Cancer and Work: Protections Under the Americans with Disabilities Act

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Abstract Before the passage of laws that protected persons with disabilities from employment discrimination, cancer survivors faced blatant employment discrimination with little legal recourse. From the early 1990s to 2008, cancer-based discrimination significantly diminished as survivors benefited from expansion of their legal rights, advances in medical care, and improvements in public perceptions about living with and beyond a cancer diagnosis. Survivors who sued their employers for discrimination in federal court, however, were seldom awarded a satisfactory remedy. In 2008, Congress revised the Americans with Disabilities Act to make it less burdensome for individuals who have disabilities to seek remedies for employment discrimination. This article will review the work experiences of cancer survivors, describe their rights under the original Americans with Disabilities Act of 1990, and project how the Americans with Disabilities Act Amendments Act of 2008 may improve cancer survivors’ employment opportunities.

With about 12 million cancer survivors living in the US,[1] cancer affects millions of working Americans. Improvements in early detection and treatment have resulted in a significant number of newly diagnosed and long-term survivors of working age. Approximately 4,180,000 people—38% of all cancer survivors—are 20 to 64 years old.[2] The majority of these individuals want to and are able to return to work after diagnosis and perform their jobs.

Cancer treatment limits the ability of only a minority of survivors to work as they had prior to diagnosis. Surveys in the 1980s reported that approximately 80% of survivors return to work after diagnosis.[3] A survey of 10 studies that assessed return-to-work rates of a total of 1,904 cancer survivors from 1986 to 1999 found that a mean of 62% returned to work.[4] A study of 1,763 survivors who were first diagnosed between January 1997 and December 1999 found that of the 1,433 who were working at diagnosis, 73% returned to work within 1 year of diagnosis and 84% returned to work within 4 years.[5] Bradley et al. interviewed 253 long-term survivors in 1999 and found that 67% were employed 5 to 7 years later.[6]

Nonetheless, cancer can have a significant negative impact on survivors' employment opportunities. Although the majority of cancer survivors are able to continue working or return to work without limitations resulting from their diagnosis or treatment, some survivors experience significant physical or
mental limitations that affect their ability to work.[5–8] An analysis of the 2000 National Health Interview Survey found that cancer survivors have poorer outcomes across all employment-related burden measures relative to matched control subjects.[9] One estimate is that 16.8% of working-age survivors (compared with 5% of matched controls) are unable to work because of a physical, mental, or emotional problem; of those who could work, 7.4% (compared with 3.2% of matched controls) were limited in the kind or amount of work they could do.[6] An analysis of 36 studies of 177,969 participants found that survivors were more likely than healthy control participants to be unemployed. (33.8% vs 15.2%).[10]

Whether a survivor continues to work during treatment or returns to work after treatment—and if so, whether that survivor's diagnosis or treatment will result in working limitations—depends on many factors. They include the survivor's age, stage at diagnosis, financial status, education, and access to health insurance and transportation, as well as the physical demands of the job and the presence of any other chronic health conditions.[5,6,11] For example, survivors in physically demanding jobs have higher disability rates than those in more sedentary jobs; survivors with advanced education have higher return to work rates than those with less education.[5,11] Medical treatment decisions that consider quality of life and the shift towards providing cancer treatment in outpatient settings have contributed to the increasing number of survivors who can work during their treatment.[12]

Prior to the passage of laws that prohibited disability-based discrimination, a significant percentage of cancer survivors (25% to 84%) experienced cancer-related employment discrimination.[13–15] In the late 1980s and early 1990s, new federal and state laws prohibited employment discrimination based on disabilities such as cancer. Since then, survivors have reported decreasing incidences of work problems attributable to their cancer.

A 2006 national survey of cancer survivors found that most employers appear to be highly sensitive and accommodating to the needs of employees who have cancer and to employees who are caregivers for cancer survivors.[16] Three out of five survivors reported receiving co-worker support, such as help with work or random acts of kindness.[16] Survivors and caregivers reported very low incidences of negative reactions from their employers and co-workers.[16] The most common negative reaction, reported by one in five survivors, was that an employer gave a survivor less work after diagnosis.[16] Other consequences, such as being fired or laid off (6%), denied a raise or promotion (7%), and denied health insurance benefits (4%), were far less common.[16]

CANCER SURVIVORS' EMPLOYMENT RIGHTS UNDER THE ORIGINAL AMERICANS WITH DISABILITIES ACT OF 1990

Prior to 1990, cancer survivors had few legal protections from cancer-based employment discrimination. The Federal Rehabilitation Act,[17] which governed only federally funded employment, and a patchwork of state laws provided very limited remedies to a small number of cancer survivors. By 1992, however, the employment provisions of the Americans with Disabilities Act of 1990[18] became effective. Additionally, many states amended their employment discrimination laws to cover persons with disabilities, including, in most cases, cancer survivors. Under these laws, an employer cannot treat a survivor who meets the statutory definition of a person with a disability differently from other workers in job-related activities because of his or her cancer history, as long as the survivor is qualified for the job. Individuals are protected by these laws only if 1) they can do the major duties of the job in question; and 2) their employer treated them differently from other workers in job-related activities because of their cancer history.

