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Extending the Protections of the ADA to Individuals with Cancer in Employment*

Naoko Wake

Introduction

As of January 1, 2019, an estimated 16.9 million people in the United States had a history of cancer.(1) Some of these cancer patients and survivors are not affected by their diagnoses in their daily lives, while others are constantly reminded of their illness by limitations and active treatments. Many of these Americans have a need to be employed in order to pay medical bills and to feel like a contributing member of society. One principal purpose expressed in the 2008 amendments(2) to the Americans with Disabilities Act of 1990 ("ADA")(3) was that an expansive range of impairments are within the scope of the ADA's protection, overriding case law that had significantly narrowed the ADA's coverage since its passage.

The fight by cancer patients and survivors for the ADA's protection did not end there. The second prong in the *prima facie* analysis under the ADA, namely, whether the employee or prospective employee with cancer is a "qualified

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(1) American Cancer Society, Cancer Treatment & Survivorship Facts & Figures 2019–2021 (2019).

(2) ADA Amendments Act of 2008, Pub. L. No. 110–325, 122 Stat. 3553.

(3) Americans with Disabilities Act of 1990, Pub. L. No. 101–336, 104 Stat. 327 (codified as amended in 42 U.S.C. §§12101–12213 (2018)).

individual," continues to be a formidable obstacle for some employees and prospective employees. This article examines the ADA and its interpretation by the courts, particularly with regard to the application of the statutory requirement of being "qualified" to cancer patients and survivors and the interrelated issue of reasonable accommodation. The description of certain aspects of work as essential functions can disadvantage cancer patients and survivors, yet these individuals are less likely to succeed in challenging such requirements in court. This article examines the factual and legal underpinnings in court decisions finding that cancer patients and survivors are not qualified and supports flexible application of the qualified individual requirement and duty to provide reasonable accommodation as adopted by some courts and advocated by certain scholars and attorneys.

I. Enactment of the ADA and the ADA Amendments Act

Disability is not considered one of the suspect or quasi-suspect classifications subject to heightened scrutiny for equal protection under the U.S. Constitution.(4) The U.S. Supreme Court determined, prior to enactment of the ADA, that discrimination based on disability is considered under the rational basis test.(5) Therefore, legislation was needed to provide broader protection from discrimination for persons with disabilities.(6) The Rehabilitation Act of 1973 ("Rehabilitation Act") provided a breakthrough in that it was the first federal statute addressing

(4) George A. Rutherglen & John J. Donohue III, Employment Discrimination: Law and Theory 781 (4th ed. 2018). In contrast, Convention on the Rights of Persons with Disabilities, adopted by the United Nations in 2006, classifies the rights of persons with disabilities to participate fully in society as human rights. Convention on the Rights of Persons with Disabilities, Art. 1, U.N. GAOR, 61st Sess., 76th plen. mtg., U.N. Doc. A/Res/61/106 (Dec. 13, 2006); *see also* Arlene S. Kanter, *Let's Try Again: Why the United States Should Ratify the United Nations Convention on the Rights of People with Disabilities*, 35 Touro L. Rev. 301, 323 (2019).

(5) *City of Cleburne v. Cleburne Living Ctr, Inc*., 473 U.S. 432, 446 (1985).

(6) Rutherglen & Donohue, *supra* note 4, at 781.

vocational training and employment for persons with disabilities,[7] laying the groundwork for the ADA. The covered entities and programs or activities under the Rehabilitation Act include federal departments and agencies (Section 501), entities with federal contracts of more than $10,000 (Section 503), and programs or activities receiving federal funds (Section 504). Although the limited coverage and lack of remedies provided by the Rehabilitation Act drew criticisms,[8] case law interpreting the Rehabilitation Act remains significant today because the ADA explicitly states that its level of protection does not fall below that provided by the Rehabilitation Act.[9]

The ADA extended its coverage to private entities with fifteen or more employees, state and local governments, and the U.S. Congress. The ADA, the first comprehensive disability discrimination law at the national level,[10] became a model for the Convention on the Rights of Persons with Disabilities.[11] Among the five titles of the ADA, this article focuses on Title I, which prohibits discrimination in employment.

Overtime, problems with judicial interpretation of the ADA arose. The ADA Amendments Act was enacted in 2008 in order to specifically override the U.S. Supreme Court's narrow interpretation of who is a covered person under the Act.[12] Among the main purposes of the amendments was to override the requirements articulated in *Sutton v. United Air Lines, Inc*.[13] that the ameliorative effects of mitigating measures should be considered in determining whether a person's

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(7) The Rehabilitation Act of 1973, 29 U.S.C. §§701–796 (2018); *see also* Rutherglen & Donohue, *supra* note 4, at 781.

(8) For instance, an individual has no private right of action under Section 503. Mark A. Rothstein et al., Employment Law 415, 416 (6th ed. 2019).

(9) 42 U.S.C. §12201(a); *see also* Rutherglen & Donohue, *supra* note 4, at 784.

(10) Rothstein et al., *supra* note 8, at 417.

(11) Kanter, *supra* note 4 at 302.

