



November 23, 2009

Stephen Llewelyn
Executive Officer
Executive Secretariat

Equal Employment Opportunity Commission

Attention: Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, as Amended

131 M Street, NE, Suite 4NW08R

Room 6NE03F

Washington, DC 20507

Via Electronic Filing at <http://www.regulations.gov>

RE: RIN 3046-AA85

Dear Mr. Llewelyn,

The American Cancer Society Cancer Action Network (ACS CAN) respectfully submits the following comments for your consideration regarding regulations to implement the equal employment provisions of the Americans with Disabilities Act (ADA) as amended. ACS CAN is the nonpartisan, nonprofit advocacy affiliate of the American Cancer Society (the Society), and the nation's leading cancer advocacy organization that is working every day to make cancer a national priority. Together, ACS CAN and the Society represent over three million volunteers nationwide who help people in a wide variety of important ways, from helping them stay well by providing information about prevention, to providing information and support during and after a cancer diagnosis.

We know that cancer patients and survivors deserve a workplace free of employment discrimination. Employment provides the ability to earn funds to pay for necessities such as housing and food. In addition, for the majority of non-elderly Americans, it also provides the opportunity to buy health insurance.¹ Society-led scientific research in peer-reviewed journals indicates that the uninsured are more likely to be diagnosed with late-stage cancer, and are at greater risk of death than those with insurance.² Preventing employment discrimination is not simply about fairness, it can also be a matter of life and death. Therefore, we strongly support the Equal Employment Opportunity Commission (EEOC)'s proposed regulations to implement the ADA Amendments Act of 2008 (hereinafter, "the Amendments").

¹ Approximately 63% non-elderly or 117 million Americans receive their health insurance coverage through employer-based plans. See John Holahan & Allison Cooke, *Changes in Health Insurance Coverage, 2007-2008: Early Impact of the Recession 2* (The Henry J. Kaiser Family Foundation 2009), available at <http://www.kff.org/uninsured/upload/8004.pdf>.

² See, e.g., Michael T. Halpern et al, *Association of Insurance Status and Ethnicity with Cancer Stage at Diagnosis for 12 Cancer Sites: A Retrospective Analysis*, 9 *Lancet Oncology* 222 (2008).

What Is Cancer?

Cancer is a group of diseases characterized by uncontrolled growth and spread of abnormal cells. If the spread is not controlled, it can result in death. This abnormal growth can be caused by external factors, such as tobacco, or internal factors, such as inherited mutations. These factors may act together or in sequence to initiate or promote carcinogenesis. Cancer is treated with surgery, radiation, chemotherapy, hormone therapy, biological therapy, and targeted therapy. All cancer involves the malfunction of genes that control cell growth and division.³

The 5-year relative survival rate for all cancers diagnosed between 1996 and 2003 is 66%.⁴ The National Cancer Institute estimates that approximately 10.8 million Americans with a history of cancer were alive in January 2004. Some of these individuals were cancer-free, while other still had evidence of cancer and may have been undergoing treatment.⁵

As indicated above, cancer is defined by abnormal cell growth. However, it is important to note that limitations from the disease result not only from abnormal cell growth, but also from treatments given to halt this abnormal cell growth. Treatments such as radiation or chemotherapy can often cause debilitating pain and other symptoms and side effects that continue after cancer is in remission.

“Remission” is a period of time when the cancer is responding to treatment or is under control. In a complete remission, all the signs and symptoms of the disease go away and cancer cells cannot be detected by any of the tests available for that cancer. It is also possible for a patient to have a partial remission, when the cancer shrinks but does not completely disappear. Remissions can last anywhere from several weeks to many years. Complete remissions may go on for years and over time be considered cures. If the disease recurs, another remission may be possible with further treatment.⁶

Thus, having a definition of disability that includes having a “record of” the disability (see below) can be particularly important for cancer survivors.

³ American Cancer Society, *Cancer Facts & Figures 2008* 1 (2008).

⁴ *Id.* at 2.

⁵ *Id.* at 1.

