cancers.[68] Studies of prostate cancer and

63. Bradley & Bednarek, *supra* note 59, at 196.

64. Breast cancer survivors comprise both the largest percentage of all survivors and the largest percentage of female survivors. Cathy J. Bradley et al., *Does Employer-Provided Health Insurance Constrain Labor Supply Adjustments to Health Shocks? New Evidence on Women Diagnosed with Breast Cancer*, 32 J. HEALTH ECON. 833, 835 (2013) [hereinafter *Employer-Provided Health Insurance*].

65. Mehnert, *supra* note 46, at 123 (meta-analysis of sixty-four studies showing type and stage of cancer affected probability of working).

66. Butler et al., *supra* note 23, at 58; de Boer et al., *supra* note 56, at 757–58; Roelen et al., *supra* note 60, at 1003–04; Spelten et al., *supra* note 59, at 124, 126, 128.

67. Butler et al., *supra* note 23, at 58; de Boer et al., *supra* note 56, at 757–58.

68. de Boer et al., *supra* note 56, at 757–58; *Employer-Provided Health Insurance*, *supra* note 64, at 835; Spelten et al., *supra* note 57, at 126; *Short-Term Effects*, *supra* note 56, § 5.2.

employment show mixed results.[69] Later stage cancers adversely affect work in most studies[70] but not for all cancers; a study of Hodgkins and lymphoma patients showed no relationship between cancer stage and work.[71] Survivors with a recurrence, metastasis, or second primary cancers have lower employment rates and work hours compared to the general population than survivors who are cancer free, although both groups suffer reduced employment for as long as two to six years after diagnosis.[72]

The physical and mental effects of cancer and treatment also impact work, again a result that is not surprising.[73] Cancer-related disabilities cause employees to leave the workplace.[74] In a study of breast and prostate cancer patients, the type of treatment had the greatest impact on absenteeism from work for those who continued to work.[75] Fifty-two percent of those receiving chemotherapy stopped working.[76] Physical and psychological symptoms caused reduced hours or changes in their occupational role for survivors in another study.[77] Some cancer

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69. *See* Butler et al., *supra* note 23, at 52, 58 (finding higher unemployment for prostate cancer survivors); de Boer et al., *supra* note 56, at 758 (finding no higher risk of unemployment for prostate cancer survivors); *Employment and Cancer*, *supra* note 60, at 50–51 (finding reduced employment for prostate cancers six months after diagnosis but no statistically significant reduced employment twelve and eighteen months after diagnosis).

70. Reynard R. Bouknight et al., *Correlates of Return to Work for Breast Cancer Survivors*, 24 J. CLINICAL ONCOLOGY 345, 348–49 (2006) (finding women with advanced stage breast tumors had a reduced likelihood of returning to work); Short et al., *supra* note 36, at 1298; Spelten et al., *supra* note 59, at 128.

71. Spelten et al., *supra* note 59, at 128. *But see* Short et al., *supra* note 36, at 1297, 1298 (showing that Stage IV blood and lymph cancers adversely affected employment).

72. John R. Moran et al., *Long-Term Employment Effects of Surviving Cancer*, 30 J. HEALTH ECON. 505, 509–10 (2011).

73. *See* Mehnert, *supra* note 46, at 123–24 (showing impact of treatment on working).

74. Bradley & Bednarek, *supra* note 59, at 193; de Boer et al., *supra* note 56, at 761 (meta-analysis showing reasons for unemployment were "physical limitations, cancer-related symptoms, or both"); Oberst et al., *supra* note 38, at 326. In using the term disability here I use it as used in the studies, not as a legal definition of disability under any particular statute or disability plan.

75. *Absenteeism*, *supra* note 60, at 743–44; *see also* Mahasin S. Mujahid et al., *Racial/Ethnic Differences in Job Loss for Women with Breast Cancer*, 5 J. CANCER SURVIVORSHIP 102, 109 (2009) (finding more aggressive treatment associated with higher levels of absenteeism).

76. *Absenteeism*, *supra* note 60, at 742. In another study, Hassett found that chemotherapy adversely affected employment of women with breast cancer. Michael J. Hassett et al., *Factors Influencing Changes in Employment Among Women with Newly Diagnosed Breast Cancer*, 115 CANCER 2775, 2778 (2009) (finding women receiving chemotherapy had "1.8-fold greater risk of experiencing a change in employment versus women who were not receiving chemotherapy"). When age was considered, there was a statistically significant association for women over age fifty-one, but not those age fifty-one and under. *Id.*

77. John F. Steiner, *The Impact of Physical and Psychosocial Factors on Work Characteristics After Cancer*, 17 PSYCHO-ONCOLOGY 138, 140–41 (2008).

survivors, however, with an average of seven years post-diagnosis, worked more hours and had higher pay than a control group.[78]

2. Demographic Factors

Several studies have found that race and ethnicity are associated with employment and cancer.[79] African-American women were less likely to remain employed following breast cancer diagnosis.[80] Similarly, low-income Latinas were less likely to be employed at six and eighteen months after a breast cancer diagnosis than low-income, non-Latina whites.[81] Type of work, with more physical jobs associated with lower levels of employment, was a factor in the disparity, but did not fully explain the difference.[82] The authors posited that lack of knowledge of lymphedema, a frequent complication of breast cancer surgery and its treatment, might be an additional causative factor.[83] And another study found that independent of socio-demographic factors, Latina women were more likely to suffer unemployment as a result of breast cancer than white women, but found no similar difference between African-American and white women.[84] Researchers theorized that the differences might result from problems "navigating the health care system and in turn balancing work and treatment"[85] and/or language barriers or other

78. *Breast Cancer and Women's Labor*, *supra* note 46, at 1325; *Breast Cancer Survival*, *supra* note 43, at 769. The women in the study tended to be white, married, and well-educated, which may have affected the results. Women in that demographic are more likely to have jobs without physical demands that might limit the ability to work. *See infra* notes 93–99 and accompanying text. The women also may have been working more to replace lost income. *Infra* notes 93–99 and accompanying text.

79. *See* Steiner, *supra* note 77, at 145; *infra* notes 80–86 (citing relevant Articles).

80. Bouknight et al., *supra* note 70, at 348, 351; Cathy J. Bradley & Amber Wilk, *Racial Differences in Quality of Life and Employment Outcomes in Insured Women with Breast Cancer*, 8 J. CANCER SURVIVORSHIP 49, 51, 58 (2014) (finding substantial reduced employment among African-American women after a diagnosis of cancer as compared to non-Hispanic white women after controlling for many job characteristics and insurance, leading to supposition that differences in treatment regimen or symptom control might explain the difference); *Employment and Cancer*, *supra* note 60, at 49; Hassett et al., *supra* note 76, at 2775. Another study found no statistically significant difference between white and African-American women in job loss following cancer after controlling for other socio-demographic factors, however. Mujahid et al., *supra* note 75, at 106.

81. Victoria S. Blinder et al., *Return to Work in Low-Income Latina and Non-Latina White Breast Cancer Survivors: A 3-Year Longitudinal Study*, 118 CANCER 1664, 1664, 1667 (2012).

82. *Id.* at 1672.

83. *Id.* at 1669. Lymphedema is a complication that causes lymph fluid to pool in the arm, resulting in swelling and sometimes pain. It is exacerbated by physical activity such as heavy lifting.

84. Mujahid et al., *supra* note 75, at 106.

85. *Id.* at 110.

factors not measured by the study such as "more isolated work settings, multiple employers, or temporary employment."[86] Research on age[87] and gender[88] as factors has found mixed results.

A recent study discovered that more rural survivors than urban survivors take early retirement and that fewer rural survivors receive paid disability benefits.[89] Because more rural workers have physical jobs, the authors hypothesized that the higher incidence of manual work limited survivors' ability to remain employed because of the effects of cancer and its treatment.[90] Additionally, rural survivors have less access to psychosocial resources, leading to higher rates of emotional distress that may also encourage retirement.[91] Finally, both manual jobs and rural homes are associated with reduced availability of disability benefits, which may explain the lower number of rural survivors receiving such benefits.[92]

3. Type of Work

Individuals with more physical jobs are less likely to remain employed both during and after treatment. Significant percentages of breast and prostate cancer survivors who had jobs requiring physical

86. *Id.*

87. *See, e.g.*, Bradley & Bednarek, *supra* note 59, at 193 (finding only slightly higher retirement rate among cancer survivors compared to general population); de Boer et al., *supra* note 56, at 760 (showing no clear association between age and unemployment for cancer survivors); Hassett et al., *supra* note 76, at 2778 (finding older women with cancer more likely to experience a change in employment than younger women); Mehnert, *supra* note 46, at 123 (noting that some studies in meta-analysis showed younger age associated with likelihood of return to work); Spelten et al., *supra* note 59, at 129 (finding in meta-analysis of fourteen studies that most showed no relationship between age and return to work, but one showed increasing age negatively associated with work); Markowski, *supra* note 13, at 118 (finding cancer-free survivors are not likely to retire sooner than individuals with no history of cancer while cancer survivors with recurrence retire sooner).

88. *See, e.g.*, Short et al., *supra* note 36, at 1296–97 (showing higher disability rates for women than for men); Mehnert, *supra* note 46, at 123 (showing some studies in meta-analysis found females less likely to return to work); Moran et al., *supra* note 72, at 511 (showing similar employment effects for both genders except that men had a larger reduction in hours and also had greater employment reductions than women if they had recurrence, metastasis, or new cancers); Spelten et al., *supra* note 59, at 129 (finding in meta-analysis of fourteen studies no relationship between gender and return to work); Markowski, *supra* note 13, at 41, 131 (finding female cancer survivors with greater levels of education were more likely to work while the same was not true for men and that stage of cancer affects continuation of employment for men but not women).

89. Michelle Sowden et al., *The Impact of Cancer Diagnosis on Employment: Is There a Difference Between Rural and Urban Populations?*, 8 J. CANCER SURVIVORSHIP 213, 216 (2014).

90. *Id.*

91. *Id.*

92. *Id.*

work reported physical disabilities[93] at twelve and eighteen months following diagnosis.[94] Those with disabilities were more likely to leave the workforce.[95] Cancer survivors from low-income families are also less likely to work following cancer diagnosis,[96] although those who continued to work were not more likely to reduce their hours or change jobs.[97] Lower income survivors were more likely to report a broad range of negative work experiences in the two years following diagnosis, including discharge, layoff, denial of a raise or promotion, demotion, or transfer.[98] The tendency of low-income survivors to leave work almost certainly has some relationship to type of work, but may have some independent force as well.[99] Quality of life may have less association with work for lower income individuals.[100] It is also possible that lower income survivors may be eligible for government benefits that replace more of pre-cancer income and provide some health benefits so that the urgency to return to work is less. Indeed, these low-income jobs may not provide health insurance benefits so that unemployment is not associated with loss of health insurance coverage.

4. Source of Health Insurance

Because employment provides health insurance for many individuals in the United States, the source of health insurance has been examined as a factor in determining employment outcomes for individuals with cancer. Further, the absence of insurance has been demonstrated to cause

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93. The study used the definition of disability from the International Classification of Functioning, Disability and Health: "[L]imitations in physical or mental functions, caused by one or more medical conditions, in carrying out socially defined tasks or roles." Oberst et al., *supra* note 38, at 323.

94. *Id.* at 326–27.

95. *Id.* At twelve months post-diagnosis, sixty percent of women and twenty-nine percent of men reported physical disability resulting from cancer, while at eighteen months post-diagnosis, the disability rates had declined to thirty-six percent for women and seventeen percent for men. *Id.* at 326. Reports of cognitive disability among those with jobs requiring cognitive tasks were less prevalent, but still present. *Id.*

96. Bouknight et al., *supra* note 70, at 347; Mehnert, *supra* note 46, at 123 (finding a number of studies showing both lower income and manual labor associated with reduced likelihood of employment); Blinder et al., *supra* note 81, at 1671 (finding that low income survivors of various ethnicities did not have the same rates of return to work as higher income white survivors); Steiner, *supra* note 77, at 145.

97. Steiner, *supra* note 77, at 145.

98. Miao Yu et al., *Employment Experience of Cancer Survivors 2 Years Post-Diagnosis in the Study of Cancer Survivors-I*, 6 J. CANCER SURVIVORSHIP 210, 212–13, 217 (2012).

99. *See* Blinder et al., *supra* note 81, at 1669.

100. *Id.* at 1672.

poor health outcomes for cancer patients.[101] Thus maintenance of insurance is important to reduce treatment costs and save lives.[102] Evidence demonstrates that cancer survivors with employer-provided health insurance are more likely to remain employed[103] and to work more hours than those with health insurance through another source, such as a working spouse.[104] When married women with employer-based health insurance were compared with similarly situated women with insurance from another source, a study found that at least some survivors were working and working more hours than they would without the need to maintain health insurance coverage.[105] While maintaining employment may appear to be a beneficial outcome, these workers may have adverse health outcomes as a result of continuing to work, as compliance with the best treatment options may be difficult or impossible to reconcile with the need for continued employment.[106] Additionally, some employees may be constrained in their career development because of a concern that changing jobs might affect their ability to obtain affordable health insurance coverage that would cover future cancer treatment if needed, and residual effects of past treatment.[107]

Employer-based health insurance not only spurs continued employment and increased hours of work, but it also limits job changes for cancer survivors.[108] While cancer survivors who did not have health insurance from their employer changed jobs more often than other

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101. Cathy J. Bradley et al., *Acute Myeloid Leukemia: How the Uninsured Fare*, 117 CANCER 4772, 4772, 4776 (2011); Cathy J. Bradley et al., *Differences in Breast Cancer Diagnosis and Treatment: Experiences of Insured and Uninsured Women in a Safety-Net Setting*, 45 INQUIRY 323, 328 (2008) [hereinafter *Breast Cancer Diagnosis*].

102. *Breast Cancer Diagnosis*, *supra* note 101, at 328.

103. *See* Cathy J. Bradley et al., *Employment-Contingent Health Insurance, Illness, and Labor Supply of Women: Evidence from Married Women with Breast Cancer*, 16 HEALTH ECON. 719, 732 (2006) [hereinafter *Employment-Contingent Health Insurance*]; *Employer-Provided Health Insurance*, *supra* note 64, at 841, 848; *Employment and Cancer*, *supra* note 60, at 51; Kaan Tunceli et al., *Cancer Survivorship, Health Insurance, and Employment Transitions Among Older Workers*, 46 INQUIRY 17, 29 (2009). These studies preceded the implementation of the Patient Protection and Affordable Care Act, which has expanded the availability of health insurance and limited the exclusion of preexisting conditions. It is too early to assess the impact of that law, but it should limit the constraining effects of health insurance for at least some cancer survivors.

104. *Employment-Contingent Health Insurance*, *supra* note 103, at 732; Steiner, *supra* note 77, at 141–42; Tunceli et al., *supra* note 103, at 26.

105. *Employment-Contingent Health Insurance*, *supra* note 103, at 732.

106. *Id.*

107. Steiner, *supra* note 77, at 142–43.

108. *Id.* at 143; Tunceli et al., *supra* note 103, at 29.

employees, those whose health insurance was tied to their employment changed jobs less frequently.[109] As one group of scholars noted:

> Not only are survivors handicapped in advancing their careers or pursuing leisure interests by their need for health insurance, but those who have continuing health problems as a result of cancer and treatment may be less able to accommodate changes in their health or functional status by changing jobs or cutting back on work. In these ways, survivors pay a higher "price" for health insurance that affects their quality of life and adds to the economic burden of cancer.[110]

5. Employer Support and Accommodation

Studies reflect the importance of workplace support and accommodation for survivors' successful return to work. Perceived support and accommodation are positively associated with working for survivors and perceived discrimination is negatively associated with continuing to work.[111] Reports of discrimination were not widespread in those studies that asked survivors about discriminatory treatment, however.[112] Not only was support from employers and a flexible work

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109. Tunceli et al., *supra* note 103, at 29.

110. *Id.*

111. Blinder et al., *supra* note 34, at 768–69; Bouknight et al., *supra* note 70, at 345; Bradley & Bednarek, *supra* note 59, at 189; M.L. Lindbohm et al., *Cancer as the Cause of Changes in Work Situation (A NOCWO Study)*, 20 PSYCHO-ONCOLOGY 805, 810–11 (2010); Mehnert, *supra* note 46, at 122–23 (meta-analysis of sixty-four studies showing perceived employer accommodation increased likelihood of return to work while perceived discrimination decreased it, and the availability of flexible work arrangements increased the probability of working during treatment); Moskowitz et al., *supra* note 62, at 177 (finding discrimination, poor treatment, and denial of accommodations by employer significantly related to both ability to work and maintenance of employment); Mujahid et al., *supra* note 75, at 108; Spelten et al., *supra* note 59, at 128–29 (conducting a meta-analysis of fourteen studies from different countries and finding that support and accommodation of flexible work hours and workloads was positively associated with return to work but citing one study from Canada finding employer discrimination was not "significantly related to return to work" and "did not seem to be a more prevalent problem among cancer survivors than in a control group"); Tiedtke et al., *supra* note 34, at 677, 680, 682 (conducting a meta-analysis of six studies from three different countries). The Canadian study found that eighteen percent of cured cancer survivors reported discrimination, twenty-one percent of cancer survivors with a poor prognosis reported discrimination, and fifteen percent of the control group reported discrimination. Deborah Ehrmann-Feldmann et al., *Perceived Discrimination Against Cured Cancer Patients in the Workforce*, 136 CAN. MED. ASS'N J. 719, 722 (1987).

112. *Employment and Cancer*, *supra* note 60, at 52; Spelten et al., *supra* note 59, at 128 (meta-analysis of fourteen studies from different countries); Yu et al., *supra* note 98, at 215 (finding only 9.3% of cancer survivors reported discrimination at work but the study separately reported negative working experiences such as layoff and termination that might also have been the result of discrimination. Also the study reported lack of support from the employer as a significant problem

environment significant in association with work continuation after a cancer diagnosis, but support of coworkers was also important.[113] Among the accommodations that made survivors more likely to remain employed were a return-to-work meeting with the employer, flexible work schedules, paid sick leave, assistance with certain work tasks, and control over the type or amount of work.[114] The importance of accommodation cut across demographic lines and applied regardless of type of work or type of cancer.[115]

C. Summary

The good news is that many cancer patients are able to work, some with little or no disruption in employment. Others, however, have work disruptions of various lengths, depending on the type of cancer, the treatment and the job, and even after return to work need accommodation. Some cancer survivors are unable to continue working because of their cancer. Low income workers and workers with physical jobs are less likely to be employed after a cancer diagnosis, and some studies also find race and ethnicity associated with lower employment levels. Insurance also has a constraining effect—cancer survivors who have employer-based health insurance are more likely to remain employed. In some cases, working may exacerbate symptoms and psychological stress, while in others it may have positive benefits for the survivor.

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which could encompass failure to accommodate, which under the Americans with Disabilities Act, constitutes discrimination). A Korean study, however, found discrimination against cancer patients to be a more significant problem. Jae-Hyun Park et al., *Changes in Employment Status and Experience of Discrimination Among Cancer Patients: Findings from a Nationwide Survey in Korea*, 19 PSYCHO-ONCOLOGY 1303, 1306 (2010).

113. Spelten et al., *supra* note 59, at 128.

114. Blinder et al., *supra* note 34, at 5–6 (finding flexibility in work schedule and job tasks, medical leave and assistance with physical job tasks to be important accommodations); Anja Mehnert et al., *Employment Challenges for Cancer Survivors*, 10 CANCER 2151, 2153 (2013) (citing studies showing the importance of, inter alia, a return-to-work meeting, flexible working conditions, training, and counseling); Mujahid et al., *supra* note 75, at 108 (finding paid sick leave and a flexible work schedule to be important accommodations); Pryce et al., *supra* note 40, at 87–90 (showing the importance of flexible work schedules, paid time off, sick leave in excess of the legal minimum, and changes in the physical environment in remaining employed); Tiedtke et al., *supra* note 34, at 681 (finding flexibility in schedule and work, assistance with work tasks, changes in work tasks, and gradual assimilation back into the workplace to be valued accommodations).

115. *See Employment and Cancer*, *supra* note 60, at 51–52; Short et al., *supra* note 36, at 1299–1300 (emphasizing the importance of accommodation and support over the long-term); Mujahid et al., *supra* note 75, at 108; Spelten et al., *supra* note 59, at 129; Park et al., *supra* note 112, at 1306–07.