(12) Pub. L. No. 110–325, §2, 122 Stat. at 3553–54; *see* Rothstein et al., *supra* note 8, at 420.

disability substantially limits major life activities.[14] Congress also stated that another purpose of the amendments was "to reject" certain criteria established in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams.*[15] The Supreme Court had ruled in that case that the requirements of a "substantially limiting" impairment that impacted a "major life activity" should be strictly construed "to create a demanding standard for qualifying as disabled."[16] Thus, the Supreme Court's narrow interpretation of the ADA required Congress to enact legislation clarifying its intent that the question of what constitutes a disability under the Act should be construed more broadly.[17] As discussed in Part II, this pertains to the first element of the *prima facie* case. The next part will discuss the basic structure of the ADA as amended, in particular, the first two elements of the *prima facie* case.

II. Establishing a *Prima Facie* Case Under the ADA

A. Disability Defined

The first element of the *prima facie* case is whether the individual has a covered disability. Federal law provides three alternative definitions of a covered disability under the Rehabilitation Act and ADA: (1) "a physical or mental impairment that substantially limits one or more major life activities of such individual," (2) "a record of having such an impairment," or (3) "regarded as" having such an impairment.[18]

Equal Employment Opportunity Commission ("EEOC") regulations state that one has a record of a disability when the person has a history of, or has been mistakenly considered as having, an impairment that substantially limits major life

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⑬ *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999).

⑭ *Id*. at 482–87; Pub. L. No. 110–325, §2(b)(2), 122 Stat. 3554.

⑮ *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002).

⑯ *Id*. at 197.

⑰ Pub. L. No. 110–325, §2(b), 122 Stat. at 3554.

⑱ 29 U.S.C §706(9)(B); 42 U.S.C. §12102 (1).

activities.[19] Suppose that a person had experienced cancer years ago in a way that substantially limited the major life activity of working but the cancer no longer substantially limits her working. That person has a record of an impairment that meets the first element of the *prima facie* case and may be entitled to occasional leave for periodical doctor's visits as a reasonable accommodation, for instance, if certain other requirements of law are satisfied.[20]

With respect to being regarded as having a disability, this definition was included by Congress to address harmful myths, fears, prejudices or stereotypes about disabilities.[21] A person is "regarded as having such an impairment" if she is subject to discrimination by a covered employer based on an actual or perceived impairment, whether or not the impairment substantially limits a major life activity.[22] Since the enactment of the 2008 amendments, plaintiffs are no longer required to prove the employer's subjective mind as to whether it perceived her to have an impairment that substantially limited a major life activity.[23] If, for instance, a job applicant does not receive an offer of employment because she has cancer, she might be able to prove that the employer regarded her as having a disability.

Thus, cancer patients and survivors may utilize any one or all three definitions of disability. The three elements, a "physical or mental impairment" that "substantially limits" one or more "major life activities," are central to the definitions of disability except concerning the "regarded as" definition as explained above.

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⑲ Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, 29 C.F.R. §1630.2(k)(1) (2020).

⑳ *Id*. §1630.2(k)(3)(A).

㉑ Interpretive Guidance on Title I of the Americans with Disabilities Act, 29 C.F.R. pt. 1630, App. §1630.2(l) (2020).

㉒ 42 U.S.C. §12102 (1).

㉓ 29 C.F.R. pt. 1630, App. §1630.2(l); Rothstein et al., *supra* note 8, at 423. A person who makes out a *prima facie* case by meeting the "regarded as" definition is not entitled to reasonable accommodation. 29 C.F.R. §1630.2(o).

1. “Physical or Mental Impairment”

“Physical or mental impairment” is defined as 1) “any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more body systems,” or 2) “any mental or psychological disorder.”[24] This definition extends to a variety of medical disorders and conditions, including cancer. A “physical or mental impairment” is a disability if it “substantially limits” one or more “major life activities.”

2. “Substantially Limits” and “Major Life Activities”

The ADA, as implemented by the EEOC, prescribes that an impairment does not have to “prevent, or significantly or severely restrict, the individual from performing a major life activity” to be considered substantially limiting.[25] Furthermore, impairments must be ascertained without considering the “ameliorative effects of the mitigating measures,”[26] and “disability” includes an impairment that is “episodic or in remission” as long as it substantially limits a major life activity “when active.”[27]

Prior to the 2008 amendments, persons with cancer were closely scrutinized to determine whether they had a covered disability. They were treated as though they did not have an impairment that substantially limited their major life activities, because their cancer was in remission due to the treatment they received.[28] This was the case even though the treatment was ongoing. The ADA currently sets forth that “major life activities” include major bodily functions such as normal cell growth.[29] Current EEOC regulations state that “cancer substantially limits normal

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[24] 29 C.F.R. §1630.2(h)(1)-(2).
[25] *Id*. §1630.2(j)(1)(ii).
[26] 42 U.S.C. §12102(4)(E)(i).
[27] *Id*. §12102(4)(D).
[28] *See generally* Rutherglen & Donohue, *supra* note 4, at 809.
[29] 42 U.S.C. §12102(2)(B).

cell growth."[30] Therefore, cancer patients and survivors no longer face unsuccessful battles to prove that they are individuals with covered disabilities, which is the first element of stating a claim under the ADA.