⁶ American Cancer Society, *Detailed Guide: Cancer (General Information) What Is Remission?* http://www.cancer.org/docroot/CRI/content/CRI_2_4_3X_What_is_remission.asp (last visited Nov. 19, 2009).

Background on the ADA and Cancer

The Society (prior to ACS CAN's creation) supported the original ADA before its passage. Indeed, Congress considered evidence of pervasive and irrational discrimination against cancer survivors when considering the legislation. The legislative history of the ADA states that "there still exists... widespread irrational prejudice against persons with cancer" and that "being identified as disabled often carries both blatant and subtle stigma."⁷ As just one example, Congress cited instances of employers that discriminated against cancer patients by requiring medical examinations prior to offering employment and using this information "to exclude applicants with disabilities -- particularly those with so-called hidden disabilities such as . . . cancer -- before their ability to perform the job was even evaluated."⁸

The ADA prohibits employers from discriminating against qualified individuals on the basis of a disability.⁹ This protection applies to the hiring, promotion of an individual, as well as other terms of employment such as its conditions and privileges.¹⁰ Also, employers must make a "reasonable accommodation" to a known disability if it would not impose an "undue hardship" on the employer.¹¹ A disease or other impairment qualifies as a disability under the ADA when it substantially limits one or more of a person's major life activities.¹² Having a record of such impairment, or being regarded as having such an impairment also qualifies.¹³

Unfortunately, the U.S. Supreme Court significantly limited the ADA's protection for cancer survivors and others with disabilities in case law that ensued,¹⁴ and lower courts followed suit. Those survivors whose cancer has been successfully treated are often unable to prove that their impairments are of sufficient duration, or their activities sufficiently limited, to be considered "disabled" under the ADA. A few recent cases exemplify the struggles faced by cancer survivors as they have tried to establish that they are protected under the ADA (prior to the amendments) or similar anti-discrimination laws.

⁷ H.R. Rep. No. 101-485, pt. 2, at 75 (1990), as reprinted in 1990 U.S.C.C.A.N. 303, 357-58; see also H.R. Rep. No. 101-485, pt. 3, at 44 (1990), as reprinted in 1990 U.S.C.C.A.N. 445, 467.

⁸ H.R. Rep. No. 101-485, pt. 2, at 72 (1990), as reprinted in 1990 U.S.C.C.A.N. 303, 355.

⁹ 42 U.S.C.A. § 12112(a) (Supp. 2009).

¹⁰ *Id.*

¹¹ 42 U.S.C.A. § 12112(b) (2005 & Supp. 2009).

¹² 42 U.S.C.A. § 12102(1) (Supp. 2009).

¹³ *Id.*

¹⁴ See *Toyota Motor Mfg. of Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002); *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999).

In the recent case of *Slane v. Metamateria Partners, L.L.C. et al.*, the Court of Appeals of Ohio affirmed the lower court's judgment in favor of a cancer survivor's employer on the survivor's claim for employment discrimination under the Ohio Civil Rights Act.¹⁵ Mr. Slane was terminated by his employer during a leave of absence to allow him to receive and recover from treatment for cancer, which included the removal of a large portion of his jaw and replacement with a prosthetic.¹⁶ His employer claimed that he took too many days of leave without providing a written release from his physician, although Mr. Slane did not even learn he was terminated until he went to the pharmacy to fill a prescription and was told he had no insurance.¹⁷ The court, looking to federal regulations and case law interpreting the ADA for guidance, found that Mr. Slane "failed to produce evidence that his impairment rose to the level of a disability."¹⁸ Incredibly, despite the fact that Mr. Slane had permanent difficulty pronouncing an "s" sound and producing saliva, and also needed to clean his nose more frequently, the court found that he was not substantially limited in the major life activities of speaking, breathing, eating, drinking, or swallowing.¹⁹ Because according to the court Mr. Slane was not limited in a major life activity, he was not eligible for protection under the law.