The Americans with Disabilities Act of 1990 (ADA) prohibits some types of job discrimination by employers, employment agencies, and labor unions against people who have or have had cancer. The
ADA covers private employers with 15 or more employees, state and local governments, the legislative branch of the federal government, employment agencies, and labor unions. From July 26, 1992 through September 30, 2008, of all charges brought under the ADA 3.1% were cancer-based discrimination claims.[19,20] The ADA prohibits employment discrimination against individuals who have a disability, have a record of a disability, or are regarded as having a disability. A disability is a major health problem that substantially limits the ability to do everyday activities, such as care for oneself or walk. Because most cancer survivors, even those who do not consider themselves to be limited by their cancer, fit under at least one of these three groups, most cancer survivors are protected by the ADA from the time of diagnosis.

Whether an individual is covered by the ADA is determined on a case-by-case basis. Most federal courts find that cancer survivors who are qualified for their jobs are covered by the ADA.[21] As will be discussed in this article, some federal courts, however, applied the ADA so strictly as to place cancer survivors in a Catch-22 situation by concluding that a cancer survivor who is sufficiently healthy to work is not a person with a disability as defined by the ADA.[21] The ADA prohibits discrimination in almost all job-related activities. (See Table 1 for selected examples of restrictions on employment practices under the ADA.)

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<th>Table 1: Selected Employment Practices Designated as Discriminatory Under the Americans with Disabilities Act of 1990</th>
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<tr>
<td>Not hiring an applicant for a job or training program</td>
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<td>Firing a worker; providing unequal pay, working conditions, and benefits such as pension, vacation time, and health insurance</td>
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<tr>
<td>Punishing an employee for filing a discrimination complaint</td>
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<td>Screening out disabled employees</td>
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In most cases, an employer may not ask prospective employees if they have ever had cancer. An employer has the right to know only if the applicant can perform the duties of the job in question. An employer may not ask a prospective employee about his or her health history, unless the employee has a visible disability and the employer could reasonably believe that it affects the person's ability to perform that job. A job offer may be contingent upon passing a relevant medical exam, provided that all prospective employees are subject to the same exam. An employer may ask detailed health questions only after offering a job.

Employers must keep employee medical histories in a file separate from other personnel records. The only people entitled to see employee medical files are supervisors who need to know whether the employee needs an accommodation, emergency medical personnel, and government officials who enforce the ADA.

If a survivor needs extra time or help to do his or her job, the ADA requires an employer to provide a “reasonable accommodation.” An “accommodation” is a change in working conditions, such as in work hours or duties (see Table 2).

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<th>Table 2: Common Accommodations for Cancer Survivors During and After Treatment Under the Americans with Disabilities Act of 1990</th>
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<td>Providing extended leave or flexible work hours to accommodate treatment schedules</td>
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<tr>
<td>Relocating an employee from a physical area that may compromise his or her health</td>
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<tr>
<td>Providing a fatigued cancer survivor sufficient time to rest</td>
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<td>Allowing a survivor to work from home when practical</td>
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“Undue hardship” and “reasonable accommodation” under the ADA

An employer does not have to make changes that would be an “undue hardship” on the employer or other workers. “Undue hardship” refers to any accommodation that would be unduly costly, extensive, substantial or disruptive, or that would fundamentally alter the nature or operation of the business. For example, an employer may be permitted to replace a cancer survivor who has to miss a substantial amount of work time and whose work cannot be performed by a temporary employee. Studies of employees with disabilities report that most employees can be accommodated with relatively simple and inexpensive solutions.[22] The ADA does not prohibit an employer from firing or refusing to hire a cancer survivor under any circumstance. Because the law requires employers to treat all employees similarly, regardless of disability, an employer may fire a cancer survivor who would have been terminated even if he or she were not a survivor.

The ADA allows employers to establish attendance and leave policies that are uniformly applied to all employees, regardless of disability. Employers must grant leave to cancer survivors if other employees would be granted similar leave. They may be required to change leave policies as a reasonable accommodation. Employers are not obligated to provide additional paid leave, but accommodations may include leave flexibility and unpaid leave.

The ADA does not require employers to provide health insurance, but when they choose to provide health insurance, they must do so fairly. For example, an employer who provides health insurance to all employees with similar jobs may violate the ADA by refusing to provide health insurance to a cancer survivor. The employer must prove that the failure to provide health insurance is based on legitimate actuarial data or that the insurance plan would become insolvent or suffer a drastic increase in premiums, co-payments, or deductibles.