To summarize, the first two requirements for making out a *prima facie* case under the ADA require a showing (a) that the person is an individual with a covered disability, *i.e.*, the person (1) has a physical or mental impairment that substantially limits one or more major life activities, (2) has a record of, or (3) is regarded as having such an impairment; and (b) that the person is a "qualified individual."[31] Part II. B. will consider the second element, whether the person is a qualified individual.

B. Qualified Individual Defined

This section begins with an overview of what actions are prohibited by the ADA when taken against a qualified individual on the basis of disability. Prohibited discriminatory actions include (1) adversely affecting the equal employment opportunities of a person by "limiting, segregating, or classifying" an employee or prospective employee on the basis of disability; (2) contracting or entering into an arrangement or relationship that results in discrimination against a person with a disability; (3) "utilizing standards, criteria, or methods of administration" that in effect cause discrimination; (4) excluding or denying equal employment or benefits to a qualified individual because the individual is known to be associated with a person who is known to have a disability; (5) "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee," unless the employer can demonstrate that the accommodation would cause an undue hardship

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⑶⓪ 29 C.F.R. §1630.2(j)(3)(iii).

⑶① 42 U.S.C. §§12102(1), 12112(a); *see also* Rutherglen & Donohue, *supra* note 4, at 812.

on the business of the employer; (6) "using qualification standards, employment tests or other selection criteria" that screen out a person with a disability, unless the criteria are work-related and conform with business necessity (disparate impact discrimination); and (7) failing to administer tests pertaining to employment that accurately reflect the ability of an applicant or employee with a sensory, manual or speaking disability.[32] The failure to provide reasonable accommodations is one of the main topics of this article.

The ADA bans discrimination, not against all persons with disabilities, but only against qualified individuals with disabilities. The ADA states that "(n)o covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment."[33] Accordingly, after a person establishes that she has a covered disability, the next requirement in meeting the *prima facie* burden is putting forth proof that she is a "qualified individual."[34] The definition of "qualified individual" is related to the question of whether the employer has discriminated against the person with a disability, the latter being a question on the merits[35] that may include failure to provide a reasonable accommodation.

"Qualified individual" is defined as "an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position."[36] The first step in determining the person's qualification is to ask whether the person has the educational background, work experience, skills, licenses, and other prerequisites for the position.[37] Determining whether the person can perform

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(32) 42 U.S.C. §12112 (b); Rutherglen & Donohue, *supra* note 4, at 784.

(33) 42 U.S.C. §12112 (a).

(34) Rutherglen & Donohue, *supra* note 4, at 812.

(35) *Id*.

(36) 42 U.S.C. §12111 (8).

the "essential functions" of the position with or without reasonable accommodation is the next step.[38]

"Essential functions" are "the fundamental job duties" of the position already held or sought by the claimant.[39] Essential functions do not include the position's marginal functions.[40] Factors that are typically used to determine what is considered an essential function are whether the position exists for the purpose of performing the function, whether there is a limited availability of employees to perform the function, whether the function is highly specialized, and whether the position would be fundamentally altered if the function is removed from the position.[41] Evidence that can be used to support these findings is discussed in Part III.A.1 below.

With respect to the related question of reasonable accommodation, as stated above, not providing reasonable accommodations for the known limitations of an otherwise qualified individual with a disability is discrimination.[42] Reasonable accommodation is making "any modifications or adjustments" that enable an individual with a disability to enjoy equal employment opportunities.[43] There are three types of reasonable accommodation an employer may be required to make: (1) making changes to the application process to accommodate applicants with disabilities; (2) implementing modifications to the working environment or to the manner in which the job is customarily performed so that the qualified person with a disability is able to perform the essential functions of the position; and (3) making adjustments that enable the person with a disability "to enjoy equal benefits and

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(37) 29 C.F.R. pt. 1630, App. §1630.2(m)

(38) *Id*.

(39) 29 C.F.R. §1630.2(n)(1).

(40) *Id*.

(41) 29 C.F.R. §1630.2(n); *Id*. pt. 1630, App. §1630.2(n).

(42) 42 U.S.C. §12112 (b).

(43) 29 C.F.R. pt. 1630, App. §1630.2(o).

privileges of employment."[44] The ADA supplies some examples of reasonable accommodation, namely, making existing facilities accessible; job restructuring; part-time or modified work schedules; reassigning to a vacant apposition; acquiring or modifying equipment; adjusting examinations, training materials or policies; and providing readers or interpreters.[45]

Undue hardship is an affirmative defense the employer has to the duty to provide reasonable accommodation. Undue hardship is "an action requiring significant difficulty or expense."[46] Some of the factors to be considered in determining the existence of undue hardship are the nature and cost of the necessary accommodation; the overall financial resources, the number of employees, and the impact on expenses and resources on the operation of the affected facility; the overall financial resources and size of the business of the employer entity; and the type of operation of the employer entity.[47] Under the ADA, the plaintiff is required to prove the existence of a reasonable accommodation that enables her to perform the essential functions of her position.[48] Then the employer may raise the affirmative defense of undue hardship and has the burden of proving it.[49]

Thus far, this article has reviewed the basic structure of the ADA, including an overview of when the protections of the law are triggered. Part III will highlight the second element of the *prima facie* case in particular. The question of whether the plaintiff is a qualified individual and the related question of whether the employer provided necessary reasonable accommodation are major obstacles for plaintiffs with cancer.