Having reviewed the research on cancer and employment, I turn now to the question of what implications this data has for the law. Some of the factors that affect employment, such as the type of cancer and race and ethnicity, are outside anyone's control. Law, medicine, and employers can impact the other factors, however, such as type of treatment, type of work, employer support and accommodation, and source of insurance. These controllable factors can have some mitigating impact on the effects of race and ethnicity. As noted in the medical research, many of the medical, legal, and social interventions designed to increase employment have focused on the individual with cancer.[116] The law, however, has the ability to spur structural and policy changes that may increase employment of cancer survivors.

III. THE LAWS

In the United States, there is a patchwork of laws that provide some protection for cancer survivors (and others) in achieving the goals discussed above. Among the relevant laws are the following: the Family Medical Leave Act ("FMLA"), which provides for employment leave for serious medical conditions; the Americans with Disabilities Act ("ADA"), which prohibits employment discrimination against individuals with disabilities and requires employers to offer them reasonable accommodations to enable employment; the Consolidated Omnibus Budget Reconciliation Act of 1986 ("COBRA"),[117] which provides for continuation of health insurance following termination of employment; the Health Insurance Portability and Accountability Act ("HIPAA"),[118] which bars preexisting condition limitations in health insurance under certain conditions; the Employee Retirement Income Security Act ("ERISA"),[119] which governs employee benefit plans; the Social Security Act,[120] which provides income and Medicare[121] or Medicaid[122] health insurance coverage for disabled individuals; and the

116. Moscowitz et al., *supra* note 62, at 174.

117. Consolidated Omnibus Budget Reconciliation Act of 1986, Pub. L. No. 99-272, 100 Stat. 82.

118. Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 110 Stat. 1936 (codified as amended in scattered sections of 18 U.S.C., 26 U.S.C., 29 U.S.C., and 42 U.S.C.).

119. Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829 (codified as amended in scattered sections of 5 U.S.C., 18 U.S.C., 26 U.S.C., 29 U.S.C., and 31 U.S.C.).

120. 42 U.S.C. §§ 401–434 (2012).

121. *Id.* §§ 1395–1395ccc.

122. *Id.* §§ 301–1397mm.

recently enacted Patient Protection and Affordable Care Act,[123] which is designed to assist individuals with preexisting conditions in obtaining health insurance and encourage employers to provide, and individuals to obtain, health insurance. In addition to these federal laws, many states have laws that offer additional benefits and protections for cancer survivors.[124]

This Article initiates what is contemplated to be a long-term, multi-stage assessment of these laws against the research on cancer and employment, accompanied by recommendations for change. Of course, to some extent all of the legal protections are interrelated and changes in one may affect or vitiate the need for changes in another. But as is typical in American employment law, our country has taken a piecemeal approach to addressing the issues with a variety of legal mechanisms. The project begins with an analysis of the laws that require leave and other accommodations and prohibit discrimination based on disability. The federal FMLA and the ADA are closely related pieces of legislation that work together to protect workers with medical problems and preserve their employment.[125] The FMLA requires employers of a certain size to provide leave to employees with serious medical conditions,[126] while the ADA prevents discrimination and requires accommodation of disabilities.[127] Since leave may be an accommodation, these laws are interrelated. Thus this Article assesses

123. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), *amended by* Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029.

124. *See, e.g.*, CAL. GOV'T CODE § 12940 (West, Westlaw through 2015 Reg. Sess.) (prohibiting discrimination in employment/housing because of "medical condition"); *id.* § 12926 (defining "medical condition" as "[a]ny health impairment related to or associated with a diagnosis of cancer or a record or history of cancer" and extending protection to persons with "genetic characteristics" which "cause" cancer, including the children of those with cancer); N.J. STAT. ANN. § 10:5-4.1 (West, Westlaw through 2013) (prohibiting housing and employment discrimination against individuals with disabilities); Soules v. Mount Holiness Mem'l Park, 808 A.2d 863, 867 (N.J. Super. 2002) (finding individual with cancer had a disability "regardless of the length of the recuperative period or the temporal consequences of his cancer" and citing earlier case finding individual with cancer who had mastectomy had disability because any illness that causes amputation is a disability); *infra* notes 325–26, 410–11 and accompanying text.

125. Rehabilitation Act of 1973, 29 U.S.C. §§ 701–797 (2012), which bars disability discrimination by the federal government, federal contractors, and federal fund recipients will also be considered to the extent that it applies. Congress provided that the ADA standards for employment discrimination apply to discrimination claims under the Rehabilitation Act. *Id.* § 794(d). A significant difference between the two statutes, however, is that the Rehabilitation Act of 1973 specifically requires affirmative action on the part of federal agencies and government contractors. *Id.* §§ 791, 793.

126. *See* Family Medical Leave Act, *id.* §§ 2601–2654.

127. *See* Americans with Disabilities Act, 42 U.S.C. §§ 12101–12213 (2012).

each of these laws and discusses similar state laws that provide greater protection and/or benefits to cancer patients.

A. Normative Goals

Before assessing what approach the law should take with regard to employment and cancer, it is important to determine the goals that the law should be designed to achieve. Broadly, it seems beyond debate[128] that cancer survivors should have the basic human rights of sufficient income and resources for a minimum standard of living[129] along with access to necessary medical treatment.[130] Additionally, the psychological benefits of working[131] suggest that those cancer patients who can work (and, importantly, those that also *want* to work) should have the opportunity to do so—even when they would have sufficient resources without work. The employment goal provides a societal benefit as well since individuals who are working at living wage jobs pay state, federal, and Federal Insurance Contributions Act taxes and, in most cases, do not draw significantly on public benefits.[132] For those for whom working interferes with treatment, enabling them to support themselves and obtain treatment without working should be the goal.

The question of how to achieve the goals, including what role the law should play, leaves more room for debate. For those survivors able and desiring to work, the ability to obtain or maintain a job without discrimination is likely to meet these goals if the job provides affordable

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128. While some might disagree on how to achieve these goals and what sort of cost/benefit analysis to apply to efforts to achieve them, the goals themselves seem incontrovertible. The United Nations Universal Declaration of Human Rights provides the following: "Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment," G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III), Art. 23(1) (Dec. 10, 1948), *available at* http://www.un.org/en/documents/udhr/index.shtm; "Everyone who works has the right to just and favorable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary by other means of social protection," *id.* at Art. 23(3); and everyone has "the right to security in the event of unemployment, sickness, disability, . . . or other lack of livelihood in circumstances beyond his control," *id.* at Art. 25(1). *See also* BEFORT & BUDD, *supra* note 30, at 91, 112 (arguing for living wage jobs that provide "physical, economic, social and health security" as a matter of equity and noting that employment law in the United States is strong on efficiency and weak on equity). For those who disagree with the goals, there really is nothing to debate.

129. This would include adequate shelter, food, and clothing.

130. Such medical treatment includes any medication necessary.

131. *See supra* notes 34, 44, 112–13 and accompanying text.

132. *See* Nicole Buonocore Porter, *Relieving (Most of) the Tension: A Review Essay of Samuel R. Bagenstos, Law and the Contradictions of the Disability Rights Movement*, 20 CORNELL J.L. & PUB. POL'Y 761, 802–03 (2011).

health insurance coverage, adequate work hours and pay, and the flexibility to continue necessary medical treatment.[133] For those unable to work at a job that will provide these benefits who have no other resources to meet these goals, some form of income support and affordable health insurance or treatment coverage will be necessary. These goals are important not only for the individuals involved but also for society as a whole. The economy suffers as a result of reduced productivity, locking employees into jobs that do not take advantage of their skills and abilities because of their cancer, costly health problems resulting from inability to obtain proper treatment in a timely fashion, bankruptcies, and poverty. But in determining how to achieve these goals, we must consider where the costs fall. If the goals are achieved through employment laws such as the ADA and FMLA, they will fall on employers. Thus, in determining how to approach the problem, we must consider not only issues of equity for cancer survivors but also efficiency for business and society.[134] In considering efficiency, we must be aware of the fact that American business must compete in a globalized economy.

B. Family Medical Leave Act

Because the availability of leave, and particularly paid leave, is an important determinant of continued employment, the FMLA will be analyzed first. This federal statute, which covers employers with fifty or more employees,[135] entitles eligible employees with serious health conditions to take up to twelve weeks of unpaid, job-protected leave in a twelve-month period.[136] To be eligible, an employee must have worked for the employer for one year and worked at least 1250 hours in the past year.[137] Health insurance must be continued during the leave as if the

133. Of course, not all jobs currently available in the United States meet these requirements. BEFORT & BUDD, *supra* note 30, at 91. Cancer survivors should be no more likely to end up in such jobs than other employees, however, and should not end up in those jobs because they have cancer. Further, since the Patient Protection and Affordable Care Act, insurance is available to many, though not all, through means other than employment.

134. I rely here on the framework adopted by Befort and Budd for evaluating employment laws. They should balance the goals of equity, efficiency, and voice for workers. BEFORT & BUDD, *supra* note 30, at 129–30.

135. 29 U.S.C. § 2611(2)(B)(ii) (2012). While state employers are covered by the FMLA, employees cannot collect damages from state employers who violate the FMLA's provisions dealing with the employee's own serious health condition. Coleman v. Court of Appeals of Md., __ U.S. __, 132 S. Ct. 1327, 1335 (2012).

136. 29 U.S.C. § 2612(a)(1)(D).

137. *See id.* § 2611(2)(A).

employee was working.[138] The law allows employees to take the leave intermittently if needed,[139] though the employee must make a reasonable effort to schedule treatment so as not to unduly disrupt the employer's operations.[140] The employer has the option to alter work duties to avoid disruption caused by intermittent leave for planned treatment.[141] Employees may opt to take any paid leave available as part of the FMLA leave and the employer may require the use of paid leave as well.[142] An additional benefit of the FMLA is the caregiver provision, which allows employees time off to care for family members with serious health conditions.[143] Finally, the FMLA prohibits retaliation against individuals who take advantage of its provisions.[144]

The FMLA has the potential to assist with the needs of cancer survivors by providing job-protected leave for treatment and recovery since cancer will almost always constitute a serious health condition.[145] The provisions for intermittent leave can be particularly helpful by allowing patients to take periodic time off for treatments like radiation and chemotherapy. Employees can take the necessary leave without fearing loss of either their job or their essential health insurance. While employers initially feared that FMLA leave would impose significant burdens, it appears that most employers do not replace employees on leave and the overwhelming majority of employees on leave return to work for the employer, so no costly permanent replacement is necessary.[146] Further, a relatively small percentage of workers take

138. *See id.* § 2614(c)(1).

139. *See id.* § 2612(b)(1).

140. *See id.* § 2612(e)(2)(A).

141. *See id.* § 2612(b)(2).

142. *See id.* § 2612(d)(2)(A).

143. *See id.* § 2612(a)(1)(C). The FMLA also provides leave for birth or adoption of a child. *Id.* § 2612(a)(1)(A)–(B).

144. *Id.* § 2615(b); Drew v. Quest Diagnostics, Inc., No. 1:10-cv-00907, 2012 WL 2341690 (S.D. Ohio June 20, 2012) (denying summary judgment to employer because jury could find FMLA retaliation where plaintiff was laid off during reduction in force while on FMLA leave for surgery, during which time her fiancé was diagnosed with cancer, and others with similar disciplinary records were not laid off); Scott v. Grand Prairie Indep. Sch. Dist., No. 3:11-CV-02094-G, 2012 WL 136162 (N.D. Tex. Apr. 19, 2012) (denying motion to dismiss plaintiff's claim that he was denied a transfer in retaliation for taking FMLA leave to care for his wife with cancer).

145. Burnett v. LFW Inc., 472 F.3d 471, 478 (7th Cir. 2006). "Serious health condition is defined" by the C.F.R. as "an illness, injury, impairment or physical or mental condition that involves inpatient care as defined in § 825.114 or continuing treatment by a health care provider as defined in § 825.115." 29 C.F.R. § 825.102 (2014).

146. Gayle Cinquegrani, *FMLA Leave Not Overly Disruptive or Costly and Should Be Expanded, Panelists Contend*, 26 DAILY LAB. REP. (BNA) A-7 (Feb. 27, 2013); ABT ASSOCS., FAMILY MEDICAL LEAVE IN 2012: TECHNICAL REPORT 109, 145–46 (2013), *available at*

intermittent leave and FMLA leave does not impose a substantial burden on most employers.[147]

But there are significant limitations in the FMLA's benefits for cancer survivors. Because of the limitations on employer and employee coverage, many employees cannot take advantage of the leave provided. Our hypothetical survivor Sarah, for example, has not been employed for a year and thus has no FMLA entitlement, although her employer is of sufficient size to be covered. A recent study found that approximately forty-one percent of workers are ineligible for FMLA coverage, leaving large numbers of workers outside the scope of the statute.[148] More than a third of worksites surveyed that were not covered by the law had employees who took leave for reasons that would qualify for FMLA protection.[149]

Further, FMLA leave is unpaid, and while paid leave can be substituted if available, many employees taking leave receive no pay.[150] And because of employer limits on paid leave, the more time an employee takes, the less likely that it will be fully paid.[151] Notably, however, employees eligible for FMLA leave were more likely to receive pay for leave based on the employer's policies.[152] Additionally, employees in higher income brackets are substantially more likely to have fully paid leave, while employees in lower income brackets are

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http://www.dol.gov/asp/evaluation/fmla/FMLA-2012-Technical-Report.pdf. Most of the data in this section comes from the most recent study funded by the U.S. Department of Labor, which administers the law. *Id.* at i. That study is not limited to individuals with cancer. *Id.*

147. ABT ASSOCS., *supra* note 146, at 162.

148. *Id.* at i, 21–22. While some states have similar leave statutes, most do not cover smaller employers and most do not provide longer leave periods. *See State Family and Medical Leave Laws*, NAT'L CONF. STATE LEGISLATURES (Dec. 31, 2013), http://www.ncsl.org/research/labor-and-employment/state-family-and-medical-leave-laws.aspx.

149. ABT ASSOCS., *supra* note 146, at 84. This includes leave for childbirth and parenting as well as leave for the employee's own serious health condition or that of an immediate family member. While these employees may have been provided leave, the absence of FMLA protections means that the employees were not guaranteed a return to their job or insurance continuation.

150. *Id.* at ii, 97. About a third of employees received no pay. *Id.* at 97. Forty-eight percent received full pay and another seventeen percent partial pay. *Id.* at 98. Another study, based on data from the Bureau of Labor Statistics, found that only 57.1% of employees have access to any paid sick days on their job. Sarah Jane Glynn & Jane Farrell, *Latinos Least Likely to Have Paid Leave or Workplace Flexibility*, CTR. FOR AM. PROGRESS 2 (Nov. 20, 2012), https://www.americanprogress.org/wp-content/uploads/2012/11/GlynnLatinosPaidLeave1.pdf.

151. ABT ASSOC., *supra* note 146, at ii, 97. Only forty-one percent of employees with leaves of more than ten days, which probably includes almost all individuals with cancer, received full pay. *Id.* at 97.

152. *Id.* at 102–03.

much more likely to have no paid leave.[153] Paid leave also varies by race and ethnicity, with Latinos least likely to have paid sick leave, followed by African-Americans.[154] This may help explain why Latinas with cancer suffer more unemployment than non-Latina workers.[155] Almost two-thirds of surveyed employees reported difficulty making ends meet as a result of taking leave with partial or no pay.[156] While our hypothetical survivor, Sarah, has paid leave, it is voluntarily provided by her employer, and is unlikely to be sufficient for her needs.[157] Given that cancer survivors in the extensive studies analyzed above indicated that paid leave was an important accommodation in retaining employment, these findings regarding the limits of paid leave are significant.

Another limitation of the FMLA that may affect cancer survivors is the length of the leave. Only twelve weeks are available in each twelve-month period. If an employee needs more leave, FMLA does not protect the employee's job.[158]As demonstrated by the research on cancer and employment, treatment for some cancers may affect the employee's health in ways that limit the ability to work for more than twelve weeks, regardless of whether the leave is taken intermittently or in succession. Even if Sarah was covered by the FMLA, her need for leave might exceed the twelve weeks, especially if her employer's opposition to her shift changing accommodation persists.

C. Americans with Disabilities Act

The Americans with Disabilities Act has broader protections than the FMLA and therefore greater potential to preserve employment for cancer survivors. After a brief introduction to the statute, this Article will analyze the ADA's application to the identified needs of cancer survivors. The employment provisions of the ADA took effect in

153. *Id.* at 99; Glynn & Farrell, *supra* note 150, at 4.

154. Glynn & Farrell, *supra* note 150, at 2. Latinos are significantly below the other ethnic groups in leave availability, with only 38.4% having paid sick leave, compared to 57.4% of African-Americans, the next lowest group. *Id.* Latinos are also far less likely to have other leave that might be taken in lieu of sick leave, such as paid vacation. *Id.*

155. *See supra* notes 81, 84–85 and accompanying text.

156. ABT ASSOC., *supra* note 146, at 106.

157. Voluntarily provided leave may not be an enforceable benefit if it is not provided in an employment contract. Even if it is, lung cancer is a debilitating cancer that will likely require more than the two weeks of leave that Sarah has available. *See supra* note 61.

158. The study, depending on the method of counting for leaves that were in progress at the time of the interview, indicated that either fourteen percent or seventeen percent of leaves were sixty or more days in length. ABT ASSOC., *supra* note 146, at 68.

1992.[159] The law covers employees of employers with fifteen or more employees,[160] and prohibits discrimination against individuals with disabilities, individuals with a record of disabilities, and individuals who are perceived to have a disability.[161] Further, to be protected from discrimination in employment, the individual must be a "qualified individual" which is defined as someone who can perform the "essential functions" of the job with or without reasonable accommodation.[162] The definition of disability was substantially amended in 2008, effective 2009, to broaden the coverage of the Act, which had been restricted by judicial interpretation.[163] Cancer survivors who meet the definition of disability and are denied initial employment or terminated or discriminated against on the job because of their cancer have a remedy under the statute.[164]

As discussed in Section III.B.5, employer accommodation of cancer survivors is an important determinant of employment. In addition to prohibiting discrimination, the ADA requires covered employers to accommodate individuals with disabilities to enable them to do the job, so long as the accommodation is reasonable, allows the employee to perform the essential functions of the job, and does not impose undue hardship on the employer.[165] This implicates the flexibility in work that many survivors indicate is crucial to maintaining employment.

The following sections will first review how the definition of disability has been applied to cancer survivors both before and after the 2008 amendments. Then the anti-discrimination and accommodation provisions most relevant to the needs of cancer survivors will be analyzed for their effectiveness.

1. A Historical Perspective

In 2000, Barbara Hoffman, General Counsel of the National Coalition

159. President Bush signed the ADA, Pub. L. No. 101–336, 104 Stat. 327 (1990), on July 26, 1990. Title I became effective July 26, 1992 for employers with twenty-five or more employees and two years later for employers with fifteen or more employees. S. REP. NO. 101-116, 2 (1989).

160. *See* 42 U.S.C. § 12111(5) (2012). Thus, the law does not protect employees of small employers and independent contractors.

161. *See id.* § 12102 (defining disability); *id.* § 12112 (prohibiting discrimination).

162. *See id.* § 12112 (barring discrimination); *id.* § 12111(8) (defining "qualified individual" with disability).

163. *See infra* notes 175–81 and accompanying text.

164. *See* 42 U.S.C. § 12112 (barring discrimination in hiring, promotion, discharge, and other terms and conditions of employment).

165. *See id.* § 12112(b)(5)(A).

for Cancer Survivorship, comprehensively evaluated the effectiveness of the ADA as applied to cancer survivors.[166] She analyzed a series of cases decided under the statute, finding that plaintiffs either prevailed or survived summary judgment in fewer than half.[167] The problem she identified, the Catch-22, was that courts found that plaintiffs who could work had no disability, but those who were limited in their ability to work were not "qualified individuals with disabilities"[168] and therefore not protected by the Act.[169] Capturing the problem by describing the Fifth Circuit's decision in *Ellison v. Software Spectrum, Inc.*,[170] Hoffman noted:

> Under the Fifth Circuit's logic, had Ellison chosen to take several months of medical leave during the first stage of her treatment, and then returned to work half-time for the next several weeks, she would have demonstrated a "substantial limiting impairment" of her ability to work. Thus, under the Fifth Circuit's analysis, those employees who work the hardest to maintain their jobs are precisely the ones denied protection under the ADA. Bringing this irony full circle, the Fifth Circuit would doubtlessly have concluded that had Phyllis Ellison taken an extended medical leave from work, she would not have been "otherwise qualified" for her job, and therefore it would have caught her with the other prong of the Catch-22.[171]

In the cases in which plaintiffs prevailed, the courts were more

166. 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 (2000).