Protecting families under the ADA

Most employment discrimination laws protect only the employee. The ADA offers protection more responsive to survivors' needs because it prohibits discrimination against family members, too. Employers may not discriminate against workers because of their relationship or association with a “disabled” person. Employers may not assume that an employee's job performance would be affected by the need to care for a family member who has cancer. For example, employers may not treat an employee differently because they assume that the employee would use excessive leave to care for a spouse who has cancer. Additionally, employers that provide health insurance benefits to dependents of employees may not decrease benefits to an employee solely because that employee has a dependent with cancer.

HOW THE ADA AMENDMENTS ACT OF 2008 IS LIKELY TO IMPROVE CANCER SURVIVORS' EMPLOYMENT RIGHTS

Although the ADA greatly reduced incidents of discrimination based on disability, including cancer, most employees who filed complaints with the Equal Employment Opportunities Commission and who sued their employers in court met with little success. The vast majority of claimants received neither a favorable settlement with their employers nor a remedy from a court.[23–26] The main reason the ADA provided a remedy in only a small number of employment discrimination cases is that judicial interpretation of the ADA imposed a very high threshold for employees to prove they had a disability, as defined by the statute, and in so doing prevail in court.[23–26]

In response, Congress passed the ADA Amendments Act of 2008 (“Amendments Act”) to make it easier for claimants to meet the definition of an “individual with a disability.” The Amendments Act, which
took effect on January 1, 2009, retains the three alternative ways to prove disability: 1) an impairment that substantially limits one or more major life activities; 2) a record of such an impairment; or 3) being regarded as having such an impairment. A claimant's ability to prove that he or she satisfies one of these alternatives will be less burdensome, however, because of four key changes provided by the Amendments Act.

Four Key Changes Provided by the ADA Amendments Act of 2008

*First,* the Amendments Act adds the definition of “major life activities” to the statute itself and expands the list of covered activities. The regulations to the ADA had defined major life activities as “functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.”[27] The Amendments Act supplements this nonexhaustive list by adding “eating, sleeping, standing, lifting, bending, reading, concentrating, thinking, and communicating.”[28] Moreover, the Amendments Act broadens the definition of major life activity to include “the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.”[29] Under the ADA, some cancer survivors could not prove that their cancer had an impact on one of the major life activities identified by the regulations. The far more expansive definition of major life activities in the Amendments Act provides practically all survivors the ability to identify a major life activity affected by their cancer.

**Cancer and Job Loss**

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Much has been written about cancer survivors feeling the need to hold on to their jobs while undergoing cancer treatment, for fear of losing their health insurance benefits (“job lock”). Certainly today's tough economic times pressure survivors to stay in their jobs while undergoing or recovering from treatment for cancer, because they worry that these jobs may not still be available to them when they are ready to return to work. Many may shun taking a break from employment at a time when their ill health and need for healing are paramount.

In the US, two-wage-earner households are the norm, and this helps to cushion the financial blow of job loss. Whether caused by illness and disability or the economic downturn, becoming unemployed has serious implications for the long-term health and well-being of jobless people and their families. Research by Andrew J. Oswald, an economist at the University of Warwick, UK, indicates that the stress effect of being involuntarily out of work for 6 months or longer is equivalent to experiencing the death of a spouse, one of the most stressful experiences that a person can or will endure in his or her lifetime. These mental health impacts have little to do with the financial strains associated with the loss of a paycheck.[1] Most of the effect is related to one's sense of self and loss of self-worth. For middle-aged men especially, research has shown job loss and an accompanying loss of a daily routine and sense of purpose in life are often followed by an increase in alcohol use, onset of depressive symptoms, increases in suicidal ideation and suicide, and domestic violence.
Beyond these mental health and social issues, research suggests that physical health problems and unemployment are related, most likely having to do with fewer financial resources and higher stress levels. Of course, cancer increases one's risk of physical health problems and even death, but so does losing one's job. Economist Till Marco von Wachter at Columbia University, New York, concluded in a recent study that there appears to be “a particularly pronounced increase in mortality following job loss and a long-run increase of 10% to 15% in the annual probability of dying persisting for at least the next 20 years.”[2] Furthermore, in a recent study he found that the lives of workers who lost their jobs at 30 years of age were shorter than those who lost their jobs at age 50 or 55, and shorter than those who never lost their jobs at all. Thus, the younger the worker, the greater the effect of job loss on his/her lifespan. Translated to cancer survivors, losing one's job because of illness may compound the risk of death and have an impact on cancer survivors’ future health.