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[44] *Id*. §1630.2(o); *Id*. pt. 1630, App. §1630.2(o).

[45] 42 U.S.C. §12111 (9).

[46] *Id*. §12111 (10).

[47] *Id*.

[48] *US Airways, Inc. v. Barnett*, 535 U.S. 391, 401–402 (2002); Rutherglen & Donohue, *supra* note 4, at 844.

[49] *US Airways, Inc.*, 535 U.S. at 401–402; Rutherglen & Donohue, *supra* note 4, at 844.

III. Reasonable Accommodation for Qualified Cancer Patients and Survivors with Known Limitations

The duty of providing reasonable accommodation possibly arises only when an "otherwise qualified individual" has "known physical and mental limitations."[50] This part considers the courts' application of these two elements in determining whether or not an employer discriminated against cancer patients and survivors by not providing reasonable accommodation.

A. "Qualified Individual" in Case Law

As mentioned previously, Congress amended the ADA to "reinstat[e] a broad scope of protection to be available under the ADA."[51] Congress further explained its intent "that the primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations, and to convey that the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis."[52] Therefore, Congress intended that the general attention of litigations should be on the employer's obligations without subjecting individual plaintiffs to extensive and intrusive inquiries into their health conditions. Notwithstanding, the ADA Amendments Act only lowered the threshold for the question of whether a person has a disability with the related inquiry into whether the person is a qualified individual left untouched.[53] While the conflicting legislative intent underlying the ADA Amendments Act

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[50] 42 U.S.C. §12112 (b)(5)(A). "Otherwise qualified individual" is similar to "qualified individual" in that it emphasizes that a person is qualified, because she meets all of the prerequisites for the position, but needs a reasonable accommodation in order to perform the essential functions. 29 C.F.R. pt. 1630, App. §1630.9.

[51] Pub. L. No. 110–325, §2(b)(1), 122 Stat. at 3554.

[52] *Id.* §2(b)(5).

[53] 42 U.S.C. §§12111(8), 12112 (a).

(broadening protection by reducing scrutiny of the individual's disability but not addressing the burden of proving qualifications) was a step forward, Congress and some courts have allowed roadblocks for individuals with cancer and other disabilities to persist by making it difficult to prove their qualifications. An investigation of the relationship among the concepts of qualified individual, essential functions, and reasonable accommodation will bring this to light.

1. Questions of Fact

The first requirement in determining whether the plaintiff is a qualified individual under the ADA is to ask whether the employee or candidate can perform the essential functions of her position.[54] In order to determine which job functions are essential, "consideration shall be given to the employer's judgment."[55] Written job descriptions prepared by the employer before the claim arose may be used as evidence of the essential functions of the position.[56] Other examples of evidence that is probative in determining whether a function is essential include the terms of collective bargaining agreements, whether the plaintiff has been performing the job in the past and for how long and the work experience of other employees who held the position in question or similar positions.[57] Courts are divided on whether the employer or the plaintiff has the burden of proving what job duties are essential and whether the plaintiff can perform them.[58] Ultimately, determining what job functions are essential is a question of fact often for the jury.[59]

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[54] *Id.* §12111(8).

[55] *Id.*

[56] 42 U.S.C. §12111(8); 29 C.F.R. pt. 1630, App. §1630.2(n)(3)(ii).

[57] 42 U.S.C. §12111(8); 29 C.F.R. pt. 1630, App. §1630.2(n)(3).

[58] *Hamlin v. Charter Twp. of Flint*, 165 F.3d 426, 439 (6th Cir. 1999); *Richardson v. Friendly Ice Cream Corp.*, 594 F.3d 69, 76 (1st Cir. 2010).

[59] 42 U.S.C. §12111(8); *see also Miller v. Ill. DOT*, 643 F.3d 190, 197–98, 200 (7th Cir. 2011).

If the individual with a disability is unable to perform the essential functions due to her disability, whether the person can perform the essential functions with reasonable accommodation must be determined.[60] The ADA allocates the burden of proof between the plaintiff and defendant in reasonable accommodation cases.[61] First, the plaintiff must satisfy the burden of producing evidence that an accommodation is reasonable "ordinarily or in the run of cases" with regard to the effectiveness and impact on the employer and other employees.[62] If the plaintiff meets this burden, the defendant must demonstrate that it provided the plaintiff with a reasonable accommodation or that an undue hardship relieves it of providing accommodation.[63] Whether an accommodation is reasonable and whether it poses an undue hardship are also factual questions that should require detailed case-specific analyses.[64]

2. Courts of Appeals Decisions on Essential Functions and Reasonable Accommodation

This section will consider specific cases addressing whether regular attendance, long working hours, and physically demanding work should be treated as essential functions of a position. These areas can be problematic for certain cancer patients in need of ADA job protection.

a. Uninterrupted Attendance as an Essential Function

Some courts seem to presume that "uninterrupted attendance" is an essential function, even though it does not fit the definition of essential functions provided by the EEOC.[65] In *Golden v. Indianapolis Housing Agency,*[66] a police officer who had

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(60) Rothstein et al., *supra* note 8, at 431.