167. *Id.* at 407–08.

168. "Qualified individual with a disability" is a statutory term, defined as one who can do the essential functions of the job, with or without accommodation. 42 U.S.C. § 12111(8) (2000).

169. Hoffman, *supra* note 166, at 353. This Catch-22 is not, of course, limited to cancer survivors and was one of the motivating factors for amendment. *See* Stephen F. Befort, *Let's Try This Again: The ADA Amendments Act of 2008 Attempts to Reinvigorate the "Regarded As" Prong of the Statutory Definition of Disability*, 2010 UTAH L. REV. 993, 1001–19 (detailing the concerns that led to the amendments and the Congressional response). For additional criticism of judicial interpretation of the ADA, see, for example, Cheryl L. Anderson, *What Is "Because of the Disability" Under the Americans with Disabilities Act? Reasonable Accommodation, Causation, and the Windfall Doctrine*, 27 BERKELEY J. EMP. & LAB. L. 323 (2006); Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99 (1999); Matthew Diller, *Judicial Backlash, the ADA, and the Civil Rights Model*, 21 BERKELEY J. EMP. & LAB. L. 19 (2000); Chai R. Feldblum, *Definition of Disability Under Federal Anti-Discrimination Law: What Happened? Why? And What Can We Do About It?*, 21 BERKELEY J. EMP. & LAB L. 91, 91–92 (2000); Bonnie Poitras Tucker, *The Supreme Court's Definition of Disability Under the ADA: A Return to the Dark Ages*, 52 ALA. L. REV. 321 (2000).

170. 85 F.3d 187 (1996).

171. Hoffman, *supra* note 166, at 380 (citations omitted).

willing to look at the Equal Employment Opportunity Commission ("EEOC") regulations and the legislative history of the ADA. These authorities indicate an intent both to include cancer as a disability under the statute and to find that hospitalization, which most cancer survivors undergo at some point, establishes a record of impairment sufficient to meet the definition for statutory coverage.[172] Additionally, Hoffman found that plaintiffs who alleged disability under all three prongs of the definition were more likely to succeed.[173] Finally, the type of cancer seemed to have an impact on the determination of whether it met the definition of disability.[174]

While Hoffman identified significant difficulties for cancer survivors bringing ADA cases, she offered a blueprint on how to overcome the hurdles created by the courts.[175] Despite her good advice and somewhat optimistic conclusion that cancer survivors in some cases might overcome the challenges, she conducted a subsequent analysis that confirmed that plaintiffs continued to face dismal prospects under the ADA between 2000 and 2008.[176] In 2008, Congress amended the statute, responding to the judicial narrowing of the definition of disability and

172. *Id.* at 409–11.

173. *Id.* at 408–09.

174. *Id.* at 411–12.

175. *Id.* at 432–38.

176. *See* Barbara Hoffman, *The Law of Intended Consequences: Did the Americans with Disabilities Act Amendments Act Make It Easier for Cancer Survivor to Prove Disability Status?*, 68 N.Y.U. ANN. SURV. AM. L. 843, 858–67 (2013). For case examples, see *Turner v. Sullivan University Systems, Inc.*, 420 F. Supp. 2d 773 (W.D. Ky. 2006) (finding patient with breast cancer was not limited in major life activities despite her inability to perform any activities that required lifting, including portions of her job, and thus was not disabled under the ADA); *Treiber v. Lindbergh Sch. Dist.*, 199 F. Supp. 2d 949 (E.D. Mo. 2002) (finding that music teacher with breast cancer, who underwent a lumpectomy, chemotherapy, and suffered limited movement in her left arm, was not disabled under the ADA because the impairment had not sufficiently interfered with major life activities); and *Pimental v. Dartmouth-Hitchcock Clinic*, 236 F. Supp. 2d 177 (D.N.H. 2002) (finding the plaintiff with breast cancer requiring an eight month leave of absence for treatment consisting of chemotherapy, mastectomy, and radiation was not disabled because her impairment was too short term to be considered substantially limiting of major life activities and therefore, a statutory disability). For a study that shows the dismal success rate for all ADA plaintiffs, see Amy Albright, *2004 Employment Decisions Under the ADA Title I—Survey Update*, 29 MENTAL & PHYSICAL DISABILITY L. REP. 513, 515 (2005) (showing employers won the following percentages of ADA employment cases between 2000 and 2004: 2000—96.4%; 2001—95.7%; 2002—94.5%; 2003—98%; 2004—97%). Interestingly, a pre-amendment study of EEOC claims filed by cancer survivors found that the EEOC was more likely to find reasonable cause in cancer cases compared to other disabilities. *See* Michael Feuerstein et al., *Pattern of Workplace Disputes in Cancer Survivors: A Population Study of ADA Claims*, 1 J. CANCER SURVIVORSHIP 185, 191–92 (2007). Administrative success before the EEOC, however, does not necessarily translate to success in court. A few plaintiffs did manage to establish cancer as a disability under the statute despite the difficulties, however. Hoffman, *supra* note 166, at 409–12.

consequent difficulties for plaintiffs bringing ADA claims.[177]

2. The ADA Amendments Act: Restoring the Act's Coverage

Congress sought to redress the exact problem Hoffman identified: The difficulty plaintiffs faced establishing a current disability or a record of disability, or, alternatively, that their employer regarded them as having a disability.[178] As a result of this difficulty, most plaintiffs failed to meet the first requirement necessary for coverage under the statute, never reaching the question of whether they were discriminated against or unlawfully denied accommodation. While the definition of disability was not substantially changed, Congress expressly rejected the Supreme Court cases that had narrowed the definition of disability and specified that the definition of disability should be broadly construed.[179] Further, Congress clarified the interpretation of the terms "substantially limits," "major life activities," and "regarded as" in the definition of disability.[180] In defining major life activities, Congress included "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."[181]

Congress directed the EEOC to issue regulations implementing the statutory changes, which it did, effective May 24, 2011.[182] In addition to the general broadening of the definition of disability, several provisions in the regulations will help cancer survivors meet the definition. Among the EEOC's rules of construction of disability derived explicitly from the statute is the following: "An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active."[183] In support of this regulation the EEOC cited the legislative

177. *See* Befort, *supra* note 169, at 1001–19.

178. *See id.*; Hoffman, *supra* note 176, at 846–48.

179. Befort, *supra* note 169, at 1013; Alex B. Long, *Introducing the New and Improved Americans with Disabilities Act: Assessing the ADA Amendments Act of 2008*, 103 NW. U. L. REV. COLLOQUY 217 (2008); *see* ADA Amendments Act of 2008, Pub. L. No. 110–235, §§ 2(b)(1)–(5), 3(4)(A), 122 Stat. 3553 (codified at 42 U.S.C. § 12102(4)(A) (2012)) ("The definition of disability in this chapter shall be construed in favor of broad coverage of individuals under this chapter, to the maximum extent permitted by the terms of this chapter.").

180. Befort, *supra* note 169, at 1014–18.

181. 42 U.S.C. § 12102(2)(B).

182. Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, as Amended, 76 Fed. Reg. 16978 (Mar. 25, 2011) (to be codified at 29 C.F.R. pt. 1630).

183. *See* 29 C.F.R. § 1630.2(j)(1)(vii) (2014); 29 U.S.C. §12102(4)(D) (2012).

history's rejection of cases finding cancer in remission to be too "short-lived" to meet the test of substantial limitation.[184] Further, Section 1630.2(j)(3) cites certain impairments whose coverage will be "predictable, consistent, and workable," leading to a conclusion "in virtually all cases" that there is either an actual disability or a history of a disability.[185] Among the conditions cited is cancer, as it "should easily be concluded that . . . cancer substantially limits normal cell growth," which is, according to the amendments, a major life activity.[186] The explanatory comments quote Representative Steny Hoyer, one of the original sponsors of the ADA, stating "we could not have fathomed that people with diabetes, . . . cancer, . . . and other disabilities would have their ADA claims denied because they would be considered too functional to meet the definition of disability."[187]

Both the statute and the regulations seem designed to ensure that, among others, cancer survivors will be covered by the ADA. Although it is far too early for a complete assessment,[188] the cases decided post-amendment have largely found cancer survivors covered by the statute.[189] Plaintiffs have survived defense motions for summary

184. Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, as Amended, 76 Fed. Reg. at 17011 (citing H.R. REP. NO. 110-730, pt. 2 (2008)).

185. 29 C.F.R. § 1630.2(j)(3).

186. *Id.*

187. Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, as Amended, 76 Fed. Reg. 17012 (quoting H.R. REP. NO. 110-730, pt. 2 at 10 (2008)).

188. Because the statute has not been found to apply retroactively, relatively few ADAAA cases have reached the decisional level. *See* Boitnott v. Corning, Inc., 669 F.3d 172, 177 (4th Cir. 2012) (holding employee with leukemia not disabled under pre-amendment ADA and no retroactive application); Fredricksen v. United Parcel Serv., 581 F.3d 516, 521–23 & n.1 (7th Cir. 2009) (holding that the amendments did not apply retroactively and that the plaintiff with leukemia could not show substantial impairment of a major life activity or that he was regarded as having such an impairment).

189. *See* NAT'L COUNCIL ON DISABILITY, A PROMISING START: PRELIMINARY ANALYSIS OF COURT DECISIONS UNDER THE ADA AMENDMENTS ACT (2013), *available at* http://www.ncd.gov/publications/2013/07232013 (finding plaintiffs under the ADAAA have been largely successful in getting courts to accept the EEOC's determination that cancer is virtually always a disability); Hoffman, *supra* note 176, at 882 (reviewing post-amendment disability claims by cancer survivors and finding that more claims were filed with the EEOC and resolved favorably to plaintiffs, that courts denied defendants' pre-trial motions based on lack of disability more frequently, and that no court had determined that a cancer survivor was "too healthy to be disabled, yet too ill to work"). The exceptions, where cancer was not found disabling, are pro se cases that failed to survive motions to dismiss. *See* Fierro v. Knight Transp., No. EP-12-CV-00218-DCG, 2012 WL 4321304, at *3 (W.D. Tex. Sept. 18, 2012) (finding plaintiff did not allege facts from which the court could infer any limitation on major life activities); Brandon v. O'Mara, No. 10-CV-5174-RJH, 2011 WL 4478492 (S.D.N.Y. Sept. 28, 2011) (finding that because of plaintiff's limited allegations of fatigue and lifting limitations upon her return to work after cancer treatment, her

judgment,[190] and in some cases a favorable settlement has been reached.[191] EEOC experts note that more cases are surviving summary judgment motions and more cases turn on whether the statute has been violated, rather than whether the plaintiff is covered by the statute.[192] A recent study confirmed that prior to the amendments, courts decided 74.4% of disability status summary judgment motions in favor of the employer, while subsequent to the amendments, the percentage dropped to 45.9%.[193] The percentage of cases in which the courts reached the issue and decided whether the plaintiff was a qualified individual with a disability jumped from 28.2% pre-amendments to 47.1% post-amendments.[194] Thus, more plaintiffs successfully proved disability status and moved to the question of whether they were qualified to do the job, with or without accommodations. Accordingly, whether the ADA is likely to provide real benefit to cancer survivors who want to continue to work depends on the interpretation of the discrimination and

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complaint failed to state a claim that she was disabled). Unlike other cases, *see infra* note 190, these courts did not consider the fact that cancer in remission is a disability because of its impact on normal cell growth when active. One scholar has described these as poorly litigated cases that might come out differently with better advocacy. Nicole Buonocore Porter, *The New ADA Backlash*, 87 TENN. L. REV. 1 (2014).

190. Katz v. Adecco USA, Inc., 845 F. Supp. 2d 539 (S.D.N.Y. 2012) (denying defendant's motion for summary judgment, finding cancer in remission was a disability); Norton v. Assisted Living Concepts, 786 F. Supp. 2d 1173 (E.D. Tex. 2011) (denying motion for summary judgment, finding cancer in remission was a disability); Hoffman v. Carefirst of Fort Wayne, Inc., 737 F. Supp. 2d 976 (N.D. Ind. 2010) (denying defendant's motion for summary judgment, finding plaintiff's renal cell cancer was a disability, even in remission); Chalfont v. U.S. Electrodes, No. 10-2929, 2010 WL 5341846, at *9 (E.D. Pa. Dec. 28, 2010) (rejecting motion to dismiss on the ground that plaintiff's leukemia, which was in remission, did not constitute a disability); *see also* Meinelt v. P.F. Chang's China Bistro, Inc., 787 F. Supp. 2d 643 (S.D. Tex. 2011) (denying a summary judgment motion arguing that brain tumor was not a disability where case does not state whether the brain tumor was malignant or benign).

191. *See* Consent Decree, EEOC v. Southlake Comm. Mental Health Ctr., No. 2:10-CV-00444-PPS-APR (N.D. Ind. Mar, 11, 2013) (settling claim that employer failed to provide reasonable accommodation and terminated employee for missing work when she sought leave for breast cancer treatment. Settlement required employer to consider leave as an accommodation even where employees were not entitled to FMLA leave); Consent Decree, EEOC v. Journal Disposition Corp., No. 10-CV-00886-RHB (W.D. Mich. Nov. 10, 2011) (settling claim by employee that employer denied accommodation allowing employee to work part-time, and instead terminated him).

192. Patrick Dorrian, *EEOC Attorney, Administrative Judge Share Insights, Tips About Amended ADA*, 196 DAILY LAB. REP. A-5 (Oct. 5, 2012); *see also* Kevin M. Barry, *Exactly What Congress Intended?*, 17 EMP. RTS. & EMP. POL'Y J. 5, 27 (2013) (noting that early judicial interpretations of the ADAAA appear to be in accord with congressional intent to reverse restrictive interpretations of the definition of disability).

193. *See* Steven F. Befort, *An Empirical Examination of Case Outcomes Under the ADA Amendments Act*, 70 WASH. & LEE L. REV. 2027, 2050–51 (2013).

194. *Id.* at 2055.

accommodation requirements, as well as the requirement that the plaintiff be a qualified individual with a disability.[195]

3. Qualified Individuals with a Disability

In passing the ADA, Congress recognized that, unlike many other groups protected from discrimination, discrimination against individuals with disabilities might be justified if the disability prevented the individual from doing the job. Accordingly, the law bars only discrimination against "qualified" individuals with disabilities.[196] A qualified individual with a disability can perform the essential functions of the job, with or without reasonable accommodation by the employer.[197] The issue as it arises in practice is typically intertwined with the issues of discrimination and accommodation. Thus, the employer may admit it acted on the basis of the disability but claim that the disability prevented the employee from meeting the job qualifications.[198] The employer may also assert that there is no reasonable accommodation that would enable the employee to meet the job qualifications that can be provided without undue hardship.[199]

Professor Befort's research shows that post-ADAAA, employers are winning more summary judgment motions based on qualified status.[200] Professor Porter has suggested an explanation for this.[201] The analysis of essential functions of the job is more structured by the statute than the

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195. Of course, it is always possible that early indications may not be an accurate predictor of later developments. One of the very earliest ADA cases involved an executive with brain cancer who successfully sued his employer, EEOC v. AIC Sec. Investigations, Ltd., 55 F.3d 1276 (7th Cir. 1995)**,** but as the law developed, plaintiffs' victories were few and far between as noted *supra*. The amendments did not change the law's definition of disability and the EEOC regulations can always be circumvented by the courts. BEFORT & BUDD, *supra* note 30, at 86-7; Kate Webber, *Correcting the Supreme Court—Will It Listen? Using the Models of Judicial Decision-Making to Predict the Future of the ADA Amendments Act*, 23 S. CAL. INTERDISC. L.J. 305, 350–52 (2014) (indicating that even if lower courts are currently interpreting the ADA Amendments Act consistently with congressional intent, the Supreme Court may not do so).

196. 42 U.S.C. § 12112(a) (2012).

197. *Id.* § 12111(8).

198. *See, e.g.*, McMillan v. City of New York, 711 F.3d 120, 124–25, 127 (2d Cir. 2013) (reversing summary judgment for the employer which was granted on the basis that the employee could not meet the job qualification of arriving on time for work because of his disability).

199. *See, e.g.*, Spears v. Creel, No. 14-12261, 2015 WL 1651646 (11th Cir. Apr. 15, 2015) **(**accepting employer's claim that there was no available reasonable accommodation for employee with cancer that could be provided without undue hardship).

200. Befort, *supra* note 193, at 2055 (showing increase in employer wins on summary judgment motions based on qualified status from 47.9% of cases to 69.7% of cases).

201. Porter, *supra* note 189, at 57.

vague notion of reasonableness, which has never been defined by the Supreme Court.[202] Thus the essential functions analysis is easier for the courts to use, particularly in granting summary judgment to the employer.[203] There is often an aspect of the job that the employee cannot do.[204] If the court finds that to be an essential function, the law does not require that function to be eliminated or reassigned.[205] An accommodation is only possible if it allows modification, but not elimination, of one of the essential functions of the job or if the accommodation eliminates a non-essential or marginal function of the job.[206]

Professor Porter's analysis of the cases suggests that while courts are willing to require employers to accommodate employees with physical adjustments to the workplace, such as providing equipment, they are often unwilling to require employers to make structural changes in the workplace as accommodations.[207] An example of this phenomenon from our hypothetical survivor, Sarah, would be a characterization of working her regular shift as an essential function of the job. Sarah's inability to work that shift daily as a result of her treatment would render her unqualified. This, of course, has important implications for cancer survivors like Sarah that are explored in the following sections.

Alternatively, of course, the employer may claim that any challenged action was based on another reason having nothing to do with the individual's disability. In such cases, the employer may or may not contest the employee's ability to meet the definition of "qualified individual." Because of the relationship between qualified individual with a disability and accommodation, qualified individual with a disability will be discussed further in connection with accommodations.

4. Hiring, Termination, and Other Discrimination

Where the employer denies any disability-related discrimination, there is nothing unique about discrimination claims under the ADA once disability is established.[208] The key to proving discrimination is showing

202. *Id.* at 55–56.

203. *Id.* at 56.

204. *Id.* at 57.

205. *Id.*

206. *Id.*

207. *Id.* at 54–55, 57.

208. What is unique about ADA claims as compared to those under other discrimination laws, however, is that the more common ADA case is one where the employer admits to relying on the disability but claims that the employee is not qualified because of the disability.

that the employer's adverse actions are based on the disability and not on other factors. This motive-based inquiry is fact-specific and will depend on the evidence in the particular case, including the timing of the employer's actions and any other evidence that suggests a motive based on the employee's cancer.[209]

The particular issues that are most likely to arise for cancer patients in these pure discrimination cases are termination or discipline of an employee allegedly based on the employee's cancer or failure to hire an employee who has a history of cancer.[210] In the case of hypothetical survivor Sarah, the employer's recently instituted criticism of her performance may be discrimination based on her cancer and could ultimately lead to termination. Alternatively, her performance may in fact be deteriorating, which would provide a legitimate nondiscriminatory reason for discipline and, without improvement, discharge.[211] The success of any challenge to the employer's action would depend on the evidence as to the employer's motive.

An example from an actual case is *Crane v. Monterrey Mushroom, Inc.*,[212] where the court denied an employer's summary judgment motion. In that case, Crane brought claims of discrimination based on his diagnosis of prostate cancer and intent to take leave under the FMLA for treatment.[213] The employer eliminated Crane's position shortly after his diagnosis, and he alleged he was discriminatorily selected for

209. The standard for proof on the issue of causation under the ADA is unsettled. *See* Quillen v. Touchstone Med. Imaging LLC, 15 F. Supp. 3d 774, 780 n.10 (M.D. Tenn. 2014) (discussing split of courts on standard of proof and impact of *University of Texas Southwest Medical Center v. Nassar*, __ U.S. __, 133 S. Ct. 2517 (2013), which required proof of "but for" causation for retaliation claims under Title VII); Gallagher v. San Diego Unified Port Dist., 14 F. Supp. 3d 1380 (S.D. Cal. 2014) (applying the *Nassar* standard to ADA retaliation claim); Siring v. Or. State Bd. of Higher Educ., 977 F. Supp. 2d 1058, 1062–63 (D. Or. 2013) (refusing to apply the *Nassar* standard to discrimination claims under the ADA).