Older adolescent and young adult cancer survivors may be at the greatest risk of all when it comes to unemployment. Research indicates that two-thirds of real lifetime wage growth typically occurs in the first 10 years of one's career or involvement in the job market.[3] Missing out on employment opportunities as a result of cancer and its treatment threatens young adult survivors' long-term career opportunities, financial status, and lifetime earnings. Furthermore, work by sociologist Krysia Mossakowski from the University of Miami, Coral Gables, Florida, indicates that people who are unemployed for long periods in their older teen and young adult years are far more likely to develop alcohol problems and depressive symptoms.[4,5]

Summarizing US labor statistics, Deputy Managing Editor Don Peck of The Atlantic reported that in 2009, 44% of US families experienced a job loss, reduction of hours, or pay cut.[6] These losses can be attributed to multiple and varied causes, including the economic downturn, disability, and illness. Attending to the employment rights of cancer survivors is an important step toward protecting their current and future health and well-being.

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whose cancer was placed in remission by chemotherapy was not disabled because he or she was not substantially limited by the cancer. Similarly, a court could hold that a lung cancer survivor whose cancer affected his or her ability to breathe was not disabled if he or she could breathe while on oxygen therapy.

The Amendments Act addressed this dilemma by stating: “The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures,” which include medication, prosthetic devices, mobility devices, and oxygen therapy equipment and supplies.[31] Under this language, a court could no longer consider how cancer treatment mitigated the effects of cancer on an individual. For example, a sarcoma survivor whose leg was amputated, but who could walk with the use of a prosthetic leg, has a disability because his or her leg was amputated. A court can no longer consider how well the survivor could walk with the prosthesis.

Third, prior to the Amendments Act, a person whose impairment was episodic or in remission would be unlikely to prove that it substantially limited a major life activity. Therefore, a survivor whose cancer was in remission or whose cancer affected a major life activity only occasionally may not have been covered under the ADA. The Amendments Act overcame this hurdle by stating that an “impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.”[32] This new language will benefit the large numbers of cancer survivors whose cancer is chronic, but often managed. Many survivors live for years or decades with their cancer, and at times are not substantially limited by their diagnosis.

Fourth, under the original ADA, an employee could be covered if his or her employer “regarded” him or her as having a disability if the employer believed that the employee had a disability. The Amendments Act no longer requires that the employer actually believe that the employee is substantially limited in a major life activity. Now the employee need prove only that “he or she has been subjected to an action prohibited under [the ADA] because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.”[33] Therefore, a survivor who is treated differently because of his or her cancer, regardless of whether his or her cancer substantially limits any major life activity, may be protected under the ADA.

Advocating for your patient

Healthcare providers can assist patients who face workplace or employment discrimination by providing them with documentation of their cancer diagnosis and, as appropriate, documenting (e.g., in a letter to the employer) that, in the provider's professional medical opinion, the patient is able to carry out the duties of his or her job. Nurses and doctors also can advocate for their patients via a note recommending to the employer reasonable accommodations (e.g., flexible daily work arrangements, leave flexibility) that will not interfere with (and which, in some cases, may be anticipated to improve) the worker's productivity without posing an undue burden on the employer.

Reasonable accommodations may also play a role in an individualized assessment. For example, a healthcare professional who is asked to perform an individualized assessment of a cancer survivor may note that the worker is experiencing difficulty concentrating at work in the afternoons and is making mistakes that the employer has documented. If the worker can avoid this problem, however, with the accommodation of taking two short breaks as needed to rest in the mid-afternoon instead of taking one long lunch break, the healthcare professional can document that the worker is able to do the job, with the accommodation of the two breaks.

CONCLUSION
Civil rights statutes, such as the ADA, are not a panacea to the employment problems faced by cancer survivors. They do not eliminate all discrimination. They do, however, provide employees with a level playing field that reasonably balances employees' rights to be treated according to their capabilities, instead of medical diagnoses, with employers' rights to dismiss employees who cannot do their jobs. The ADA Amendments Act is likely to further diminish employment discrimination against cancer survivors because it provides the opportunity for a legal remedy to all survivors who can perform the essential functions of their jobs with or without a reasonable accommodation.

References


25. Ellison v. Software Spectrum, Inc., 85 F.3d 187, 190-91 (5th Cir. 1996, holding that a breast cancer survivor did not have a disability as defined by the ADA because she successfully mitigated the effects of her cancer and returned to work).

26. Gordon v. E.L. Hamm & Assocs., 100 F.3d 907, 912 (11th Cir. 1996, holding that plaintiff's history of lymphoma was not a record of a disability because except for a couple of days of medical testing and a 10-day leave of absence for bone marrow testing, plaintiff was capable of working).

27. 29 U.S.C. 1630.2(i).


32. 42 U.S.C. 12102(4)(D).