(61) 42 U.S.C. §12112(b)(5)(A).

(62) *US Airways*, 535 U.S. at 401.

(63) *See id.*

(64) *Miller*, 643 F.3d at 199; *Morton v. United Parcel Services, Inc.*, 272 F.3d 1249, 1256–57 (9th Cir. 2001).

cancer took twelve weeks of leave under the Family and Medical Leave Act of 1993 ("FMLA")[67] and an additional four weeks of unpaid medical leave to undergo surgery and receive other treatments. In addition, the employee requested further leave as provided by the city policy. The leave was not granted, and she was discharged. The U.S. Court of Appeals for the Seventh Circuit held that "[a]n employee who needs long-term medical leave cannot work and thus is not a 'qualified individual' under the ADA."[68] Moreover, the court opined that "a multimonth leave of absence is beyond the scope of a reasonable accommodation under the ADA."[69] According to the court, the employee's need for leave beyond that provided by the FMLA excluded her from the protected class of persons under the Rehabilitation Act and the ADA.[70]

The court's decision, however, is contrary to a more natural reading of the Rehabilitation Act and ADA. It is possible for an employee to have additional leave after taking leave under the FMLA, provided that certain requirements are met.[71] Rather than applying a per se limit on the length of a leave of absence, an employee may be granted leave if it is determined that she can perform the essential functions at the end of leave, there is no other effective accommodation, and the leave does not cause any undue hardship.[72]

⑹⑸ 29 C.F.R. §1630.2(n)(1); Ann C. Hodges, *Working with Cancer: How the Law Can Help Survivors Maintain Employment*, 90 Wash. L. Rev. 1039, 1083 (2015); Written Testimony of Brian East Senior Attorney, Texas Disability Rights, U.S. Equal Emp. Opportunity Comm'n 9 (June 8, 2011).

⑹⑹ *Golden v. Indianapolis Housing Agency*, 698 Fed. App'x. 835 (7th Cir. 2017).

⑹⑺ 29 U.S.C. §2601–54 (2018).

⑹⑻ *Golden*, 698 Fed. App'x. at 837 (quoting *Stevenson v. Hartland Woodcraft, Inc.,* 872 F.3d 476 (7th Cir. 2017)).

⑹⑼ *Id.* at 837.

⑺⓪ *Id.*

⑺① U.S. Equal Emp. Opportunity Comm'n, Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the ADA, EEOC Notice No. 915.002 (Oct. 17, 2002).

⑺② *See Garcia-Ayala v. Lederle Parenterals, Inc.*, 212 F.3d 638, 648–50 (1st Cir. 2000);

Other courts have held that regular attendance is an essential function ("[T]here is general consensus among courts, including ours, that regular work-site attendance is an essential function of most jobs";[73] "Attendance is an essential aspect of most jobs."[74]) Presuming that uninterrupted attendance is an essential function of a position would make it impossible for an employee who requires medical leave to receive the accommodation, even though it is a possible reasonable accommodation under the ADA. An essential function is a fundamental job duty,[75] while uninterrupted attendance is better characterized as the manner in which a function is performed.[76] Hence, an essential function is a fundamental duty that is to be performed by making modifications, if necessary, such as obtaining a temporary replacement or allowing to work from home, the reasonableness of which should be determined under a reasonable accommodation analysis.

As a related issue and as already indicated above, courts and legal scholars have pointed out that the presumption that uninterrupted attendance is an essential function exempts employers from the burden of showing that the requested leave causes undue hardship.[77] An analysis of undue hardship should take into account such factors as financial and non-financial costs of the accommodation and the resources of the employer.[78] The court in *Golden*, presuming that a multi-month

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EEOC-Notice No. 915.002; Written Testimony of Brian East, *supra* note 65.

[73] *Credeur v. Louisiana*, 860 F.3d 785, 793 (5th Cir. 2017).

[74] *Hamm v. Exxon Mobil Corporation,* 223 Fed. Appx. 506, 508 (7th Cir. 2007).

[75] 29 C.F.R. §1630.2(n)(1).

[76] Written Testimony of Brian East, *supra* note 65 ("[Attendance] is a means to an end, not the end itself") (citing U.S. Equal Emp. Opportunity Comm'n, EEOC-M1A, 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.")