210. The ADA protects individuals with a record of a disability and individuals who are regarded as having a disability but do not. 42 U.S.C. § 12102(1)(B)–(C) (2012). Pre-amendment studies of EEOC claims found termination claims to be more prevalent for cancer survivors as compared to claims by individuals with other conditions. Feuerstein et al., *supra* note 176, at 189. Also more common were claims relating to inequitable application of terms and conditions of employment. *Id.* These claims, like termination and hiring claims, will typically depend on proof of motive. Hiring cases were not common among claims filed by cancer survivors, perhaps because of proof difficulties. *Id.* at 188. For further discussion of proof problems, see *infra* notes 219–21 and accompanying text.

211. Accommodation, discussed *infra* Part VI.B.5, might be relevant in such a determination also. If Sarah was denied a reasonable accommodation that would have enabled her to perform the job and then be disciplined or discharged for her failure to perform adequately, the discipline or discharge might be found to be discriminatory.

212. 910 F. Supp. 2d 1032 (E.D. Tenn. 2012).

213. *Id.* at 1038.

termination.[214] He had informed his boss in December that he might have cancer and gave the supervisor the official diagnosis on January 13.[215] Crane was notified of his layoff in early February.[216] There was conflicting evidence about when the decision to terminate was made—before or after knowledge about the cancer or potential cancer—as well as conflicting evidence about whether the decision-maker was angry about Crane's cancer diagnosis and its impact on his work.[217] Based on this material factual dispute, the court denied summary judgment, leaving it to the jury to determine whether the layoff was discriminatory or legitimate.[218]

The reality is that ADA discrimination cases are far more likely to challenge terminations than failures to hire.[219] Hiring cases are difficult to win, have limited damages, and often involve plaintiffs with few resources, making them unattractive to the plaintiffs' employment bar.[220] The problems with hiring discrimination cases are not unique to the ADA,[221] nor are the potential fixes. Because of the difficulties with hiring cases, most cancer patients will be in a better position under the ADA if they can keep the jobs they have rather than leaving the job and returning to the work force later.[222] Employers have an economic incentive to avoid hiring someone with a history of cancer, as they fear a recurrence that might lead to costly absenteeism or expensive medical treatment. A return to the workforce requires an explanation for absence,

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214. *Id.* at 1039–40.

215. *Id.* at 1039.

216. *Id.* at 1040.

217. *Id.* at 1048–50.

218. The case was dismissed before trial on joint motion of the parties, presumably based on a settlement. Joint Stipulation and Order of Dismissal with Prejudice, Crane v. Monterey Mushrooms, Inc., 910 F. Supp. 2d 1032 (E.D. Tenn. 2013) (No. 3:10-CV-00149).

219. SAMUEL BAGENSTOS, LAW AND THE CONTRADICTIONS OF THE DISABILITY RIGHTS MOVEMENT 127 (2009).

220. *Id.* at 127–28. The EEOC has brought several hiring claims for cancer survivors, however. *See* EEOC v. Dyn McDermott Petroleum Operations Co., 537 F. App'x 437, 448 (5th Cir. 2013) (reversing summary judgment for employer on EEOC claims that employee was not hired because of his age and his wife's cancer); EEOC v. Prof'l Freezing Servs., LLC, 15 F. Supp. 3d 783 (N.D. Ill. 2013) (alleging failure to hire because of prostate cancer and settled with consent decree); Complaint, EEOC v. SITA Info. Networking Computing USA, Inc., No. 1:11-cv-02818-RLV (N.D. Ga. Aug. 24, 2011) (alleging rescission of employment offer because of diagnosis of cancer and request for accommodation); Consent Decree, EEOC v. SITA Info. Networking Computing USA, Inc., No. 1:11-cv-02818-RLV (N.D. Ga. May 6, 2013) (settling the dispute).

221. BAGENSTOS, *supra* note 219, at 127 n.50.

222. Evidence of persistent unemployment of cancer survivors suggests that survivors may have difficulty finding employment after leaving the work force for cancer treatment. *Employment-Contingent Health Insurance*, *supra* note 103, at 732.

and since any hiring discrimination will be difficult to prove,[223] it is most useful to look at how the ADA might enable employees with cancer to retain their employment.

5. Reasonable Accommodation

A widespread finding of the cancer studies was that employer accommodation and support was an important factor in continued employment of cancer patients.[224] This finding applied regardless of the demographic characteristics of the cancer patients, the type of cancer, or the type of work.[225] These findings indicate the significance of the accommodation requirement of the ADA. Accommodations found to be particularly important were flexible work schedules, paid sick leave, assistance with job tasks, and control over the type and amount of work.[226] These accommodations are among the most difficult for employers for they require flexibility in work planning and impose burdens on both employers and employees due to workplace restructuring and employee absence.[227]

The ADA states reasonable accommodation may include:

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

223. As just one example, an employer can screen out applicants with employment gaps based on resumes or applications. The applicant will never know the reason for the rejection. Unless an applicant is uniquely highly qualified for a particular position, showing a rejection is based on disability or history of a disability rather than some other reason is extremely difficult.

224. *See supra* notes 111–15 and accompanying text.

225. Interestingly, a pre-amendment study of ADA claims (covering the years 2000–05) did not find a high incidence of failure to accommodate claims filed by cancer survivors as compared to those with other disabilities. Feuerstein et al., *supra* note 176, at 188. This result seems anomalous given the importance of accommodation to the maintenance of employment revealed by numerous studies. The authors hypothesized that uncertainty about the need and availability of accommodations might explain the lower rate of claims. *Id.* at 189–90. It may also reflect the fact that some desired accommodations would not give rise to a viable legal claim, such as emotional support from the employer and fellow employees. *See* Yu et al., *supra* note 98, at 215 (finding two of the most common reported negative employment experiences of cancer survivors were lack of support by employer and coworkers).

226. *See supra* note 114 and accompanying text.

227. Stephen F. Befort, *The Most Difficult ADA Reasonable Accommodation Issues: Reassignment and Leave of Absence*, 37 WAKE FOREST L. REV. 439, 441–42 (2002).

accommodations for individuals with disabilities.[228]

Accommodations are assessed on an individualized basis. What may be reasonable in one employment situation may not be in another. The regulations recommend an interactive process between employers and employees to determine whether an accommodation is possible, and the courts have affirmed the importance of the interactive process.[229] In determining whether an accommodation is reasonable, the first question is whether it is reasonable on its face or in most employment settings.[230] If the employee makes that showing, the second question is whether the employer can show that the accommodation would cause undue hardship in the particular situation at issue.[231]

Because of the individualized nature of the accommodation inquiry and the inclusive nature of the accommodation definition, there is always a possibility that an individual with cancer can be accommodated. To assess the effectiveness of the law for cancer survivors generally, however, it is useful to look at how the EEOC and the courts have interpreted the law with respect to the accommodations deemed most important by survivors.

a. Leave as a Reasonable Accommodation

Research clearly shows that some cancers create long-term employment effects. Some survivors are still unable to work or unable to work full-time twelve to eighteen months after diagnosis.[232] An employer's willingness to provide continued flexibility for the employee with cancer is a key accommodation enabling retention of employment, which may require time off or reduced hours for some employees. Accordingly, leave will often be important in enabling survivors to remain employed.[233] As discussed above, the FMLA requires up to

228. 42 U.S.C. § 12111(9) (2012).

229. *See* Bielich v. Johnson & Johnson, Inc., 6 F. Supp. 3d 589, 620 (W.D. Pa. 2014); 29 C.F.R. § 1630.2(o)(3) (2014); FEDERAL CIVIL JURY INSTRUCTIONS OF THE SEVENTH CIRCUIT § 4.08 (2009), *available at* http://www.ca7.uscourts.gov/Pattern_Jury_Instr/7th_civ_instruc_2009.pdf (stating that both parties must cooperate in interactive process).

230. U.S. Airways, Inc. v. Barnett, 535 U.S. 391, 401–02 (2002).

231. *Id.* at 402. Undue hardship is "significant difficulty or expense." 42 U.S.C. § 12111(10)(A).

232. *See supra* notes 56–57, 60–61, 72, 81, 93–95 and accompanying text.

233. *See, e.g.*, Hwang v. Kan. State Univ., 753 F.3d 1159 (10th Cir. 2014) (finding employer did not violate Rehabilitation Act by failing to extend six month leave for professor when she was unable to return from leave after cancer treatment as her inability to work meant she was not able to perform the essential functions of the job); Complaint, EEOC v. Children's Hosp. & Research Ctr., No. 4:13-CV-05715 (N.D. Cal. Dec. 11, 2013) (alleging that employee with breast cancer given six month leave and terminated when she requested an additional two month leave); Complaint,

twelve weeks unpaid leave in a twelve-month period, including intermittent leave, which provides some accommodation for cancer survivors that meet its eligibility requirements.[234] The ADA can supplement FMLA leave.[235] For employees in smaller workplaces, with less than fifty but at least fifteen employees, or employees who do not yet qualify for FMLA leave, the ADA can substitute.

An important limitation on ADA leave, however, is that, unlike the FMLA, the statute does not expressly require continuation of health insurance during leave.[236] If the employer continues insurance for employees on other leaves, however, employees with disabilities cannot be treated differently.[237]

i. Paid Leave

Paid sick leave is easily dispatched. It is not a required accommodation under the ADA. However, the EEOC's Enforcement Guidance, issued to advise employers and individuals about rights and responsibilities under the law, does indicate that an employer may be required to modify its existing paid leave policies to allow an employee to use paid leave to accommodate a disability.[238] Nor does the FMLA require paid leave unless it is otherwise available under the employer's policies.[239] Thus, paid leave is in the discretion of the employer unless required by state or local law.[240] About sixty-seven percent of workers

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Rozenfeld v. Neurological Assocs. of Long Island, P.C., No. 2:13-CV-04509 (E.D.N.Y. Aug. 9, 2013) (alleging employer failed to accommodate plaintiff by providing six month leave for treatment of brain cancer, instead deeming plaintiff permanently disabled under employment contract and terminating her); Consent Decree, EEOC v. Southlake Comm. Mental Health Ctr., Inc., No. 2:10-CV-00444 (N.D. Ind. Mar. 11, 2013) (settling case of employee fired for absenteeism after requesting leave for breast cancer treatment).

234. *See supra* notes 139–40 and accompanying text.

235. *See* 29 C.F.R. § 825.702(b) (2014) (indicating that leave is a reasonable accommodation absent undue hardship).

236. Ivelisse Bonilla, *Cancer as a Disability After the American with Disabilities Act Amendments Act*, 59 FED. LAW. 12, 1 (2012).

237. *Id.*

238. U.S. EQUAL EMP'T OPPORTUNITIES COMM'N, ENFORCEMENT GUIDANCE: REASONABLE ACCOMMODATION AND UNDUE HARDSHIP UNDER THE AMERICANS WITH DISABILITIES ACT ¶ 24 (2002) [hereinafter ENFORCEMENT GUIDANCE] (citing Dutton v. Johnson Cnty. Bd. of Comm'rs, 868 F. Supp. 1260, 1264–65 (D. Kan. 1994)), *available at* http://www.eeoc.gov/policy/docs/accommodation.html (finding discrimination where employer refused to allow employee to use paid vacation leave to accommodate disability although employee could not meet requirement of advance notice for scheduling vacation).

239. *See supra* note 142 and accompanying text.

240. For a summary of current legislation, see NAT'L P'SHIP FOR WOMEN & FAMILIES, PAID SICK DAYS STATUTES (2015), *available at* http://www.nationalpartnership.org/research-library/work-

currently have some paid sick leave, while only thirty-seven percent have some form of short term disability benefits.[241] Although a few states and localities require some employers to provide paid sick leave, most require only five days and some even fewer.[242] This is far less than almost all cancer patients would need to cover the absences required. Additionally, many statutes limit coverage. For example, Connecticut's law covers only some hourly service workers, excluding manufacturing employees, those working for employers with less than fifty employees, salaried workers, temporary workers, and others.[243] In addition to the paid leave laws, a few states have public disability insurance programs similar to unemployment insurance that apply to many employers and provide partial pay for disability from a state-administered fund.[244] There is increasing pressure for paid sick leave for many purposes, however, and state and local legislative campaigns exist in many locations.[245] Each additional law requiring paid leave improves cancer survivors' ability to maintain employment. Unpaid leave is a different story.

ii. Unpaid Leave

The EEOC has been active on the issue of leaves of absence as reasonable accommodations in recent years, and in 2011 it held a public meeting to evaluate the topic. At that meeting, EEOC commissioners confirmed that leave as an accommodation must be considered on a case-by-case basis, but also indicated that additional guidance would be forthcoming to help employers and employees better deal with this particularly difficult issue.[246]

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family/psd/paid-sick-days-statutes.pdf.

241. U.S. BUREAU OF LABOR STATISTICS, 3 PROGRAM PERSPECTIVES 3 (2011), *available at* http://www.bls.gov/opub/btn/archive/program-perspectives-on-sick-leave-and-disability-benefit-combinations-pdf.pdf.

242. *See* NAT'L P'SHIP FOR WOMEN & FAMILIES, *supra* note 240.

243. *Id.* The recently enacted Massachusetts law has broader coverage, requiring employers with eleven or more employees to provide up to forty hours of paid sick leave with smaller employers required to provide equivalent unpaid leave. *Id.*

244. U.S. DEP'T OF LABOR, COMPARISON OF STATE UNEMPLOYMENT INSURANCE LAWS 8-1, *available at* http://www.unemploymentinsurance.doleta.gov/unemploy/pdf/uilawcompar/2014/disability.pdf. These programs are discussed further *infra* notes 410–13 and accompanying text.

245. For a summary of current and pending legislation requiring paid sick time at the state and local level, see NAT'L P'SHIP FOR WOMEN & FAMILIES, STATE AND LOCAL ACTION ON PAID SICK DAYS (2015), *available at* http://www.nationalpartnership.org/research-library/campaigns/psd/state-and-local-action-paid-sick-days.pdf.

246. Peter J. Petesch, *EEOC Moves Toward Guidance Addressing Leave as a Reasonable Accommodation Under the ADA*, BNA INSIGHTS: LAB. & EMP. L. (June 6, 2011). Such guidance has

The commissioners noted that some employer "best practices" were likely to be encouraged in future policy guidance. For example, they concluded that finite leave of absence policies, without built-in flexibility, were problematic.[247] While extended leave allowances need not be expressly provided in the policy, some indication of a procedure to deal with extenuating circumstances would be helpful to avoid employee confusion. Even if a policy provides a substantial leave period, it will likely be insufficient if it does not provide for individualized exceptions. Additionally, communication between employers and employees on leave is crucial, as the employer has a duty to engage in an interactive accommodation process. Future EEOC actions may indeed focus on employers who provide leave initially, but terminate the accommodations too early in the process, before they have exhausted all avenues of communication.[248]

Recent EEOC cases have targeted inflexible leave policies, reflecting the current agency view that exceptions must be made in some situations.[249] In 2011, the EEOC received its largest ADA-related settlement ever from Verizon Communications. The company paid twenty million dollars to resolve a lawsuit alleging that its "no fault" leave policy failed to take into account the need for leave as a reasonable accommodation.[250] Similarly, the EEOC settled a suit with the Denny's

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not been forthcoming as of yet, however. Kevin P. McGowan, *EEOC Officials, Attorneys Discuss Priorities Under Agency's Strategic Enforcement Plan*, 42 EMP. DISC. REP. (BNA) 125 (Jan. 16, 2014).

247. Petesch, *supra* note 246.

248. *Id.*

249. *See, e.g.*, EEOC v. United Parcel Serv., Inc., No. 09–cv–05291, 2013 WL 140604, at *1 (N.D. Ill. Jan. 11, 2013), *appeal denied* 2013 WL 2628795 (N.D. Ill. June 11, 2013); EEOC v. United Rd. Towing, Inc., No. 10-CV-06259, 2012 WL 1830099, at *1 (N.D. Ill. May 11, 2012); EEOC v. Princeton HealthCare Sys., No. 10–4126, 2012 WL 1623870, at *1 (D.N.J. May 9, 2012); EEOC v. Supervalu, Inc., No. 09-CV-05637, 2010 WL 5071196, at *1 (N.D. Ill. Dec. 7, 2010). Each of the cases was resolved by consent decree except the *United Parcel Service* case, which continues in litigation. *See* Consent Decree, EEOC v. United Rd. Towing, No. 10-CV-06259, 2012 WL 1830099 (N.D. Ill. June 20, 2012); Consent Decree, EEOC v. Princeton HealthCare Sys., No. 3:10-cv-04126-PGS-DEA (D.N.J. June 25, 2014); Consent Decree, EEOC v. Supervalu Inc., No. 1:09-CV-05637, (N.D. Ill. Jan. 14, 2011). On July 15, 2014, a magistrate recommended that the district court grant the EEOC's motion for civil contempt sanctions against Supervalu for violation of the consent decree. EEOC v. Supervalu, Inc., No. 09-CV-05637, 2014 WL 6787073, at *21. *But see* Hwang v. Kan. State Univ., 753 F.3d 1159, 1161–63 (10th Cir. 2014) (rejecting employee's argument that an inflexible six-month sick leave policy violated the Rehabilitation Act and finding that a refusal to provide additional leave to recover from cancer did not violate the law, although employer offered yearlong sabbaticals for some employees).

250. Press Release, U.S. Equal Emp't Opportunity Comm'n, Verizon to Pay $20 Million to Settle Nationwide EEOC Disability Suit (July 6, 2011), *available at* http://www.eeoc.gov/eeoc/newsroom/release/7-6-11a.cfm.

restaurant chain, alleging that the employer maintained a maximum medical leave policy that automatically denied all leave beyond a pre-determined limit, even if additional leave was required by the ADA.[251] In 2014, however, the Tenth Circuit rejected the argument that an inflexible leave policy was inherently discriminatory.[252]

In general, courts have followed the EEOC guidance and the ADA's legislative history and recognized leave as an appropriate form of accommodation.[253] However, differences arise over the amount of leave that is considered reasonable. Most courts have held that employers do not have to accommodate workers who require an indefinite period of leave.[254] For example, the Eighth Circuit has held that "a request for an indefinite leave of absence . . . is not a reasonable accommodation under the ADA."[255] In that case, the court concluded that an employee with ovarian cancer could not be considered "otherwise qualified" under the ADA because she could not perform her duties as a store manager while on leave to undergo chemotherapy.[256] Federal courts of appeals have reached similar conclusions in the First,[257] Fourth,[258] Fifth,[259] Sixth,[260]

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251. Press Release, U.S. Equal Emp't Opportunity Comm'n, Denny's to Pay $1.3 Million to Settle EEOC Disability Discrimination Lawsuit (June 27, 2011), *available at* http://www.eeoc.gov/eeoc/newsroom/release/6-27-11b.cfm. For additional settlements, see *Written Testimony of John Hendrickson, Regional Attorney, EEOC*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION (June 8, 2011), *available at* http://www1.eeoc.gov/eeoc/meetings/6-8-11/hendrickson.cfm.

252. *Hwang*, 753 F.3d at 1164 (suggesting that inflexible policies can benefit individuals with disabilities by their transparency, clarity, and consistency).

253. Befort, *supra* note 227, at 459–60.

254. The EEOC's 2008 Guidance also reflects this view. *See The Americans with Disabilities Act: Applying Performance and Conduct Standards to Employees with Disabilities*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, http://www.eeoc.gov/facts/performance-conduct.html (last updated Jan. 20, 2011).

255. Peyton v. Fred's Stores of Ark., Inc., 561 F.3d 900, 903 (8th Cir. 2009).

256. *Id.*

257. *See* Fiumara v. President & Fellows of Harvard Coll., 327 F. App'x 212, 213 (2009) ("Similarly, indefinite leave is not a reasonable accommodation under the ADA.").

258. *See* Myers v. Hose, 50 F.3d 278, 283 (4th Cir. 1995) (stating that the ADA contains "no reference to an individual's future ability to perform the essential functions of his position").

259. *See* Rogers v. Int'l Marine Terminals, 87 F.3d 755 (5th Cir. 1996) (noting that an ability to appear for work is an essential aspect of any job); Harville v. Tex. A&M Univ., 833 F. Supp. 2d 645, 661 (S.D. Tex. 2011) ("Where attendance is an essential aspect of the job, an individual who has frequent absences is unqualified.").

260. *See* Gantt v. Wilson Sporting Goods Co., 143 F.3d 1042, 1047 (6th Cir. 1998) (ruling against an employee with a shoulder injury who failed to state when she would return to work and was terminated after a year's leave). *But see* Cehrs v. Ne. Ohio Alzheimer's Research Ctr., 155 F.3d 775, 783 (6th Cir. 1998) (finding a genuine issue of fact as to whether an eight-week leave of absence followed by a request for an additional one-month leave was a reasonable accommodation).