Similarly, in *Fournier v. Payco Foods Corp.*, the United States District Court for the District of Puerto Rico granted a motion for summary judgment by a cancer survivor's employer on the survivor's claim for disability discrimination under the ADA.²⁰ Mr. Fournier, who worked as a truck driver on a delivery route, was treated for cancer and thereafter alleged that he could not drive long distances or exert excessive force because these activities aggravated the scar from his cancer surgery.²¹ His suggestion that he be allowed to drive a shorter delivery route was denied, and he was terminated.²² Surprisingly, the court held that Mr. Fournier was not disabled because his physical impairments did not render him substantially limited in the major life activity of working, citing the fact that his physical impairments were only temporary as one of the major reasons for its assessment.²³

¹⁵ 892 N.E.2d 498, 506 (Ohio. Ct. App. 2008).

¹⁶ *Id.* at 500-501.

¹⁷ *See id.*

¹⁸ *Id.* at 504.

¹⁹ *See id.* at 503.

²⁰ 611 F. Supp. 2d 120, 134 (D. Puerto Rico 2009).

²¹ *Id.* at 125, 130.

²² *Id.* at 126.

²³ *Id.* at 130-31.

Finally, in *Adams v. Rice*, the United States District Court for the District of Columbia granted the State Department’s motion for summary judgment on a cancer survivor’s claim that her rejection for a position with the Department was disability discrimination under the Rehabilitation Act of 1973.²⁴ Kathy Adams applied to become a Foreign Service Officer and passed the written and oral examinations.²⁵ She was then diagnosed with breast cancer and was successfully treated.²⁶ Ms. Adams’s treating physician stated that she had “no job limitations whatsoever” and her future treatment would entail only an annual mammogram and a semi-annual breast exam by a physician or nurse practitioner for five years following surgery.²⁷ Nevertheless, the Office of Medical Services gave Ms. Adams a medical clearance indicating that she could not be safely posted outside the United States, because it concluded that Ms. Adams’s semi-annual exams had to be performed by a surgeon or oncologist.²⁸ Therefore, she was denied entry into the Foreign Service entirely, despite the fact that she ranked seventh out of a total of 200 consular candidates.²⁹

The court, looking to ADA case law for guidance, found that Ms. Adams’s breast cancer did not render her “disabled” because it was not a long-term impairment and because she had fully recovered from the cancer when the Department took the adverse employment action against her.³⁰ Surprisingly, the court also found that Ms. Adams had no record of impairment because the hospitalization and recovery time following her mastectomy, the removal of her ovaries, and her breast reconstruction surgery were of a temporary nature and thus did not substantially limit a major life activity.³¹ The court also found that Ms. Adams was not “regarded as” disabled because the Department rejected her on the basis of “an extremely minor medical problem” and her medical clearance did not restrict her from a broad class of jobs sufficient to demonstrate that she was limited in the major life activity of working.³²

On appeal, the United States Court of Appeals for the District of Columbia Circuit reversed and remanded, finding that, although Ms. Adams was not disabled or “regarded as” disabled, she had presented sufficient evidence to show that she had a record of

²⁴ 484 F. Supp. 2d 15, 23-24 (D.D.C. 2007).

²⁵ *Id.* at 18.

²⁶ *Id.* at 18-19.

²⁷ *Id.* at 19.

²⁸ *Id.* at 18-19.

²⁹ *Id.*

³⁰ *Id.* at 20-21.

³¹ *Id.* at 22.

³² *See id.* at 22-23.

impairment that substantially limited her in the major life activity of engaging in sexual relations.³³ ACS CAN, while strongly supporting this result, finds the court's rationale awkward, given that there appear to be more obvious reasons for finding Ms. Adams disabled, "regarded as" disabled, or having a record of disability.³⁴

Indeed, all three of these cases demonstrate the difficulties that cancer survivors face, given the narrow interpretation courts have given to the ADA. These survivors are in a kind of "no-win" situation, in which they are subject to an adverse employment action for reasons relating to their cancer, yet not "impaired enough" to be considered disabled by the courts. Therefore, under the previous version of the ADA, many cancer survivors have been virtually powerless to fight discrimination in the workplace.