[77] Hodges, *supra* note 65 at 1083 (citing *Cehrs v, Northwest Ohio Alzheimer's Research Center*, 155 F.3d 775 (6th Cir. 1998)).

leave is not allowed under the ADA, decided as a matter of law that the employer had no obligation to provide the requested reasonable accommodation to the plaintiff without conducting a fact-intensive analysis of undue hardship. "While the burden of showing reasonable accommodation is on the plaintiff, the employer [in *Garcia-Ayala*] did not contest the reasonableness of the accommodation except to embrace a *per se* rule that any leave beyond its one-year reservation period was too long."[79] "[Assessments of reasonable accommodation and undue hardship] are difficult, fact intensive, case-by-case analyses, ill-served by *per se* rules or stereotypes."[80]

The plaintiff in *Golden* had been granted sixteen weeks of unpaid leave, including FMLA leave, before she was let go.[81] For someone who had a mastectomy and five lymph nodes removed,[82] sixteen weeks of leave is minimal. Considering the serious medical requirements of a cancer patient in the acute phase of treatment and to prepare to start working again, this is no long-term leave. Allowing cancer patients to obtain necessary medical care while on leave or while receiving other accommodations is essential. The ADA does not limit a leave of absence that is provided as reasonable accommodation to a particular number of weeks or months.[83] The court in *Garcia-Ayala v. Lederle Parenterals, Inc.*, a case in which the plaintiff had a series of cancer treatments including bone marrow treatment, held that an extension of leave after taking leave for fifteen months was reasonable absent the demonstration of undue hardship by the employer.[84] "Our concern [is] that the [lower] court applied per se rules--rather than an individualized assessment of the facts."[85] Determinations of status as a qualified individual

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(78) 42 U.S.C. §12111 (10).

(79) *Garcia-Ayala*, 212 F.3d at 649.

(80) *Id*. at 650.

(81) *Golden,* 698 Fed. App'x. at 836.

(82) *Id.*

(83) Written Testimony of Brian East, *supra* note 65.

(84) *Garcia-Ayala*, 212 F.3d at 648–50.

(essential function), reasonable accommodation, and undue burden are critical and require close attention to the facts.

In *Peyton v. Fred's Stores of Ark., Inc.*,[86] the plaintiff who was a store manager had surgery for ovarian cancer on January 12, 2006. On the same day, her supervisor called the plaintiff at the hospital and asked, "'How can we accommodating [sic] you?"'[87] The plaintiff, who was heavily medicated, did not recall being asked the question or any of the conversation, but she purportedly replied, "'I don't know. Indefinitely."'[88] She was informed on January 14 that her employment would be terminated.[89]

The court dismissed the plaintiff's claim that the employer failed to engage in the interactive process[90] for determining reasonable accommodation. The court alluded to the fact that the plaintiff was required to initiate the interactive process.[91] Yet, when she was asked how she would like to be accommodated on the day of her operation, and was advised by her boss only two days later that she was being let go there was no opportunity for her to request and take part in an interactive process to identify reasonable accommodations. Relieving an employer of the obligation to provide an opportunity for and to engage in a meaningful interactive process runs

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(85) *Id.* at 647.

(86) *Peyton v. Fred's Stores of Ark., Inc.*, 561 F.3d 900, 902 (8th Cir. 2009).

(87) *Id*. at 901, 903.

(88) *Id*.

(89) *Id*. at 901. A definite date of return is not necessary for a successful request for a leave. It is sufficient to provide an approximate date. EEOC Notice No. 915.002, *supra* note 71. In *Peyton*, however, there is a question as to whether the plaintiff had an opportunity to provide even an approximate date of return, because the conversation about accommodation took place while she was heavily medicated and she was discharged soon after the conversation.

(90) 29 C.F.R. §1630.2(o)(3). The interactive process is considered important to determining the employee's limitations and what accommodations are reasonable for the employer to provide. 29 C.F.R. pt. 1630, App. §1630.2(o). Interactive process is further explored in Part III.B.

(91) *Peyton*, 561 F.3d at 903.

the risk of rewarding the employer, in effect, by giving the employer an excuse that no reasonable accommodation was requested and that it did not discover any reasonable accommodation to provide.

Some of the decisions on essential functions take an unnecessarily rigid approach and apply a short-term perspective to cancer patients and survivors. Uninterrupted attendance should not be considered a *per se* job function, and leaves of absence should be considered as possible reasonable accommodations if they do not cause undue hardship on the employer and other legal requirements are met.

b. Full-time and Overtime Work as Essential Functions

Some employees with cancer experience extremely difficult situations when their employers require them to work long hours. For instance, the plaintiff in *Hamm* had been placed on a shift that was physically demanding and required overtime.[92] In *Green v. BakeMark USA, LLC*, a thyroid cancer patient collapsed after working non-stop for twenty-four hours several months following surgery and attendant medical complications.[93] Within the same month of his collapse at work, the company had required him to work fifty to sixty hours a week. In *Spears v. Creel*,[94] the employee had undergone cancer surgery twice and was feeling nauseated and fatigued from ongoing radiation treatments. She requested a light duty or part-time position to no avail.

Only a few months after cancer surgery and often while still undergoing chemotherapy, radiation therapy, hormonal therapy and other treatment, long working hours can be a serious hurdle for employees. Some courts treat working full-time and even overtime as essential functions, even though they sometimes should not be treated as job functions. Once working long hours is considered an essential function, medical leaves of absence or "part-time or modified work

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(92) *Hamm*, 223 Fed. Appx. at 507.