Seventh,[261] Tenth,[262] and Eleventh[263] Circuits. A leave of absence with an anticipated date of return that cannot be predicted with medical certainty, however, is not a request for indefinite leave.[264]

Therefore, some of these circuits have agreed with EEOC recommendations that it is reasonable for employers to grant successive requests or requests for a definite period of extended leave, as long as the accommodation does not unduly burden the employer. In 2000, the First Circuit concluded that an employer would suffer no hardship if it granted extra leave to a secretary with cancer who had already had considerable absences, since her temporary replacements were able to perform her duties with no loss to efficiency.[265] Likewise, in *Cehrs v. Northeast Ohio Alzheimer's Research Center*,[266] the Sixth Circuit found a genuine issue of fact existed as to whether an additional request for one month off following an initial eight-week leave of absence was reasonable.[267] The *Cehrs* court criticized the "presumption that uninterrupted attendance is an essential job requirement."[268] If attendance is treated as an essential requirement, the employer would

261. *See* EEOC v. Yellow Freight Sys., Inc., 253 F.3d 943, 950–51 (7th Cir. 2001) (holding that a dockworker's request for unlimited sick days to accommodate Kaposi's sarcoma was not a reasonable accommodation, and due to his record of frequent absences, he could not be considered "qualified").

262. *See* Lara v. State Farm Fire & Cas. Co., 121 F. App'x 796, 801 (10th Cir. 2005) (holding that employee was not entitled to three months additional leave or to substitute accrued vacation time for disability leave, because there was no reliable evidence of the expected duration of the impairment); Cisneros v. Wilson, 226 F.3d 1113, 1128–30 (10th Cir. 2000) (holding an employee whose doctor did not indicate the duration of her impairment was not entitled to leave as a reasonable accommodation); Taylor v. Pepsi-Cola Co., 196 F.3d 1106, 1110 (10th Cir. 1999) (holding extended leave after one year not reasonable where a delivery driver had told the company that he would never be able to return to work as a driver and could not say when he would be able to work at all); Hudson v. MCI Telecomms. Corp., 87 F.3d 1167, 1168–69 (10th Cir. 1996) (finding leave was not a reasonable accommodation where there was no evidence of the duration of the impairment other than that it would not be permanent).

263. Wood v. Green, 323 F.3d 1309, 1312 (11th Cir. 2003).

264. *See Written Testimony of Brian East Senior Attorney Texas Disability Rights*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION 9 (June 8, 2011) [hereinafter *Testimony of Brian East*], *available at* http://www.eeoc.gov/eeoc/meetings/6-8-11/east.cfm (citing cases).

265. García-Ayala v. Lederle Parenterals, Inc., 212 F.3d 638, 649 (1st Cir. 2000); *see also* Reed v. Jefferson Parrish Sch. Bd., No. 12-2758, 2014 WL 2589152 (E.D. La. Apr. 22, 2014) (finding plaintiff who sought an additional two weeks of leave after a six-month leave of absence was qualified and there was a genuine issue of fact as to whether the additional leave would cause undue hardship for the employer).

266. 155 F.3d 775 (6th Cir. 1998).

267. *Id.* at 783. *But see* Walsh v. United Parcel Serv., 201 F.3d 718, 727 (6th Cir. 2000) (interpreting case law among several circuits to suggest that a request for medical leave in excess of eighteen months would likely be unreasonable).

268. 155 F.3d at 782.

have no burden to show that a leave would cause undue hardship.[269] Further, the individualized inquiry that the ADA requires in disability discrimination cases would be eliminated.[270]

Whether an extended leave of absence poses an undue burden on the employer depends on many different factors, including the resources of the particular employer, and the cost or difficulty involved in providing a particular accommodation.[271] While the First Circuit has found that over a year of leave could be considered reasonable,[272] the Eighth Circuit, under a different set of circumstances, found that a leave of six months would be unduly burdensome.[273] In *Epps v. City of Pine Lawn*,[274] the court held that a small municipal government could not feasibly reallocate a police officer's duties among a small staff over a six-month period.[275]

Courts also take varying views as to whether an employer needs to accommodate periods of intermittent leave resulting from chronic illness. Several circuits have dealt with the issue by determining whether regular attendance is an essential job function—and in some cases have found it to be.[276] The Fifth Circuit, in particular, has held that attendance is essential for *any* job.[277] Where attendance is essential to the job, courts have concluded that a person whose disability causes poor attendance is not "otherwise qualified."[278] As discussed *infra* with respect to

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269. *Id.*

270. *Id.*

271. 42 U.S.C. § 12111(10) (2012).

272. García-Ayala v. Lederle Parenterals, Inc., 212 F.3d 638, 647 (1st Cir. 2000).

273. Epps v. City of Pine Lawn, 353 F.3d 588, 593 (8th Cir. 2003).

274. 353 F.3d 588 (8th Cir. 2003).

275. *Id.* at 592 n.5.

276. Rogers v. Int'l Marine Terminals, Inc., 87 F.3d 755, 759 (5th Cir. 1996); Tyndall v. Nat'l Educ. Ctrs., Inc., 31 F.3d 209, 213 (4th Cir. 1994) (stating that reliable attendance is "a necessary element of most jobs").

277. *Rogers*, 87 F.3d at 759 ("[A]n essential element of any . . . job is an ability to appear for work . . . and to complete assigned tasks within a reasonable period of time." (alteration in original) (quoting Carr v. Reno, 23 F.3d 525, 530 (D.C. Cir. 1994))). *But see* Carmona v. Sw. Airlines Co., 604 F.3d 848, 860 (5th Cir. 2010) (finding that an employee's irregular attendance did not render him unqualified where the employer's attendance policy was extremely lenient and the employee had remained compliant with the policy for seven years, despite his irregular attendance).

278. Grubb v. Sw. Airlines, 296 F. App'x 383, 388 (5th Cir. 2008) ("Lack of physical presence is a commonly-accepted disqualification for ADA protection."); *see also* Colón-Fontánez v. Municipality of San Juan, 660 F.3d 17, 33–34 (1st Cir. 2011) (finding that an employee suffering from fibromyalgia was not qualified because she was absent at least twenty percent of her scheduled work time for ten years); Jackson v. Veterans Admin., 22 F.3d 277, 278–79 (11th Cir. 1994) (finding housekeeping aide with rheumatoid arthritis was not qualified because he had unpredictable sporadic absences and consistent attendance was required by the job).

modifications of work schedules,[279] assessing this issue under the rubric of whether the individual is qualified is problematic. As the court in *Cehrs* noted, this relieves the employer of the obligation to show that leave to recover from illness or its effects causes any hardship.[280] Further, attendance is not a job function at all, as defined by the regulations.[281] Certainly, erratic or simply poor attendance can be problematic for an employer in many cases, but analyzing the issue under the undue hardship prong allows for consideration of the particular job, the needs of the employer, and the circumstances of the employee in assessing whether leave is a required accommodation under the law.

In accord with this approach, courts in other circuits have analyzed all the relevant circumstances to determine whether a series of repeated absences disqualifies an employee from performing essential job functions.[282] In *Brannon v. Luco Mop Co.*,[283] the Eighth Circuit considered several factors to conclude that a diabetic employee with toe and foot amputations was not qualified.[284] She was absent forty of seventy-seven work days prior to termination, postponed return dates three times, and failed to demonstrate that having additional time off to recuperate would enable her to have more consistent attendance.[285] In *Carlson v. InaCom Corp.*,[286] the court held that an employee was qualified, despite her absences, when the employer presented no evidence to establish that the absences resulted in essential business not being completed in a timely and efficient manner.[287]

Current law seems fairly clear that definite leave of a limited duration should be considered as a reasonable accommodation under the ADA,

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279. *See infra* notes 330–38 and accompanying text.

280. *See supra* note 269 and accompanying text.

281. *See Testimony of Brian East*, *supra* note 264 (citing, inter alia, EEOC regulations defining job functions).

282. *See* Humphrey v. Mem'l Hosps. Ass'n, 239 F.3d 1128, 1135 n.11 (9th Cir. 2001) (noting that regular attendance is not *per se* an essential job function); Cehrs v. Ne. Ohio Alzheimer's Research Ctr., 155 F.3d 775, 782 (6th Cir. 1998) (stating that "[t]he presumption that uninterrupted attendance is an essential job requirement improperly dispenses with the burden-shifting analysis" for determining ADA violations); Cook v. R.I. Dep't of Mental Health, Retardation, & Hosps., 10 F.3d 17, 27 (1st Cir. 1993) ("Unless absenteeism rises to a level such that the applicant is no longer 'otherwise qualified,' the Rehabilitation Act requires employers to bear absenteeism and other miscellaneous burdens involved in making reasonable accommodations in order to permit the employment of disabled persons.").

283. 521 F.3d 843 (8th Cir. 2008).

284. *Id.* at 848–49.

285. *Id.*

286. 885 F. Supp. 1314 (D. Neb. 1995).

287. *Id.* at 1321.

while indefinite leave in most cases is not required. In some cases, however, courts have found regular attendance to be an essential job function, which limits even the accommodation of a finite leave.[288] More difficult questions are presented in cases where the type of leave requested falls somewhere in between—extended periods of leave, successive leave requests, and multiple brief absences. These are fact-specific determinations that often turn on issues such as whether the job requires a physical presence, the length of the leave, or how much of a burden the employee's absence places on the employer. In some cases they will depend on whether the court presumes that attendance is an essential function or considers whether accommodating the particular absences causes undue hardship. Telecommuting and multiple brief absences will be explored further in the job flexibility section below.

b. Job Flexibility as an Accommodation

The literature on cancer and work indicates that flexibility in work is an important accommodation in enabling continued employment. Several possible accommodations might provide such flexibility, including reassigning some tasks to other employees, providing equipment to assist in physical tasks, rest breaks or altered schedules for survivors suffering from fatigue, and working from home. Data on workplace flexibility, however, reveal that less than half of workers have flexible hours and less than forty percent have flexibility in work days.[289] Sarah's job difficulties suggest that a more flexible approach might provide needed accommodations that enable her to keep her job. The ability to change shifts for her treatment is one such accommodation. If her performance is in fact deficient, perhaps it is due to the effects of treatment, and rest breaks or assistive equipment might help. Each of these accommodations has been addressed by the EEOC and the courts.

i. Providing Assistive Equipment

An example from a recent case illustrates the need for

288. *See, e.g.*, Basden v. Prof'l Transp., Inc., 714 F.3d 1034, 1037–38 (7th Cir. 2013) (finding attendance to be an essential function and rejecting claim of employee with multiple sclerosis who was fired despite her request for a thirty-day leave where the court did not believe the employee established that the leave would have enabled her to return to work on a regular and predictable basis).

289. Glynn & Farrell, *supra* note 150, at 5. As in the case of paid leaves, Latinos and African-Americans are less likely to have these benefits than other workers. *Id.*

accommodations for physical limitations.[290] A support services assistant at a law firm had lifting restrictions resulting from cancer treatment.[291] The job required moving heavy boxes of documents and occasionally moving machines on wheels.[292] The complaint alleged that the employer initially allowed the assistant to use a cart to move heavy boxes and to break down boxes of documents to reduce the amount of weight lifted, but then refused to continue the accommodation, ultimately firing the assistant because of her inability to lift heavy weights.[293]

First, it appears that lifting these documents was an essential function of the job. To be a qualified individual with a disability, the cancer survivor must be able to perform the essential functions of the job with or without reasonable accommodation. Elimination of essential functions is not a reasonable accommodation although reassignment of marginal functions can be.[294] Even if an employee's inability to perform essential functions is temporary, reassignment of those functions is not required as an accommodation. At most, the employee might be entitled to a reasonable leave pending recovery sufficient to enable performance of all job functions. The complaint did not allege that the employer should have reassigned these functions, but instead argued that the accommodation initially offered was reasonable and enabled her to perform the job.[295]

The assistant requested to be allowed to continue using the equipment that enabled her to do the job despite the lifting limitations from the cancer. The question is whether this accommodation is reasonable, whether it enables her to meet the requirements of her job, and whether it causes undue hardship to the employer.[296] It is certainly possible, if not

290. For another example, see Complaint, EEOC v. Wal-Mart Stores, Inc., No. 2:10-CV-00222 (E.D. Tenn. Oct. 7, 2010) (involving employee with lifting restrictions resulting from cancer who was placed on unpaid leave when he could not fill in for another employee who was on break because the position required lifting). The case was settled by consent decree in December, 2011. Consent Decree, EEOC v. Wal-Mart Stores, No. 2:10-CV-00222 (E.D. Tenn. Dec. 15, 2011).

291. *See* Complaint ¶ 8(f), EEOC v. Womble Carlyle Sandridge & Rice, No. 1:13-CV-00046, 2014 BL 178305 (M.D.N.C. Jan. 16, 2013).

292. The employer claimed that the job required lifting of up to seventy-five pounds and pushing or pulling machines on wheels weighing up to 700 pounds. *Id.* ¶ 8(h).

293. *Id.* ¶ 8(i)–(l).

294. *See, e.g.*, Bell v. Hercules Liftboat Co., 524 F. App'x 64, 69 (5th Cir. 2013) (granting summary judgment to employer on termination claim of cancer survivor who admitted she could not perform eighty percent of her job functions and was only able to return to work because her subordinates performed her job functions).

295. Complaint, *supra* note 291, ¶ 8(i).

296. There is disagreement among scholars about whether reasonableness and undue hardship are merely different recitations of the same obligation or separate requirements and, if the latter, what is

likely, that using the cart and breaking down boxes of documents into smaller sections slows the assistant in her work. If so, the question would be whether it was sufficiently significant to make the accommodation unreasonable or to constitute undue hardship in light of the size and financial resources of the employer and the impact on operations, expenses, and other employees.[297] In thinking about whether the law strikes the appropriate balance, we might ask whether it properly considers and balances efficiency and equity or fairness to employees.[298] By requiring reasonable accommodation unless the employer shows undue hardship, the law requires the employer to bear some cost. Only when that cost is unreasonable or undue does the employee lose.

Another way to look at the question is how the ADA fits with other laws and supports for cancer survivors, and where the cost should fall. Should we expect the assistant to find another job consistent with her limitations if possible? If there is no such job available to her, should society support the assistant in some way? Or is it better for society if the employer suffers some loss of efficiency, presumably either passed on to its clients in higher costs, its other employees in reduced wages and benefits, or its partners in reduced profits, to enable the assistant to continue working?

Ultimately, the EEOC's claim on behalf of the assistant was defeated on summary judgment, not because the accommodation discussed above was unreasonable but because it did not enable her to do all of the essential functions of her job.[299] The accommodation allowed the assistant to do some of her job functions but did not allow her to work at several other locations or on Saturdays where assistance was unavailable and the objects that needed lifting could not be broken down into smaller

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the distinction between the two. *Compare* Nicole Buonocore Porter, Martin*izing Title I of the Americans with Disabilities Act*, 47 GA. L. REV. 527, 545–46 (2013) (arguing that the two are different requirements and that an accommodation is unreasonable if it alters the fundamental employer-employee relationship even if it does not cause the employer undue hardship), *with* Mark C. Weber, *Unreasonable Accommodation and Due Hardship*, 62 FLA. L. REV. 1119, 1124 (2010) (arguing that reasonable accommodation and undue hardship are "two sides of the same coin"). Existing case law does not resolve the question. Porter, *supra*, at 543–53.

297. 42 U.S.C. § 12111(10)(B) (2012); *see also* Kravits v. Shinseki, No. 10-861, 2012 WL 604169, at *7 (W.D. Pa. Feb. 24, 2012) ("Providing more detailed instruction seems tailored to address Mr. Kravits's shortcomings in preparing job vacancy notices and completing other projects. While providing this written instruction would surely require an additional expenditure of time and resources, it is not clear that the costs would outweigh the benefits or that it would impose an undue hardship on the Department.").

298. BEFORT & BUDD, *supra* note 30, at 112–13.

299. EEOC v. Womble Carlyle Sandridge & Rice, LLP, No. 1:13-CV-00046, 2014 WL 2916851, at *7–8 (M.D.N.C. June 26, 2014).

ones. Thus, absent successful appeal,[300] the assistant will have to find another position consistent with her limitations.

In general, courts seem more receptive to accommodations requiring assistive equipment or devices to accommodate physical limitations than to accommodations that require changes in established working conditions like schedules.[301] Courts denying employer motions have recognized that providing seating,[302] an air-conditioned vehicle,[303] a special ergonomic keyboard,[304] voice recognition software,[305] and even a human aide[306] might be reasonable under some circumstances. While for some jobs there will be no assistance sufficient to enable cancer survivors to do the job, in other cases, an accommodation may allow a survivor with physical limitations, mental effects of treatment, or fatigue to continue to work.

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300. *See* Ben James, *EEOC Wants 4th Circ. to Revive Womble Carlyle ADA Suit*, LAW360 (Sept. 11, 2014, 3:19 PM), http://www.law360.com/articles/576344.

301. Porter, *supra* note 189, at 44, 57.

302. *See* EEOC v. Wal-Mart Stores, Inc., 477 F.3d 561, 568–69 (8th Cir. 2007) (reversing summary judgment for Wal-Mart finding jury question as to whether applicant with cerebral palsy could perform the essential functions of greeter and cashier positions with seating aids such as scooter or stool); George v. Roush & Yates Racing Engines, LLC, No. 5:11-CV-00025-RLV, 2012 WL 3542633, at *6 (W.D.N.C. Aug. 16, 2012) (denying motion to dismiss where employee alleged he was able to perform the essential functions of his job while working from couches and rolling about the building on an office chair and was nevertheless terminated); Seim v. Three Eagles Commc'ns, Inc., No. 09-CV-3071-DEO, 2011 WL 2149061, at *3 (N.D. Iowa June 1, 2011) (finding genuine issue of material fact as to whether employer failed to accommodate on air personality by providing a chair); *cf.* Glow v. Union Pac. R.R. Co., 652 F. Supp. 2d 1135, 1147 (E.D. Cal. 2009) (finding offer to purchase ergonomic chair for employee with neck and back pain was a reasonable accommodation under the California Fair Employment and Housing Act).

303. *See* Gooden v. Consumers Energy Co., No. 12-11954, 2013 WL 4805061, at *5 (E.D. Mich. Sept. 9, 2013) (denying summary judgment, finding genuine issue of material fact regarding whether providing an air-conditioned vehicle to a diabetic employee would be a reasonable accommodation).

304. *See* Kravits v. Shinseki, No. 10-861, 2012 WL 604169, at *7–8 (W.D. Pa. Feb. 24, 2012) (denying summary judgment to employer because employee established genuine issue of material fact regarding whether employer refused to reasonably accommodate by providing ergonomic keyboard and step-by-step instructions).

305. *See* Dentice v. Farmers Ins. Exch., No. 10-CV-00113, 2012 WL 2504046, at *19 (E.D. Wis. June 28, 2012) (denying summary judgment for employer on employee's claim that employer failed to accommodate by providing voice activated software); Garza v. Abbott Labs., 940 F. Supp. 1227, 1243 (N.D. Ill. 1996) (same).

306. *See* Borkowski v. Valley Cent. Sch. Dist., 63 F.3d 131, 142–43 (2d Cir. 1995) (denying summary judgment where teacher claimed providing her with an aide would enable her to perform all the essential functions of her job).

ii. Requests to Work from Home

Another aspect of job flexibility is working from home. This may not be a reasonable accommodation for most hospital employees like Sarah, who are often providing direct service to patients,[307] but would be effective for many employees whose work is primarily or exclusively computer-based.[308]

Until recently, few courts had found working from home to be a reasonable accommodation. In *Rauen v. U.S. Tobacco*,[309] the Seventh Circuit held that a software engineer's request for a home office while undergoing treatment for rectal and breast cancer was not reasonable.[310] The court stated that "working at home is rarely a reasonable accommodation . . . because most jobs require the kind of teamwork, personal interaction, and supervision that simply cannot be had in a home office situation."[311]

The Seventh Circuit has not foreclosed any possibility of working from home as a reasonable accommodation, however. In *Waggoner v. Olin Corp.*,[312] though the court held that an employee's work from home request was unreasonable, it acknowledged that such an option might be reasonable in circumstances where physical attendance is not an essential function.[313] In those cases, the relevant issue becomes whether there is an undue hardship on the employer.[314] The Seventh Circuit thus appears to be focusing on attendance as an essential job function.