The ADA Amendments and New Regulations

Congress intended to remedy this narrowing of the ADA with the ADA Amendments of 2008. ACS CAN supported this legislation before its passage, as it would significantly assist cancer survivors in the battle against discrimination in the workplace. A review of the legislative history of the ADA Amendments demonstrates Congress's understanding of the difficulties cancer survivors have faced under the pre-amendment version of the ADA:

[W]e could not have fathomed that people with . . . cancer . . . and other disabilities would have their ADA claims denied because they would be considered too functional to meet the definition of disabled. Nor could we have fathomed a situation where the individual may be considered too disabled by an employer to get a job, but not disabled enough by the courts to be protected by the ADA from discrimination. What a contradictory position that would have been for Congress to take.³⁵

Indeed, the new law contains many provisions intended to remedy this very problem. For example, the new law specifically includes "normal cell growth" as a "major life activity"³⁶ in order to ensure that individuals with cancer are protected. ACS CAN supports the proposed regulations to the extent that they help restore the rights of cancer

³³ 531 F.3d 936, 944-45, 954 (D.C. Cir. 2008).

³⁴ In fact, the American Cancer Society and AARP submitted an *amicus curiae* brief in this case, outlining some of these arguments. In particular, the brief argued that Ms. Adams presented an issue of fact as to whether, at the time her application to be a Foreign Service Officer was rejected, Department personnel regarded her as substantially limited in the major life activity of working. *See* Brief of *Amici Curiae* AARP and American Cancer Society In Support Of Plaintiff-Appellant at 28-33, *Adams v. Rice*, 531 F.3d 936 (D.C. Cir. 2008) (No. 07-5101).

³⁵ 154 Cong. Rec. H8286-03, H8297 (daily ed. Sept. 17, 2008) (statement of Rep. Jackson-Lee) (quoting testimony of Rep. Hoyer).

³⁶ 42 U.S.C.A. § 12102(2)(B) (Supp. 2009).

survivors under the ADA, and emphasize not whether an individual meets the definition of disability, but whether discrimination has occurred.³⁷

Generally, ACS CAN believes the proposed regulations will help many disabled persons assert their rights under the ADA. Particularly useful is the language declaring that an impairment “need not prevent, or significantly or severely restrict, the individual from performing a major life activity in order to be considered a disability”³⁸ and that an impairment “may substantially limit a major life activity even if it lasts, or is expected to last, for fewer than six months.”³⁹ This language will assist individuals like those in the cases described above, because impairments can be disabling even if they do not severely restrict a major life activity and are not permanent.

ASC CAN also supports the statement that cancer will consistently meet the definition of disability under the ADA.⁴⁰ Normal cell growth is a major life activity; cancer patients who undergo treatments to remove or contain abnormal cell should receive protection from discrimination. Similarly, cancer survivors must also be protected to ensure against the types of abuses we have previously seen by employers. The regulations reiterate the language of the ADA Amendments by listing “normal cell growth” as a “major bodily function” and stating that “[a]n impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.”⁴¹ ACS CAN also supports the statement that a person who has been treated for cancer “and whose doctor says he no longer has cancer, nevertheless has a ‘record of’ a substantially limiting impairment.”⁴² ACS CAN believes this language can and should ensure that cancer survivors are covered under the ADA, even if their cancer treatments have been successful and they are not presently limited in a major life activity.

In conclusion, cancer patients and survivors deserve a workplace free of discrimination. The ADA gave tremendous promise in ensuring civil rights for people with disabilities in the employment arena. The ADA Amendments remedy case law that evolved to limit those rights, and the EEOC’s regulations further that remedy. ACS CAN applauds the EEOC for its efforts, and supports the proposed regulations as drafted.

³⁷ Regulations To Implement the Equal Employment Provisions of the Americans With Disabilities Act, as Amended, 74 Fed. Reg. 48431, 48440 (proposed Sept. 23, 2009) (to be codified at 29 C.F.R. pt. 1630).

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.* at 48441.

⁴¹ *Id.* at 48440, 48441.

⁴² *See id.* at 48443.

Respectfully,

A handwritten signature in black ink, appearing to read "Daniel E. Smith", is positioned above a thin red horizontal line. To the left of the signature, a vertical black line extends downwards from the top of the signature area.

Daniel E. Smith
President, ACS CAN