(93) *Green v. MakeMark USA, LLC*, 683 Fed. Appx. 486, 489 (6th Cir. 2017).

(94) *Spears v. Creel*, 607 Fed. Appx. 943, 945–46 (11th Cir. 2015).

schedules,"[95] as provided in the ADA, will not be available as reasonable accommodations. This conflicts with the ADA provision on reasonable accommodation that allows for modified schedules. The definition of a qualified individual incorporates reasonable accommodation in such a way as to allow for flexible administration without any time limits for the length of leave or modified work schedules and without any minimum number of work hours.

One scholar has suggested that "courts could once again undermine congressional efforts to establish a national mandate against disability discrimination."[96] While the *prima facie* analysis employed by the courts may seem to be a necessary consequence of the fact that Congress did not alter the definition of a "qualified individual" in the ADA Amendments Act, some courts may be employing a narrower interpretation than what Congress intended.

c. Physically Demanding Labor as an Essential Function

Heavy lifting or other physical labor as an essential function is another area in which cancer patients and survivors are sometimes left out in the cold. In *EEOC v. Womble Carlyle Sandridge & Rice, LLP,*[97] the plaintiff was employed by a large law firm as a member of the support staff. She underwent surgery after lifting and moving many boxes weighing in the range of thirty-two to fifty pounds. Following the surgery, she developed lymphedema, a common symptom in certain breast cancer patients. She submitted a note from her doctor stating that she could not lift more than ten pounds and later submitted another note with a twenty-pound limit. Although the employer accommodated her restriction for six months and granted medical leave after that, the employee was discharged when the leave ran out.

The appellate court's analysis focused on whether lifting more than twenty

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[95] 42 U.S.C. §12111(9).

[96] Stephen F. Befort, *An Empirical Examination of Case Outcomes Under the ADA Amendments Act*, 70 Wash & Lee L. Rev. 2027, 2068 (2013).

[97] *EEOC v. Womble Carlyle Sandridge & Rice, LLP*, 616 Fed. App'x. 588 (4th Cir. 2015).

pounds was an essential function of the employee's position and her inability to perform this function. The employer had considered transferring the employee to position that did not involve lifting, but there was no vacant position. The court did not determine whether the employer engaged in an interactive process with the employee, although the plaintiff claimed that the employer violated the ADA by failing to undertake an interactive process.

Other appellate cases in which cancer patients requested and were denied reasonable accommodations for physically demanding positions include *Spears*[98] (plaintiff was a corrections officer) and *Hamm*[99] (plaintiff was a field mechanic for Exxon). Employer assignments of physically demanding duties can easily lead to the loss of employment for cancer patients, whether through termination or being forced to quit.

Granted that an employer's determination of what constitutes essential functions generally receives deference, courts should not relieve the employer from scrutiny of weather physical labor is, in fact, an essential function, whether the employer made a good faith-effort to identify a reasonable accommodation, and whether the employer demonstrated undue hardship if it cannot provide a reasonable accommodation. Good-faith communication with an employee may reveal that providing a power-assisted device for carrying heavy items or increasing the number of video conferences in place of on-site work, for instance, are reasonable.

Moreover, the Covid-19 pandemic has caused inconvenience to many workplaces in which individuals with or without disabilities are employed. Various technologies and creative solutions that followed may offer valuable insights into providing different forms of reasonable accommodations to individuals with disabilities.

Sources indicate that one of the factors that contributed to the enactment of the ADA was an expectation that the enactment would serve to reduce government

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(98) *Spears*, 607 Fed. Appx. at 945–46.

(99) *Hamm,* 223 Fed. Appx. at 507.

spending on social welfare benefits.[100] This background might explain to some degree why Congress included in the ADA and did not remove in the ADA Amendments Act the qualified individual requirement. However, even in its present form, the statute allows for more flexible reasonable accommodations for cancer patients and survivors than employers might realize.

B. Known Physical or Mental Limitations and the Interactive Process

The ADA prescribes that an employer may be in violation of the law when it does not provide reasonable accommodation "to the known physical or mental limitation of the employee."[101] In general, an employee is responsible for informing the employer that she has limitations and requires an accommodation.[102] Some scholars have criticized this requirement because it does not protect those who are unable to ask for reasonable accommodation.[103] Moreover, some courts have ruled that the plaintiffs did not properly ask for accommodations even when these employees had submitted doctor's notes that described the employee's limitations or required accommodations. In other cases, employers should have known that the employees were having difficulties because the employees requested leaves of absence and other accommodations.

In *Womble Carlyle*, the court dismissed the reasonable accommodation claim on the basis that there was no evidence that the employee had requested any accommodation, meaning that the employer's obligation to engage in an interactive

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[100] Edward Berkowitz, *George Bush and the Americans with Disabilities Act*, Social Welfare History Project (2017), http://socialwelfare.library.vcu.edu/recollections/george-bush-and-the-americans-with-disabilities-act/; *see also* Arlene S. Kanter, The Americans with Disabilities Act at 25 Years: Lessons to Learn from the Convention on the Rights of People with Disabilities. *63 Drake L. Rev.* 819, 822–23.