The EEOC lists several factors that should be considered in

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307. *See* Samper v. Providence St. Vincent Med. Ctr., 675 F.3d 1233, 1238–39 (9th Cir. 2012). *But see* Humphrey v. Mem'l Hosps. Ass'n, 239 F.3d 1128, 1136–37 (9th Cir. 2001) (suggesting that working at home might be a reasonable accommodation for a medical transcriptionist).

308. For case examples involving cancer, see *Eberle v. Forster & Garbus, LLP*, No. 1:14-CV-01687 (E.D.N.Y. Mar. 14, 2014) (alleging that employee was denied accommodation of working at home and then terminated because of his cancer and the side effects of his treatment, which included drowsiness), and Complaint ¶ 11–22, *Gregorev v. City of New York*, No. 1:14-cv-00909 (S.D.N.Y. Feb. 11, 2014) (alleging new supervisor unlawfully terminated work at home accommodation for plaintiff with multiple myeloma whose immune system might be compromised by workplace contact).

309. 319 F.3d 891 (7th Cir. 2003).

310. *Id.* at 897.

311. *Id.* at 896; *see also* Mason v. Avaya Commc'ns, Inc., 357 F.3d 1114, 1122 (10th Cir. 2004) (holding that a service coordinator's physical attendance at work was essential because the position required supervision and teamwork); Hypes v. First Commerce Corp., 134 F.3d 721, 726 (5th Cir. 1998) (finding that a bank loan officer was required to work as part of a team, and all members of the team needed to be present in the office).

312. 169 F.3d 481 (7th Cir. 1999).

313. *Id.* at 485.

314. *See* ENFORCEMENT GUIDANCE, *supra* note 238.

determining the feasibility of allowing an employee to work from home. These include the employer's ability to adequately supervise the employee, whether work requires specific tools or equipment that cannot be easily replicated at home, or whether the employee requires access to documents and information located only in the workplace.[315] The quality of work an employee produces at home may also be a factor.[316]

More recently, some courts have begun to acknowledge that technology has made working at home a more feasible accommodation.[317] Not all courts have been as open to working at home, however, despite the availability of technology that enables instant communication and virtual meetings. Recently, the Sixth Circuit, in an *en banc* decision in *EEOC v. Ford Motor Co.*,[318] recognized that telecommuting might be reasonable for some jobs, but adopted the view that on-site attendance is an essential function for jobs requiring interaction with others.[319] As the dissent pointed out, this ignores the availability of technology that allows virtual interaction and defers unnecessarily to the employer's existing practices without carefully examining the particular facts.[320]

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315. *See Work at Home/Telework as a Reasonable Accommodation*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, http://www.eeoc.gov/facts/telew-ork.html (last updated Oct. 27, 2005).

316. *See* Smith v. Ameritech, 129 F.3d 857, 867 (6th Cir. 1997) (finding that a sales representative was not entitled to accommodation of working at home but suggesting that such an accommodation would be reasonable in those rare cases where the employee could work at home without a diminution in the quality of the employee's work).

317. *See, e.g.*, Solomon v. Vilsack, 763 F.3d 1, 10 (D.C. Cir. 2014) ("Technological advances and the evolving nature of the workplace, moreover, have contributed to the facilitative options available to employers (although their reasonableness in any given case still must be proven)."); Core v. Champaign Cty. Bd. of Cty. Comm'rs, No. 3:11-CV-00166, 2012 WL 3073418, at *11 (S.D. Ohio July 30, 2012) (stating that in contrast to earlier cases suggesting that working at home would rarely be a reasonable accommodation, in light of changes in technology it would not be unusual to find such an accommodation reasonable today); Bixby v. JP Morgan Chase Bank, N.A., No. 10-CV-00405, 2012 WL 832889, at *9–10 (N.D. Ill. Mar. 8, 2012) (stating that earlier cases suggesting that working at home would rarely be a reasonable accommodation were decided before the internet and technology facilitated remote access to the workplace and other employees); Meachem v. Memphis Light, Gas & Water Div., No. 2:14-CV-02156-JTF, 2015 WL 4866397 (W.D. Tenn. Aug. 10, 2015) (denying employer summary judgment because of factual issues regarding whether physical presence at the job site was essential or whether attorney could perform essential functions of the job through telecommuting and whether permitting her to work at home would cause the employer undue hardship); Jury Verdict Form, Meachem v. Memphis Light, Gas & Water Div., No. 2:14-CV-02156-JTF (W.D. Tenn. Sept. 1, 2015) (finding that the plaintiff was qualified and the employer refused to provide a reasonable accommodation).

318. 782 F.3d 753 (6th Cir. 2015) (en banc).

319. *Id.* at 762–63.

320. *Id.* at 776–77 (Moore, J., dissenting). The *en banc* court vacated a panel decision that found that while attendance might be an essential function, it need not be at the employer's location if the job could be done remotely. EEOC v. Ford Motor Co., 752 F.3d 634, 641 (6th Cir. 2014), *rev'd en*

With continued advances in technology, telecommuting as an accommodation may be more available to cancer survivors in the future. But despite technological changes, courts such as the Sixth Circuit in *Ford Motor Co.* remain reluctant to require employers to accommodate by changing existing practices requiring actual physical attendance.[321] In addition, many jobs still require workplace presence.[322] Recent data from the Bureau of Labor Statistics indicate that flexibility in work location is not widely available to employees and even less available for Latino and African-American workers.[323] In particular, lower wage jobs often require a physical presence in the workplace for either manual labor or interaction with customers being served.

iii. Rest Breaks and Flexible Schedules

Fatigue is a common complication of cancer and its treatment. Flexibility in job schedules and rest breaks may accommodate cancer-related fatigue and other treatment effects.[324] Flexible schedules may also allow employees like Sarah to obtain needed medical treatment without taking leave or losing time from work. Additionally, rest breaks or altered schedules may enable a survivor to work a physically or mentally taxing job.

A few states have laws mandating rest breaks[325] and more require meal periods for longer work hours, but many states have no such

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banc, 782 F.3d 753 (6th Cir. 2015). The panel refused to find that the fact that the job required teamwork automatically precluded telecommuting. *Id.* at 644–45.

321. *Cf.* McMillan v. City of New York, 711 F.3d 120, 126 (2d Cir. 2013) (noting "[p]hysical presence at or by a specific time is not, as a matter of law, an essential function of all employment" and pointing out that a factual inquiry is necessary in each case).

322. *See, e.g.*, Morris v. Jackson, 994 F. Supp. 2d 38, 48 (D.D.C. 2013) (finding working at home would create undue hardship where staff, vendors, and contractors would have to come to the employee's home and change clothes and wash before entering to avoid triggering employee's allergies).

323. Glynn & Farrell, *supra* note 150, at 5.

324. For case examples involving cancer, see *EEOC v. Angel Medical Center, Inc.*, No. 2:13-CV-00034, 2013 BL 338567 (W.D.N.C. Dec. 4, 2014) (alleging that employer failed to accommodate by either setting a schedule that would allow employee to work full-time while undergoing treatment or transferring her to another department, and then terminated her for failing to work full-time), and Consent Decree, EEOC v. Journal Disposition Corp., No. 1:10-CV-00886-RHB (W.D. Mich. Nov. 10, 2011) (settling case alleging that employer fired employee after exceeding leave authorized under employer's policy despite employee's request for accommodation of part-time work).

325. *See Minimum Paid Rest Period Requirements Under State Law for Adult Employees in Private Sector*, U.S. DEPARTMENT LAB. (Jan. 1, 2014), http://www.dol.gov/whd/state/rest.htm (showing California, Colorado, Illinois, Kentucky, Minnesota, Nevada, Oregon, Vermont, and Washington all have state mandated rest breaks).

requirements and those that do often have exceptions.[326] Where no express legal requirements exist, work breaks and schedules are set by the employer. The EEOC Guidance on interpreting the ADA indicates that modified schedules, including rest breaks, are a reasonable accommodation absent undue hardship.[327] Case law also indicates that rest breaks may be a reasonable accommodation to allow an employee to do a physically demanding job.[328] Rest breaks, like allowing use of equipment that reduces productivity, come with a cost. As in the case of the support services assistant discussed above, the question is who should bear those costs. Because the statute requires reasonable accommodation, it seems that some rest breaks would be reasonable for most employers unless the job was a unique one that did not allow either interruption or substitution of workers for breaks. For a court that viewed meeting a particular schedule as an essential requirement of the job simply because it was mandated by the employer, however, an employee requiring rest breaks might be found unqualified. An important determinant in these cases will be how much deference courts will give to the employer's representation as to essential functions of the job.

Modified work schedules are specifically mentioned in the statute as a required accommodation.[329] Medication, fatigue, or treatment schedules may require a schedule modification to enable cancer survivors to work. This might include starting later, ending earlier, changing work days or times, or reducing hours, for example.

As several scholars have noted, some courts have been reluctant to require employers to change existing workplace structures such as

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326. *See Minimum Length of Meal Period Required Under State Law for Adult Employees in Private Sector*, U.S. DEPARTMENT LAB. (Jan. 1, 2014), http://www.dol.gov/whd/state/meal.htm (showing that California, Colorado, Connecticut, Delaware, Illinois, Kentucky, Maine, Massachusetts, Minnesota, Nebraska, Nevada, New Hampshire, New York, North Dakota, Oregon, Rhode Island, Tennessee, Vermont, Washington, West Virginia, Guam, and Puerto Rico all require meal periods for longer working hours). All states except New Hampshire, Tennessee, and Vermont have established exceptions to their meal period requirements. For example, West Virginia exempts any employee who is permitted to eat lunch while working, Colorado excludes certain occupations such as teacher, nurse, or other medical professional, and Kentucky, like many states, excludes employees who are covered by a collective bargaining agreement. *Id.*

327. ENFORCEMENT GUIDANCE, *supra* note 238, ¶¶ 22–23.

328. *See* Morton v. Cooper Tire & Rubber Co., No. 1:12-CV-00028, 2013 WL 3088815, at *4–5 (N.D. Miss. June 18, 2013) (denying summary judgment for employer based on factual dispute where employee with prosthetic leg claimed he could complete twelve hour shift with two ten to fifteen minute rest breaks and a thirty minute lunch although he never completed a full shift without assistance prior to termination).

329. 42 U.S.C. § 12111 (2012). Not surprisingly, the regulations also discuss modified work schedules. 29 C.F.R. § 1630.2 (2014).

schedules to accommodate individuals with disabilities.[330] A court may accomplish this result by characterizing attendance or compliance with a particular work schedule as an essential function of the job, thereby rendering the employee unqualified.[331] Professor Travis has identified cases where courts upheld refusals to accommodate by reducing overtime requirements,[332] allowing an employee to work part-time rather than full-time,[333] modifying start time and allowing the employee to make up delayed starts at the end of the shift,[334] and modifying a strict attendance policy to accommodate absences caused by a disability.[335] Professor Porter, writing about post-amendment cases, found a similar trend among courts unwilling to require employers to change workplace structures to accommodate disabilities.[336] Like Travis, Porter found cases where courts deemed employees unqualified because they needed part-time rather than full-time work[337] or because they could not meet the requirements of rigid attendance policies.[338]

On the other hand, some courts have recognized that requests for modification of attendance requirements or schedule changes must be considered in light of all the facts and circumstances of the particular employment setting, and whether the change would cause undue hardship for the employer. In *Solomon v. Vilsack*,[339] the court, reversing the lower court's grant of summary judgment for the employer, found that a flexible schedule could be a reasonable accommodation where the government budget analyst asked to arrive late and work late as needed to accommodate her depression.[340] The plaintiff submitted sufficient

330. Porter, *supra* note 189, at 57; Michelle Travis, *Recapturing the Transformative Potential of Employment Discrimination Law*, 62 WASH. & LEE L. REV. 3, 22–27, 32–36 (2005).

331. Travis, *supra* note 330, at 31–32.

332. *Id.* at 27 (citing Davis v. Fla. Power & Light Co., 205 F.3d 1301 (11th Cir. 2000)).

333. *Id.* at 24–25 (citing Terrell v. USAir, 132 F.3d 621 (11th Cir. 1998)).

334. *Id.* at 32–33 (citing Earl v. Mervyns, Inc., 207 F.3d 1361 (11th Cir. 2000)).

335. *Id.* at 33–35 (citing EEOC v. Yellow Freight Sys., Inc., 253 F.3d 943 (7th Cir. 2001); Maziarka v. Mills Fleet Farm, Inc., 245 F.3d 675 (8th Cir. 2001)).

336. Porter, *supra* note 189, at 60.

337. *Id.* at 61 (citing White v. Standard Ins. Co., 529 F. App'x 547, 549–50 (6th Cir. 2013)).

338. *Id.* at 61–62 (citing Brown v. Honda of Am., No. 2:10-CV-00459, 2012 WL 4061795, at *4–6 (S.D. Ohio, Sept. 14, 2012)); Lewis v. New York City Police Dep't, 908 F. Supp. 2d 313, 326–27 (E.D.N.Y., Nov. 9, 2012), *aff'd*, 537 F. App'x 11 (2d Cir. 2013); Blackard v. Livingston Parish Sewer Dist., No. 12-CV-00704-SDD–RLB, 2014 WL 199629 at *3–5 (M.D. La. Jan. 15, 2014); *see also* CATHERINE ALBISTON, INSTITUTIONAL INEQUALITY AND THE MOBILIZATION OF THE FAMILY AND MEDICAL LEAVE ACT 23–33 (2010) (discussing cases where courts refused to restructure work norms to accommodate individuals with disabilities).

339. 763 F.3d 1 (D.C. Cir. 2014).

340. *Id.* at 10–11 (citing the ADA's explicit recognition of this accommodation incorporated by

evidence to overcome summary judgment by showing that she had been allowed to work a flexible schedule and met all deadlines and, in addition, another employee in the same job classification also worked a flexible schedule.[341] The court recognized that while the ability to work a consistent, predictable schedule might be necessary for some jobs, it is a factual determination dependent on the particular position.[342]

Ward v. Health Research Institute[343] offers another example.[344] The court there found a genuine issue of fact as to whether a data entry clerk must have a regular rather than a flexible schedule, noting that the evidence showed only that the data must be entered before the laboratory opened the next day, not that any particular start and ending times were necessary or that the plaintiff needed to overlap schedules with other employees.[345] Further, as to supervision, there was conflicting evidence as to whether a supervisor needed to be present during all of the plaintiff's work hours.[346] The court refused to accept as sufficient the employer's "general statements regarding the snowball effect of such an accommodation—it would eliminate employers' control over the workplace and ability to maintain any standards."[347] The court stated that "[s]uch an argument runs counter to the general principle behind the ADA that imposes a duty on the employer to modify some work rules, facilities, terms, or conditions to enable a disabled person to work."[348] Thus, summary judgment was inappropriate.

Rigid adherence to workplace structures such as particular schedules or attendance requirements will adversely affect the ability of some cancer survivors to maintain employment. Such requirements may be

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the Rehabilitation Act).

341. *Id.*

342. For a similar case, see *McMillan v. City of New York*, 711 F.3d 120, 126–27 (2d Cir. 2013) (finding that a predictable schedule is not essential for all jobs and reversing summary judgment for the employer that argued it could not accommodate employee's unpredictable late arrivals).

343. 209 F.3d 29 (1st Cir. 2000).

344. Travis, *supra* note 330, at 71–72; *see also* Croy v. Blue Ridge Bread, Inc., No. 3:12-CV-00034, 2013 WL 3776802 (W.D. Va. July 15, 2013) (denying employer's motion to dismiss where employee requested reduced work schedule and employer did not identify any undue hardship or engage in the interactive process designed to reach a reasonable accommodation); Peirano v. Momentive Specialty Chems., Inc., No. 2:11-CV-00281, 2012 WL 4959429 (S.D. Ohio Oct. 17, 2012) (denying employer's summary judgment motion in case where employee was denied a flexible starting time based on employer's attendance policy and claim that regular and timely attendance was essential).

345. *Ward*, 209 F.3d at 35–37.

346. *Id.* at 37.

347. *Id.* at 36.

348. *Id.* at 36–37.

essential in some jobs. Courts should avoid unquestioning acceptance of an employer's assertion that compliance with set requirements is essential, however. Application of a flexible fact-based standard to determine whether the particular job truly requires maintenance of existing structures will make the workplace more accommodating for survivors. Our hypothetical survivor Sarah, for example, has negotiated shift changes to accommodate her treatment, but suddenly the employer has become averse to the process. Is there truly a hardship on the employer that has caused this resistance? If not, such accommodation should be permitted.

c. Reassignment as a Reasonable Accommodation

If an employee is unable to perform the essential functions of the job with reasonable accommodation, the law contemplates reassignment to a vacant position. The EEOC Guidance makes clear that reassignment is an "accommodation of last resort," to be used only when there is no available accommodation that will enable the employee to perform the essential functions of the current job.[349] The position must be vacant, i.e., no employee must be bumped from a position to make it available to an employee with a disability.[350] Further, the employee must be qualified for the vacant position.[351]If more than one vacant position exists, the employee should be reassigned to the position closest to the existing job in terms of pay, benefits, and working conditions.[352] The EEOC Guidance indicates that the employee need not be the most qualified employee for the position in order to be entitled to reassignment.[353]

Like the EEOC, the courts have found that reassignment of a qualified employee to a vacant position is a reasonable accommodation if the employee can no longer perform the functions of the current position. The courts have struggled with how to accommodate the reassignment obligation to other employer policies, however. The Supreme Court weighed in on this question in *U.S. Airways v. Barnett*.[354] There, the Court held that it was not reasonable to reassign an employee with a disability to a vacant position where a unilaterally-imposed employer

349. ENFORCEMENT GUIDANCE, *supra* note 238, ¶ 24.

350. *Id.*

351. *Id.* (stating that the employee must be qualified and the employer has no obligation to assist the employee in meeting the qualifications).

352. *Id.*

353. *Id.*

354. 535 U.S. 391 (2002).

seniority system would award that job to another employee.[355] Thus, in any workplace with a seniority system, whether imposed by the employer or negotiated in a collective bargaining agreement, reassignment is unavailable unless the limited exception left open by the court is met.[356]

> The plaintiff might show, for example, that the employer, having retained the right to change the seniority system unilaterally, exercises that right fairly frequently, reducing employee expectations that the system will be followed—to the point where one more departure, needed to accommodate an individual with a disability, will not likely make a difference. The plaintiff might show that the system already contains exceptions such that, in the circumstances, one further exception is unlikely to matter. We do not mean these examples to exhaust the kinds of showings that a plaintiff might make. But we do mean to say that the plaintiff must bear the burden of showing special circumstances that make an exception from the seniority system reasonable in the particular case.[357]

Although the EEOC Guidance says the employee need not be the most qualified for the position, courts have struggled with the question of whether an employer must award a vacant position to an employee needing accommodation if a more qualified applicant is available. The courts of appeals that have addressed the issue have split.[358] *Huber v. Wal-Mart Stores, Inc.*[359] and *Smith v. Midland Brake, Inc.*[360] illustrate the two positions. The court in *Huber* concluded that an employer policy

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355. *Id.* at 406.

356. Of course, an employer—or in the case of a collective bargaining agreement, an employer and a union—could agree to make an exception to the seniority system for the employee needing accommodation. In the case of a unilateral system, there is little risk to the employer making an exception barring the unlikely situation where the system is contractually binding. In the case of a collective bargaining agreement, however, an employer and union might be sued for breach of contract and breach of the duty of fair representation by an employee who did not receive the position due to the accommodation. *See* Vaca v. Sipes, 386 U.S. 171 (1967).

357. *Barnett*, 535 U.S. at 405–06.

358. *Compare* Huber v. Wal-Mart Stores, Inc., 486 F.3d 480, 483 (8th Cir. 2007) ("We . . . conclude the ADA is not an affirmative action statute and does not require an employer to reassign a qualified disabled employee to a vacant position when such a reassignment would violate a legitimate nondiscriminatory policy of the employer to hire the most qualified candidate." (citations omitted)), *with* EEOC v. United Airlines, 693 F.3d 760, 764 (7th Cir. 2012) (stating that reassignment to a vacant position would be a reasonable accommodation absent undue hardship and finding a policy of appointing the most qualified person to the position is not, without more, undue hardship).

359. 486 F.3d 480 (8th Cir. 2008).

360. 180 F.3d 1154 (10th Cir. 1999) (en banc).

to hire the most qualified individual was analogous to a seniority system and therefore reassignment would constitute undue hardship.[361] In *Smith*, however, the court found that absent undue hardship, the employer must reassign an employee who could not perform the current job with accommodation to an open position for which the employee was qualified.[362] The existence of more qualified candidates for the vacant position does not relieve the obligation to accommodate by reassignment.[363] The court noted that requiring only that the individual be allowed to compete with others for the open position on the basis of qualification would not be an accommodation at all, because the nondiscrimination provisions of the ADA require equal consideration.[364] Given that the Supreme Court recently denied certiorari in one of the cases, this split in the courts is unlikely to be resolved soon.[365]

Other employer policies, such as those limiting transfers and light duty assignments, might also impede reassignment. Some employers bar transfers completely, while others deny them to probationary employees or allow them only within the employee's current department, facility, or other work unit.[366] The EEOC's position is that such policies do not, without more, properly limit the reassignment obligation.[367]The employer must make a specific showing of undue hardship in the

361. 486 F.3d at 483.

362. 180 F.3d at 1169 ("If no reasonable accommodation can keep the employee in his or her existing job, then the reasonable accommodation may require reassignment to a vacant position so long as the employee is qualified for the job and it does not impose an undue burden on the employer.").

363. *Id.* ("Anything more, such as requiring the reassigned employee to be the best qualified employee for the vacant job, is judicial gloss unwarranted by the statutory language or its legislative history.").

364. *Id.* at 1164–65.

365. United Airlines, Inc. v. EEOC, __ U.S. __, 133 S. Ct. 2734 (2013). The Seventh Circuit in *United Airlines* overruled its earlier decision in *EEOC v. Humiston–Keeling*, 227 F.3d 1024 (7th Cir. 2000), a case on which the Eighth Circuit relied in *Huber v. Wal-Mart*, 486 F.3d at 483. EEOC v. United Airlines, 693 F.3d 760, 761, 764–65 (7th Cir. 2012). The Supreme Court granted certiorari in *Huber*, 552 U.S. 1074 (2007), but dismissed the petition after a settlement. 552 U.S. 1136 (2008). Given these facts, the continued force of *Huber* and the argument that an employer can apply a policy of choosing the most qualified applicant to avoid reassigning a qualified individual with a disability is questionable.

366. *See, e.g.*, United States v. City & Cnty. of Denver, 943 F. Supp. 1304, 1310 (D. Colo. 1997) (finding that policy of not transferring police officers to non-police positions did not bar transfer as accommodation); Emrick v. Libbey-Owens-Ford Co., 875 F. Supp. 393, 398 (E.D. Tex. 1995) (finding that employer that did not transfer employees between facilities need not transfer disabled employee); ENFORCEMENT GUIDANCE, *supra* note 238, ¶¶ 24–25 (stating that employer policy of not transferring probationary employees does not justify failure to transfer probationary employee as an accommodation).

367. ENFORCEMENT GUIDANCE, *supra* note 238, ¶¶ 24–27.

particular situation and cannot simply rely on policies to establish undue hardship. Courts have not always agreed with the EEOC position, in some cases finding that an employer need not modify policies to allow reassignment of disabled employees.[368]

As for light duty accommodations, courts have approved employer policies reserving light duty jobs for individuals with temporary disabilities, refusing to require employers to assign individuals with disabilities to such jobs on a permanent basis.[369] Where an employer has provided light duty in some situations, however, courts have found it to be a reasonable accommodation.[370] Some courts have also found that where an employer has a policy of rotating employees through jobs, the employer need not provide a permanent assignment to a light duty position for an employee who cannot do all the jobs in a rotation.[371]

While in some cases these policies limiting light duty and transfers may be essential, as in the case of other accommodations requiring structural changes in the workplace, some courts seem to accept without serious scrutiny the employer's representation that they are necessary.[372] Requiring an employer to prove that making an exception to such a policy would cause undue hardship would make it easier for cancer survivors to retain employment.[373]

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368. *See, e.g.*, *Emrick*, 875 F. Supp. at 398 (finding that employer that did not transfer employees between facilities need not transfer disabled employee).

369. *See, e.g.*, Josey v. Wal-Mart Stores East, L.P., No. 0:11-CA-02993-CMC-SVH, 2013 WL 5566035, at *4 (D.S.C. Oct. 8, 2013), *aff'd per curium*, 566 F. App'x 209 (4th Cir. 2014); Watson v. Lithonia Lighting, 304 F.3d 749, 752 (7th Cir. 2002); Martin v. Kansas, 190 F.3d 1120 (10th Cir. 1999).

370. *See, e.g.*, Gibson v. Milwaukee Cnty., No. 12-CV-00657, 2015 WL 998249, at *9–10 (E.D. Wis. Mar. 5, 2015) (following EEOC guidance and requiring that employee with disability must be offered light duty that was offered to individuals with on-the-job injuries); Leslie v. St. Vincent New Hope, Inc., 916 F. Supp. 879, 888 (S.D. Ind. 1996); *cf.* Young v. United Parcel Serv., __ U.S. __, 135 S. Ct. 1338 (2015). There, the Supreme Court found that an employee can establish a violation of the Pregnancy Discrimination Act by proving that an employer policy imposes significant burdens on pregnant workers without sufficiently strong nondiscriminatory reasons, leading to an inference of intentional discrimination. *Id.* at 1354–55. The "plaintiff can create a genuine issue of material fact as to whether a significant burden exists by providing evidence that the employer accommodates a large percentage of nonpregnant workers while failing to accommodate a large percentage of pregnant workers." *Id.* at 1354.

371. *See, e.g.*, Hoskins v. Oakland Cnty. Sheriff's Dep't, 227 F.3d 719, 729–31 (6th Cir. 2000); England v. ENBI Ind., Inc., 102 F. Supp. 2d 1002, 1013–14 (S.D. Ind. 2000).

372. The court in *Emrick* concluded that an employer need not transfer a disabled employee to another facility unless it has a practice of such transfers without inquiring whether such a transfer would be reasonable or create undue hardship. 875 F. Supp. at 398. Other courts have accepted this conclusion as well, citing *Emrick*. *See* Wood v. Crown Redi-Mix, Inc., 218 F. Supp. 2d 1094, 1106 (S.D. Iowa 2002); Munoz v. H & M Wholesale, Inc., 926 F. Supp. 596, 608 (S.D. Tex. 1996).

373. *See* Stone v. City of Mt. Vernon, 118 F.3d 92, 100-01 (2d Cir. 1997) (reversing summary

In summary, employees seeking reassignment as an accommodation may be limited in many ways, including the lack of available positions for which they are qualified and the existence of a seniority system. Further, in some jurisdictions reassignment may be limited by the court's conclusion that individuals deemed more qualified by the employer can be hired in preference to reassigning the cancer survivor. Finally, courts that do not require accommodations in the face of rigid employer policies limiting transfers or light duty will also adversely affect the ability of survivors to retain employment. While reassignment may work for some cancer survivors, the limitations on this accommodation restrict its utility.

D. The FMLA, the ADA, and Cancer

This review of the ADA and FMLA demonstrates several limitations that adversely affect cancer survivors. Both statutes are limited in coverage, excluding many workers including those at smaller employers and, for the FMLA, employees with shorter tenure with the employer.[374] Additionally, the limited length and flexibility of available leaves and the absence of required paid leaves do not meet the needs of many cancer survivors.[375] The judicial tendency to accept the employer's structural requirements, such as attendance and transfer rules, work hours and work location, as essential functions of the job also restricts the utility of the accommodation requirement.[376] While some jobs certainly mandate that the employee work particular hours or at a particular location, courts have been reluctant to dig into such requirements to determine their necessity. The limits on reassignment as an accommodation, requiring the employee to be qualified and the position to be vacant, as well as the position of some courts that a more qualified individual can be lawfully hired, restrict the potential for reassignment as an effective accommodation.[377]

Because the relationship between cancer survivors and work is

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judgment in favor of an employer that had a policy of assigning only employees injured on the job and employees with temporary off the job injuries to particular light duty positions, finding that was insufficient to establish as a matter of law that assignment of employee with permanent off duty injury would not be a reasonable accommodation).

374. *See* 42 U.S.C. § 12111(5) (2012) (defining employer under the ADA); 29 U.S.C. § 2611(2) (2012) (defining eligible employee under the FMLA); *id.* § 2611(4) (defining eligible employer under the FMLA); *supra* notes 135–37, 148–49, 160 and accompanying text.

375. *See supra* notes 150–58, 233–88 and accompanying text.

376. *See supra* notes 301, 330–38, 366–73 and accompanying text.

377. *See supra* notes 349–51, 358–65 and accompanying text.

complex and variable, the solutions to the issues faced by cancer patients must also be varied. The two primary statutes reviewed here focus on a discrimination/accommodation model of dealing with individuals in the workplace with health issues. As Professor Bagenstos has pointed out with regard to individuals with disabilities in general, this model has its limitations and cannot alone address the issues of disability and employment.[378] "Social welfare interventions" are also necessary.[379] Yet it is possible to make some broad recommendations for changes to fill gaps left by the FMLA and ADA that would enable more survivors to maintain or obtain employment. These changes must be part of a bigger picture, however, which cannot be complete without further analysis of other laws.

First, it may be helpful to review briefly the normative goals discussed earlier. Maintaining employment benefits both survivors and employers. For employees, it provides income and access to medical treatment, along with psychosocial benefits. Keeping existing employment, if possible, is preferable to termination and later reemployment for two reasons. Hiring discrimination is difficult to prove and gaps in employment must be explained. Additionally, changing employment may require changing insurance, which can create difficulties in obtaining necessary medical treatment.[380] For employers, employee turnover is costly.[381]Thus, the goal of the changes recommended below is to enable employees to retain employment where they are able to continue working.

Nonetheless, if it were easier to obtain employment after leaving a

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378. BAGENSTOS, *supra* note 219, at 136.

379. *Id.*

380. Continuing insurance through COBRA, where possible, is expensive and unaffordable for many who lose employment. Other options such as insurance on the private market, even if subsidized and thus affordable, could require changing treatment providers and interfere with treatment protocols.

381. Of course, absenteeism is also costly, as is health insurance. In a given case, the cost of retaining a particular employee with cancer could outweigh the replacement cost. The law already makes some choices in this area, however, by prohibiting discrimination against individuals with disabilities and requiring leaves of limited duration. *See supra* notes 135–37, 159–61. Expanded protection could impose additional costs on employers. At the same time, costs of disability benefits will be reduced. Depending on the source of the benefits, however, this reduction may not directly affect the employer. Continued employment will also reduce costs for any other public benefits to which the unemployed survivor might be entitled. Additionally the choice to link health insurance and employment imposes this cost on employers, contrary to the decisions made by most other developed countries, which provide health care largely through public financing. *See* Sharon M. McManus & Khi V. Thai, *Health Care Financing: A Comparative Analysis*, 7 PUB. BUDGETING & FIN. MGMT. 279, 286 (1995). Disability benefits and health insurance will be treated in future articles.

prior job due to cancer, maintaining employment would be somewhat less significant. Implementation of Professor Bagenstos' recommendations to ease proof of hiring discrimination under the ADA would be beneficial for cancer survivors.[382] These recommendations include the following: increasing available damages to encourage attorneys to represent workers alleging hiring discrimination; increasing EEOC enforcement activity focused on hiring cases; and using testers—individuals who apply for employment to test for discrimination, rather than to actually obtain the job—to identify hiring discrimination.[383] While these changes would benefit all individuals with disabilities, a focus on FMLA leave and ADA accommodations also holds potential for improving employment for survivors.

Studies of the FMLA demonstrate that it has not created major problems for most employers. While the limitations on coverage recognized that absences create more difficulties for smaller employers, the ADA already requires employers with fifteen or more employees to accommodate absences and some state laws require smaller employers to provide leave.[384]The ADA standard is more flexible than the FMLA, and thus less predictable for employers and employees. Also, courts interpreting the ADA have been inconsistent at best in finding intermittent leaves to be a reasonable accommodation. For employees with treatment regimens of chemotherapy and radiation, intermittent leave is a crucial accommodation. Decreasing the FMLA coverage limit to twenty-five employees would guarantee more employees the availability of predictable and intermittent leave.[385] While decreasing the coverage limit would impose some costs on smaller employers, it would also have all of the benefits of increasing employment for individuals with cancer and others with serious illnesses. Similarly, reducing the qualifying period for leave to six months of employment and reducing

382. *See* BAGENSTOS, *supra* note 219, at 132–35.

383. *Id.*

384. The family and medical leave laws of the District of Columbia, Oregon, Washington, and Vermont all cover smaller employers. *See State Family and Medical Leave Laws*, *supra* note 148.

385. The National Partnership for Women and Families indicates that this change would expand coverage to 8.5 million more employees. NAT'L P'SHIP FOR WOMEN & FAMILIES, UPDATING THE FAMILY MEDICAL LEAVE ACT 2 (2013), *available at* http://www.nationalpartnership.org/site/DocServer/Updating_the_FMLA_Fact_Sheet.pdf. The Abt Associates study estimates that while 59.2% of employees are currently eligible for FMLA leave, reducing the employee coverage number to thirty would increase that percentage to 63% while reducing it to twenty would increase the percentage to 67%. ABT ASSOC., *supra* note 146, at ii. The key employee exception allows employers to exempt certain highly paid salaried employees if preserving the job would cause "substantial and grievous economic injury" to an employer, which provides some protection for employers. *See* 29 C.F.R. § 825.217–.219 (2014).

the work hours requirement for coverage to include more part-time workers would aid many cancer patients.[386] While the one-year qualification time period ensures commitment of the employee and employer to one another before requiring leave, it substantially burdens employees, like Sarah, who are diagnosed with cancer after a job change. A six-month period requires some commitment, but protects many more employees. And part-time workers may be as committed to an employer as fulltime workers, particularly given the increasing prevalence of part-time work. Additionally, women predominate in part-time employment,[387] often because they are caregivers. Since many women are cancer survivors,[388] expanded protections for part-time workers would benefit female caregivers who often are in particularly precarious financial positions.

Extending the amount of FMLA leave would also benefit survivors, as many suffer the effects of cancer and its treatment for longer than twelve weeks, calculated on either an intermittent or fulltime basis. The ADA already requires extending FMLA leave where additional leave is reasonable and does not cause undue hardship.[389] The unpredictability of the ADA, however, could be alleviated by a requirement of additional mandated leave under the FMLA with perhaps an exception that allowed an employer to demonstrate unusual circumstances that made it extremely difficult or impossible to cover the employee's responsibilities for the term of the additional leave.[390]

Additionally, requiring some sort of paid leave would be of enormous benefit, particularly to lower wage workers. While some employees, like Sarah, have paid leave as a voluntary employee benefit, many do not.[391]

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386. Some states, including Connecticut, the District of Columbia, New Jersey, Oregon, Washington, and Wisconsin, already have leave laws with shorter employment requirements, reduced work hours requirements or both. *State Family and Medical Leave Laws*, *supra* note 148. Abt Associates estimates that reducing the required work hours from the current 1250 to 780 would increase the percentage of eligible employees from 59.2 to 63. ABT ASSOC., *supra* note 146, at 21–23.

387. *See Labor Force Statistics from the Current Population Survey: Table A-6. Employed and Unemployed Full- and Part-Time Workers By Sex and Age, Seasonally Adjusted*, BUREAU LAB. STAT., http://www.bls.gov/web/empsit/cpseea06.htm (last updated August 7, 2015).

388. *See* FACTS AND FIGURES, *supra* note 11, at 10–11 (showing breast cancer as leading cause of new cancers in women with eighty-nine percent survival rate over five years from diagnosis).

389. *See supra* notes 235, 265–75 and accompanying text.

390. This could be an expansion of the key employee provision, *see supra* note 385, available only for the extended leave time.

391. Employees with lower educational attainment are less likely to have paid leave. *See, e.g.*, HELENE JORGENSEN & EILEEN APPELBAUM, CTR. FOR ECON. & POLICY RESEARCH, DOCUMENTING THE NEED FOR A NATIONAL FAMILY AND MEDICAL LEAVE PROGRAM: EVIDENCE FROM THE 2012

A study of employers covered by the Connecticut paid leave law showed that the law had little-to-no business impact, despite predictions by business owners prior to passage.[392] More than three-quarters of employers surveyed supported the law a year and a half after passage, with many reporting positive benefits such as improved morale, loyalty, and motivation.[393] The employers reported little abuse of the leave and found that many employees did not take all of the leave provided.[394] Further, the authors found that employment in the covered industries increased while employment in the exempted manufacturing industry actually decreased, belying claims that the mandated benefit would reduce employment.[395] This survey was more heavily weighted toward the larger employers covered by the law.[396]

An earlier survey with a lower response rate found more negative responses from employers.[397] Sixty-nine percent of employers in that survey indicated the law was not good for their business.[398] Forty-seven percent of the responding employers indicated that they had taken actions such as raising prices, reducing wages and benefits, or cutting employment to pay the costs of the requisite paid leave.[399] These mixed results may be explained by the timing of the surveys or by differences in employers sampled. It is possible that as employers had more experience with the law, their objections and negative reactions subsided.

FMLA SURVEY 4 (2014), *available at* http://www.cepr.net/publications/reports/documenting-the-need-for-a-national-paid-family-and-medical-leave-program-evidence-from-the-2012-fmla-survey. These employees are also likely to have fewer financial resources that would enable them to take an unpaid leave. *Id.*

392. EILEEN APPELBAUM ET AL., CTR. FOR ECON. & POLICY RESEARCH, GOOD FOR BUSINESS? CONNECTICUT'S PAID SICK LEAVE LAW 1, 11, 18 (2014), *available at* http://www.cepr.net/documents/good-for-buisness-2014-02-21.pdf.

393. *Id.* at 15.

394. *Id.* at 9, 16–17.

395. *Id.* at 4.

396. *Id.* at 3.

397. *See generally* MICHAEL SALTSMAN, EMP'T POLICIES INST., PAID SICK LEAVE IN CONNECTICUT: A PILOT STUDY OF BUSINESSES RESPONSES TO THE LAW 5–6 (2013), *available at* https://www.epionline.org/studies/paid-sick-leave-in-connecticut/.

398. *Id.* at 4. A survey of Seattle service employers covered by that city's mandated leave law also found that more than half believed it would increase their cost of doing business one year after the law's effective date. EMP'T POLICIES INST., PAID SICK LEAVE IN SEATTLE: EXAMINING THE IMPACT ON THE SERVICE INDUSTRY 2 (2013) [hereinafter PAID SICK LEAVE IN SEATTLE], *available at* https://www.epionline.org/wp-content/uploads/2014/05/130801_EPI_PolicyBrief_final1.pdf.

399. SALTSMAN, *supra* note 397, at 7. About twenty percent of Seattle employers surveyed reported taking such actions in response to the law. PAID SICK LEAVE IN SEATTLE, *supra* note 398, at 3.

The Connecticut leave law, like the current local paid leave laws, provides limited leave of only five days per year paid directly by the employer.[400] In addition, it covers only certain industries and employers with more than fifty workers.[401] Workers for covered employers begin to accrue leave after 680 hours of employment, and part-time workers as well as full-time workers are eligible for leave.[402] This may not be a perfect predictor for the impact of a broader paid leave law because of the law's restricted applicability. Many of the covered employers already provided paid leave to some employees, limiting the additional impact.[403] And while any paid leave will help cancer patients, most will need far more than five days of leave for cancer treatment. Nevertheless, the limited Connecticut study and the study of the FMLA provide some evidence that employers adjust to additional leave requirements and such requirements provide benefits to employers as well. Additionally, evidence from the Bureau of Labor Statistics indicates that paid sick leave costs for private employers average only $0.26 per hour,[404] and significantly less in the lower paid service occupations.[405] While when considered per employee per hour the costs add up, they are a fraction of the cost of total employee benefits, which averages $9.60 per hour.[406]

Paid leave could be provided in a number of ways. The FMLA could mandate pay for some or all of the available leave, or the ADA could require paid leave as an accommodation. Both options would require statutory amendment and impose direct costs on employers.[407] Alternatively, a separate paid leave law could be enacted similar to those in Connecticut and a few other states and municipalities. The law could require the employer to pay the employee either all or some portion of

400. APPELBAUM ET AL., *supra* note 392, at 3.

401. *Id.* (describing coverage of only about 287,000 of Connecticut's 1.7 million employees because of industry and size limitations).

402. *Id.*

403. *Id.* at 7 (stating that approximately 88.5% of employers had offered up to five days of sick leave).

404. News Release, U.S. Bureau of Labor Statistics, Employer Cost for Employee Compensation–December 2014, at 1 (Mar. 11, 2015) [hereinafter Employer Cost], *available at* http://www.bls.gov/news.release/archives/ecec_03112015.pdf.