[101] 42 U.S.C. §12112 (b)(5)(A).

[102] 29 C.F.R. pt. 1630, App. §1630.9.

[103] Kanter, *supra* note 4, at 321.

process was not triggered, even though the employee had submitted two letters from her doctor describing her limitations.[104] The EEOC Enforcement Guidance, however, provides that a letter from the employee's doctor about her limitations should suffice as a request for reasonable accommodation.[105] The *Womble Carlyle* court further found that even if the employer's duty to engage in an interactive process had been triggered, the EEOC could not identify a reasonable accommodation, relieving the employer of any liability.[106] The duty of reasonable accommodation, however, actually encompasses the employer's reasonable efforts to assist the employee and to communicate with her in good faith. Therefore, an employee is not required to request a precise reasonable accommodation from the employer, although it is considered that an employee must inform the employer that she needs some sort of accommodation or that she is unable to overcome a barrier at work.[107] Moreover, a plaintiff need only produce evidence that a reasonable accommodation was requested and denied. Furthermore, cooperation by the employer in *Womble Carlyle* in engaging in an interactive process might have identified reasonable and effective accommodations without intervention by the court. Therefore, an employer should make an effort to engage in dialogue with the employee to try to come up with a reasonable accommodation that enables the employee to continue working.[108] Otherwise, employers are rewarded for not being diligent in identifying reasonable accommodations when the employee is unable to request a specific accommodation or identify an accommodation that is workable.

Given that the balance of power leans sharply toward employers, and since

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(104) *Womble Carlyle*, 616 Fed. App'x. at 594.

(105) EEOC Notice No. 915.002, *supra* note 71. This guidance from the EEOC does not have the force of law, but is often used by courts as an official interpretation of a statute that the EEOC is charged with enforcing.

(106) *Womble Carlyle*, 616 Fed. App'x. at 594.

(107) EEOC Notice No. 915.002, *supra* note 71.

(108) 29 C.F.R. §1630.2(o)(3) (2020); EEOC Notice No. 915.002, *supra* note 71.

employees may expect a negative reaction when they inform their employers of their limitations, it is easy to understand why some employees submit a letter from a doctor without additional explanation. Moreover, recently-diagnosed cancer patients often have no idea what is going to happen to them and what limitations they will have. It is reasonable to think that employers "know" that the employee has a limitation when the employee submits a medical note or provides some other indications. "Once the employer knows of the disability and the employee's desire for accommodations, it makes sense to place the burden on the employer to request additional information that the employer believes it needs."[109] The "known physical or mental limitations" element should not be used to avoid liability based on the technicality that the employee did not use the most desirable method of informing the employer of the need for accommodations.

Conclusion

Some courts apply the ADA provisions narrowly and deny reasonable accommodations under the ADA that cancer patients and survivors need to continue working. Courts have not demonstrated flexibility in applying the requirement that the plaintiff must be a qualified individual. The ADA protects individuals who can perform the essential functions of their job, with or without reasonable accommodation. The ADA's protection also includes that an employer must provide some sort of reasonable accommodation to an individual with a disability if she proves by a preponderance of evidence that there is a reasonable accommodation that is effective and the accommodation was requested but denied, unless the employer successfully demonstrates its defense. This is the case whether the accommodation is a leave of absence that extends for several months or allowing the employee to work part-time.

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[109] *Taylor v. Phoenixville Sch. Dist.*, 184 F.3d 296, 315 (3d Cir. 1999).

Some courts treat uninterrupted attendance, maintaining a full-time schedule, or working overtime as essential functions, even though they are better characterized as the manner in which job duties are carried out. Furthermore, the ADA provides no maximum length of time for leave an employee may take or the minimum number of hours the employee must work in order to be protected by the ADA. Rather, defining the essential functions, determining whether the employee is qualified, whether there exists a reasonable accommodation, and whether an undue burden is present are all case-specific questions of fact.

Another area of concern for cancer patients is labor-intensive work, which may be assigned by employers as a job function. Job restructuring and modified schedules are some examples of reasonable accommodations that employers might consider. When an employer chooses to assign labor-intensive duties, or any other work for that manner, as essential functions and deny reasonable accommodation, the court should devote heightened attention to analyzing whether the essential functions of the position are in fact essential functions, considering factors unique to the case as required by the ADA.

In addition, courts should not deny reasonable accommodation based on the technicality that the employee did not use the best method for requesting reasonable accommodation. When an employee submits a doctor's letter or otherwise indicates her limitations, this should trigger the obligation of the employer to gather information and engage in an interactive process in good faith to identify a reasonable accommodation.

Reasonable accommodation requires making changes to the way things are ordinarily done in the workplace. Society should expect that some reasonable accommodations will be quite different from the usual way of doing things, just as it is discovering solutions to the limitations due to the pandemic.

Examining the ADA provisions and how they are construed will shed light on assessing the employment discrimination laws of other countries including Japan.