405. U.S. Bureau of Labor Statistics, *Paid Sick Leave in the United States*, 2 PROGRAM PERSP., Mar. 2010, at 3, *available at* http://www.bls.gov/opub/perspectives/program_perspectives_vol2_issue2.pdf.

406. Employer Cost, *supra* note 404, at 1.

407. The Healthy Families Act, which has been introduced into Congress, would require paid leave of up to seven days per year for employees who work for employers with fifteen or more employees. *See* The Healthy Families Act, S. 631, H.R. 1286, 113th Cong. (2013). Seven days is insufficient for most cancer survivors, although some paid leave is better than none.

regular wages during time off.

An alternative method of providing paid leave is through mandatory insurance similar to the unemployment compensation system.[408] Federal law currently allows withdrawal of employee contributions from a state's unemployment insurance fund for temporary disability payments.[409] California has such a system providing partial wage replacement for up to fifty-two weeks when an employee is unable to work as a result of a non-work-related illness or injury.[410] The system also provides payment for workers who suffer reduced hours or reduced wages due to a job change necessitated by a disability.[411] This disability insurance aids employees in retaining employment and maintaining the ability to pay for living expenses and treatment. The system would need to be integrated with paid leave voluntarily provided by employers and with the social security disability system, which provides benefits only to those totally and permanently disabled for at least a year.[412]It could be implemented at the federal level, by states, or a combination federal and state system like the unemployment compensation system funded by a tax on employers and/or employees. While a system funded by employer taxes would impose costs on employers, as in the case of unemployment compensation, there would be resulting economic benefits as these funds will go into the economy in the form of housing costs, food costs,

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408. Such a bill has been introduced in Congress as the FAMILY Act, which would provide twelve weeks of partial wage replacement for most workers through a trust funded by employer and employee contributions. Family and Medical Insurance Leave Act, H.R. 1439, 114th Cong. (2015). The law would reimburse employees on leave sixty-six percent of their wages up to a maximum of $4000 per month. JORGENSEN & APPELBAUM, *supra* note 391, at 8 (describing the same bill from an earlier Congress); *see also* ABT ASSOC., *supra* note 146, at 1–4 (describing earlier bills and a federal budget proposal with similar goals).

409. U.S. DEP'T OF LABOR, *supra* note 244, at 8–1.

410. For a description of the benefits of the system, see *State Disability Insurance*, STATE CAL. EMP. DEV. DEPARTMENT, http://www.edd.ca.gov/Disability/ (last visited Aug. 11, 2015); CAL. UNEMP. INS. CODE § 2653 (West, Westlaw through 2015 Reg. Sess.). Four other states, along with Puerto Rico, have similar disability insurance provisions: Hawaii, New Jersey, New York, and Rhode Island. *See* U.S. DEP'T OF LABOR, *supra* note 244, at 8-1.

411. CAL. UNEMP. INS. CODE § 2656(a); *Part-time Worker/Intermittent/Reduced Work Schedules*, STATE CAL. EMP. DEV. DEPARTMENT, http://www.edd.ca.gov/Disability/Part-time_Intermittent_Reduced_Work_Schedule.htm (last visited June 28, 2013).

412. UMAR MOULTA-ALI, CONG. RESEARCH SERV., RL32279, PRIMER ON DISABILITY BENEFITS: SOCIAL SECURITY DISABILITY BENEFITS (SSDI) AND SOCIAL SECURITY INCOME (SSI) 3 (2013), *available at* http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=2152&context=key_workplace. There is certainly overlap between paid sick leave and disability benefits, which come in both public and private forms. There is no clear line between the two. Paid sick leave can be used for illnesses and injuries that would not be considered disabilities, at least under most legal definitions, as well as those that are clearly disabilities. Disability benefits for cancer survivors will be further considered in a future article.

medical costs, and other living expenses. California employers have reported additional benefits as well, such as reductions in turnover and reductions in the use of employer benefit programs.[413] Further, the costs of mandatory insurance may potentially be paid in the form of reduced wages for employees.[414] Another advantage of the mandatory insurance approach is that these systems typically cover smaller employers and provide more leave, albeit at reduced income, than laws that require employers to provide paid sick leave.

Providing paid leave for illness would align the United States with the majority of developed countries, which already offer paid leave, either through the employer, a social insurance program, or a combination of the two.[415] While the amount of leave and the percentage of income replaced varies, a study of twenty-two developed countries around the world revealed that the United States is the only country that did not guarantee some paid leave for an employee with a fifty day absence for cancer treatment.[416] Six of the countries studied actually provided more protection to low wage workers than to the typical worker,[417] which is particularly significant because low wage workers in the United States are often the least protected by the existing laws and employer policies.[418] The United States might look to the laws in these other countries as models.

The other important change that would benefit cancer patients is in the determination of employee qualifications and assessment of accommodations. As a general rule, the EEOC's Interpretive Guidance properly interprets the statute in light of its purposes. If the courts gave more weight to that guidance, it would aid employees seeking accommodations.[419] For example, courts should not use the qualification

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413. JORGENSEN & APPELBAUM, *supra* note 391, at 9.

414. *See* James Chelius, Book Review, 46 INDUS. & LAB. REL. REV. 199, 200 (1992) (reviewing Michael J. Moore & W. Kip Viscusi, COMPENSATION MECHANISMS FOR JOB RISKS: WAGES, WORKERS' COMPENSATION, AND PRODUCT LIABILITY (1990)) (discussing how employer-provided insurance may result in a wage offset).

415. JODY HEYMANN ET AL., CTR. FOR ECON. & POLICY RESEARCH, CONTAGION NATION: A COMPARISON OF PAID SICK DAY POLICIES IN 22 COUNTRIES 5–7 (2009), *available at* http://www.cepr.net/documents/publications/paid-sick-days-2009-05.pdf.

416. *Id.* at 9–10.

417. *Id.* at 9.

418. *Id.* at 12–13; *see supra* notes 150–54 and accompanying text.

419. The level of deference due to the EEOC's interpretations of the statute is not absolutely clear. *See* Travis, *supra* note 330, at 68. Hoffman's analysis of the cancer cases prior to 2000 revealed that courts that failed to defer to the EEOC's interpretation of the law or to the legislative history of the statute were more likely to rule for defendants. Hoffman, *supra* note 166, at 410–11. This insight remains true fourteen years later.

standard to avoid dealing with the reasonableness of accommodations or the question of undue hardship.[420] The statute clearly contemplates changes in the workplace to accommodate disabilities, including modification of work schedules.[421] The job functions are the tasks required to do the job, not the method, time, or place of performing such tasks. If the employee proves that he or she can do the tasks required with or without accommodation, then the employer must prove that changing shifts, work schedules, or similar modifications would cause undue hardship.[422] Inability to work the standard shift or schedule does not automatically render the employee unqualified. Analyzing these cases as the EEOC suggests, and as some courts have done, to focus on whether the employee's request for an altered work schedule or extended leave creates undue hardship will enable more cancer survivors to remain employed. The same is true of policies that limit reassignment, such as restrictions on light duty or transfers.

As scholars who have studied these cases in-depth recognize, courts are more likely to mandate accommodations such as assistive technology than those that require changes in workplace structures. But to accommodate cancer survivors effectively, courts must recognize that workplace structures and policies are not sacrosanct but merely institutionalized practices that must yield to disability accommodations under the ADA.[423] Courts that uphold these structures as inviolable or as essential functions of the job defer too quickly to the employer's existing methods of operation. While the EEOC regulations properly recognize that the employer's judgment is one factor in determining the essential functions of the job,[424] it is only one factor and, as noted above compliance with policies or job structures should not be considered job functions.[425] Instead, courts should determine whether noncompliance

420. Porter, *supra* note 189, at 16; Travis, *supra* note 330, at 58–72.

421. 29 C.F.R. pt. 1630, app. § 1630.2(o)(2)(ii) (2004); Travis, *supra* note 330, at 62 (citing 42 U.S.C. § 12111(9)(B) (2000)); ENFORCEMENT GUIDANCE, *supra* note 238, ¶¶ 22–23.

422. ENFORCEMENT GUIDANCE, *supra* note 238, ¶ 46.

423. *See generally* ALBISTON, *supra* note 338, at 55–68.

424. 29 C.F.R. § 1630.2(n)(3)(i) (2014).

425. *See* 29 C.F.R. § 1630.2(n) (defining essential functions); EQUAL EMP'T OPPORTUNITY COMM'N, A TECHNICAL ASSISTANCE MANUAL ON THE EMPLOYMENT PROVISIONS (TITLE I) OF THE AMERICANS WITH DISABILITIES ACT § 2.3(a)(3)(b) (1992) ("In identifying an essential function to determine if an individual with a disability is qualified, the employer should focus on the purpose of the function and the result to be accomplished, rather than the manner in which the function presently is performed. An individual with a disability may be qualified to perform the function if an accommodation would enable this person to perform the job in a different way, and the accommodation does not impose an undue hardship. Although it may be essential that a function be performed, frequently it is not essential that it be performed in a particular way.").

with policies or altered job structures create undue hardship.

Of course, there are accommodations that simply will not work. The employer cannot accommodate an employee who drives a bus by allowing her to arrive late, causing the bus to be off schedule. But such cases will founder on the undue hardship prong. On the other hand, perhaps a change to a bus that runs on a different schedule would allow this hypothetical plaintiff to continue working.

Physical attendance should not be required where it is not truly necessary and where some or all of the work can be done at home.[426] And given advances in technology, working from home is more possible in many jobs, including those where interaction with fellow employees or customers is necessary.[427] Courts must not unquestioningly defer to employer claims that jobs requiring supervision, teamwork, or communication with employees or customers always require physical presence in the workplace. With today's communication technology, teamwork and supervision can easily occur remotely in many jobs.

In considering accommodations, courts must be willing to give sufficient weight to the value of retaining an employee with a medical condition that is temporarily disabling. For example, many accommodations involving assistive technology or equipment may cause a slight reduction in efficiency. Such reductions should be tolerated as a cost of retaining an employee as retention can benefit both the employer and the employee.

When contemplating reassignment as an accommodation, courts should follow the majority of circuits, which, in accord with the EEOC Guidance, require employers to reassign qualified employees with disabilities despite the presence of more qualified applicants.[428] Finally, the EEOC and the courts should consider the possibility of requiring

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426. ENFORCEMENT GUIDANCE, *supra* note 238, ¶ 34.

427. *See* Bixby v. JP Morgan Chase Bank, No. 1:10-CV-00405, 2012 WL 832889, at *3, *15 (N.D. Ill. Mar. 8, 2012) (denying summary judgment to employer that claimed that management job requiring supervision of other employees, facilitating meetings, and coordinating with other employees could not be performed at home because direction could be done by e-mail and meetings were often conducted by teleconference).

428. *See, e.g.*, EEOC v. United Airlines, Inc., 693 F.3d 760, 764 (7th Cir. 2012) (finding that a policy of hiring the best-qualified applicant does not establish undue hardship barring reassignment and directing the district court to consider if ordinarily, mandatory reassignment is a reasonable accommodation. If reasonable, the court must conduct a case-by-case analysis to determine if there is an undue hardship in the particular case that would make mandatory reassignment unreasonable); Smith v. Midland Brake, Inc., 180 F.3d 1154, 1169 (10th Cir. 1999) (en banc) (holding that a reasonable accommodation may require reassigning a disabled employee to a vacant position if the employee is qualified and reassignment would not be an undue burden to the employer and noting that requiring the employee to be the most qualified applicant is "unwarranted").

some training by employers to render employees qualified for reassignment.[429] While such a conclusion might stretch the meaning of "qualified individual with a disability," a relatively short retraining period could be considered a reasonable accommodation under the statute and might enable some cancer survivors to remain employed.

E. The Limits of Legal Change

The recommended legal changes would not resolve all of the needs of cancer survivors for employment support. Cancer survivors often cite support from the employer and fellow employees as a determinant of continued employment.[430] Where such support comes in the form of accommodations such as leave or more flexible work structures, legal changes will help. Employer engagement in the interactive process to determine appropriate and effective accommodations is also a legal requirement that might be deemed support. But the emotional support desired by cancer survivors cannot be legally mandated.[431] Indeed a legal mandate that imposes some cost on the employer and fellow employees may have exactly the opposite effect, fostering resentment rather than support.[432]

Strong cultural norms support employer control of the workplace and existing structures such as work schedules, work assignments, and work locations.[433] Changes to those norms, or even efforts to change those

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429. *Cf.* Craddock v. Lincoln Nat'l Life Ins. Co., 533 F. App'x 333, 334, 337 (4th Cir. 2013) (per curiam) (reversing dismissal of employee's complaint of age and disability discrimination based on allegations that other employees were trained on a function and had she been trained she could have been reassigned to that position). While the allegations in *Craddock* included a claim that the employer had trained others, the suggestion here is that retraining be provided, even when not provided to others, if it is not extensive or time consuming and would enable the employee to remain employed. To date, courts have not required such training where it is not provided to others. *See, e.g.*, Williams v. United Ins. Co. of Am., 253 F.3d 280, 282–83 (7th Cir. 2001) (holding no obligation to provide special training not offered to nondisabled employees). While extensive training should not be required, relatively brief training could benefit both the employer and employee by enabling retention.

430. *See supra* notes 111, 113 and accompanying text.

431. Of course, if failure to support rises to the level of harassment by either supervisors or employees, the employee may have a legal claim. *See* Fox v. Gen. Motors Corp., 247 F.3d 169, 175–76, 178–79 (4th Cir. 2001) (recognizing hostile environment harassment claim under the ADA and finding in favor of plaintiff harassed by supervisors); Walton v. Mental Health Ass'n of Se. Pa., 168 F.3d 661, 666–67 (3d Cir. 1999) (describing elements of claim for disability-based harassment); Bielich v. Johnson & Johnson, Inc., 6 F. Supp. 3d 589, 603 (W.D. Pa. 2014) (citing *Walton*, 168 F.3d at 666–67) (same).

432. Porter, *supra* note 189, at 79–81.

433. *See generally* ALBISTON, *supra* note 338 (discussing how laws such as the FMLA, which require restructuring of institutional practices, may be thwarted by the existence of persistent

norms, may evoke strong reactions that make the workplace less welcoming to cancer survivors. These same institutional norms pose limits on the effectiveness of legal changes.[434] They may discourage survivors from pursuing claims or even identifying discrimination.[435] They encourage courts to limit the law by refusing to require changes in existing workplace norms and structures.[436] Thus, legal change is only one part of the effort to increase employment opportunities for cancer survivors. Cultural change, both in the workplace and in society, must form part of the strategy. Leadership in institutions can facilitate cultural change. Cancer does not respect[437] position or authority, and its ubiquity may help foster change. Dialogue between medical, legal, and business professionals can also facilitate change. This Article and those that will follow seek to enhance that dialogue.

IV. SARAH'S FATE

The Article began with an introduction to Sarah, a hypothetical but representative individual with cancer. Would the recommended changes assist Sarah? The short answer is yes. Under current law Sarah is not eligible for FMLA leave. At best she might get leave under the ADA. The amount of leave she would be entitled to is uncertain. If the doctors cannot give her a definite leave period, she may not be entitled to the accommodation. Any leave she obtained beyond two weeks would be unpaid. Further, unless her employer continues insurance for other leaves, she would not be guaranteed retention of her insurance as if she were working. As for her changes in shift, a court might find that compliance with her assigned shift is an essential job function. She might be able to obtain an accommodation of rest breaks or assistive technology, but the rest breaks might be subject to the same argument as the shift changes. If she were terminated for poor performance, she

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cultural norms).

434. For an argument about how workplace norms limit legal change benefiting caregivers, see Nicole Buonocore Porter, *Caregiver Conundrum Redux: The Entrenchment of Structural Norms*, 91 DENV. U. L. REV. (forthcoming 2015), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2555872.

435. ALBISTON, *supra* note 338, at 235–36. This phenomenon may explain the limited numbers of survivors that report discrimination despite the low employment numbers.

436. *Id.* at 123–33, 237–40; *see also supra* notes 330–38, 367–68 and accompanying text.

437. *See* Joann S. Lublin, *Tuesday Morning Corp., Former CEO Settle Lawsuit over Firing*, WALL ST. J. (Apr. 21 2014), http://online.wsj.com/news/articles/SB10001424052702304049904579516012871293476 (describing settlement of claim that the CEO of Tuesday Morning was fired because of her cancer diagnosis).

would have to show a discriminatory motivation on the part of the employer.

Under the recommended changes, her fate would be different in several respects. The reduction of FMLA eligibility to six months of employment would entitle Sarah to at least twelve weeks of unpaid leave for her treatment (with two weeks paid based on her employer's policy). If the FMLA were amended to provide for longer leaves subject to employer proof that extending the leave would cause severe hardship, she could get additional leave. With FMLA leave, her health insurance would continue as if she were working. The ADA might also entitle her to additional leave. If a paid leave were provided under either statute or pursuant to a disability insurance program, Sarah would not only get leave for her surgery and recovery but she would have some income during that time. If indeed she has performance issues relating to her cancer, either accommodations or leave might enable her to maintain employment. Further, changing shifts to accommodate her treatment schedule would be a required accommodation unless the employer could establish undue hardship. As for any termination, she would still have to show discriminatory motivation. If hiring cases were easier to prove, however, she might have an easier time obtaining a new job after her recovery.

These legal rights would ease, though certainly not eliminate, Sarah's stress. Stress reduction could provide medical and psychosocial benefits and might make her treatment easier and her subsequent return to work more likely.[438] These benefits would attach regardless of Sarah's job, type of cancer, or socio-demographic status. In fact, the lower her income level, the less likely the employer would be able to show that her return from leave was essential, as such employees can more easily be replaced with temporary workers. Thus, these changes, with the exception of telecommuting, may be of particular benefit to the lower income and Latino and African-American workers who are more likely to suffer unemployment as a result of cancer.

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438. *See* Charissa Andreotti et al., *Cancer, Coping, and Cognition: A Model for the Role of Stress-Reactivity in Cancer-Related Cognitive Decline*, 24 PSYCHO-ONCOLOGY 617 (2015) (indicating that stress may contribute to cognitive changes in some cancer patients); Richard F. Brown et al., *Employee to Employer Communication Skills: Balancing Cancer Treatment and Employment*, 22 PSYCHO-ONCOLOGY 426, 432 (2014) (showing that educating cancer patients about their legal rights and communication skills improved their confidence regarding communicating with their employer about their needs related to their cancer treatment); *Attitudes and Cancer*, AM. CANCER SOC'Y, http://www.cancer.org/treatment/treatmentsandsideeffects/emotionalsideeffects/attitudes-and-cancer (last visited Aug. 28, 2015) (indicating that it is not clear that stress reduction, therapy, and emotional support impact survival but can improve quality of life and help patients and families manage treatment).

CONCLUSION

Analyzing the research on cancer and employment provides valuable information about how to ensure that cancer survivors who are willing and able to work during and after treatment can maintain employment. Viewing the FMLA and ADA through this lens shows the strengths and limitations of those laws. The recent amendments to the ADA have benefited cancer survivors by making clear that they are individuals with disabilities covered by the law. And the FMLA provides, for many employees, leave that enables them to access treatment without loss of employment. But the two laws have limitations that restrict their utility for many cancer survivors. First, many employees are left out because of the size of their employer or the duration of their employment. Reducing these requirements would cover many more survivors with the protections of leave and workplace accommodations. Second, paid leave is completely at the discretion of the employer and more often available to higher paid employees. A requirement of paid leave would aid survivors in keeping their employment, particularly low income workers who may otherwise leave employment to be eligible for public benefit programs. Extended leave, through either the FMLA or ADA, would also benefit many survivors.

Finally, more judicial deference to EEOC interpretations of the ADA, which tend to be more favorable to employees and less deferential to existing employer policies and work structures, would benefit cancer survivors. An important aspect of this approach is to avoid treating compliance with existing policies and structures as essential functions of the job, but instead to analyze whether allowing deviation for the individual with cancer will cause undue hardship for the employer.

Modification of the ADA and FMLA will not solve all of the problems facing cancer survivors struggling to support themselves and their families during and after cancer treatment. Some survivors are unable to work for longer periods of time than might reasonably be covered by even expanded paid leave. Further, health insurance issues are intertwined with employment and merit further exploration, particularly in light of the recently enacted Patient Protection and Affordable Care Act. Finally, a more supportive culture could both encourage employees to remain in the workplace and make legal change more likely. This Article only begins the dialogue about how to deal with the growing population of cancer survivors in America.