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## Employment Discrimination against Cancer Victims: A Proposed Solution

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## Notes

### EMPLOYMENT DISCRIMINATION AGAINST CANCER VICTIMS: A PROPOSED SOLUTION

#### INTRODUCTION

The plight of cancer victims<sup>1</sup> now follows them out of the hospital and into the workplace.<sup>2</sup> As more cancer patients survive their initial treatments and return to the job market,<sup>3</sup> they face discrimination, often with no express statutory protection.<sup>4</sup>

Federal law presently protects limited classes of cancer victims: those employed under federal contracts and those participating in or seeking admission to federally funded programs.<sup>5</sup> Only two states have

1. The term cancer victim as used in this note comprises both cancer patients and survivors. The term cancer patient as used in this note means any person diagnosed as having cancer who is not a cancer survivor. The term cancer survivor as used in this note means any person who was previously diagnosed as having cancer but who has lived at least five years without recurrence of the disease. If a person lives five years without a recurrence, the medical profession considers the person cured. See *Learning to Survive*, NEWSWEEK, April 8, 1985, at 72.

2. See *Employment Discrimination Against Cancer Victims and the Handicapped: Hearings on H.R. 1294 and H.R. 370 Before the Subcomm. on Employment Opportunities of the House Comm. on Education and Labor*, 99th Cong., 1st Sess. 6 (1985) (statement of Rep. Biaggi) [hereinafter cited as *Hearings*]. As Representative Biaggi stated during hearings before the Subcommittee on Employment Opportunities of the House Committee on Education and Labor: "An estimated one million Americans have already encountered [employment discrimination based on cancer history]. . . . It can and does include many overt and subtle forms ranging from job denial to wage reduction, exclusion from and reduction in benefits, promotion denial, and even outright dismissal." *Id.*

3. See *id.* at 5 (statement of Rep. Martinez). Representative Martinez noted during the hearings that an estimated five million Americans now have cancer or a history of cancer. *Id.* He further observed that "[m]ore cancer patients are surviving today than previously. Of the five million patients treated, three million have passed the five-year mark of their diagnosis without relapse, which medical authorities consider clinically cured for cancer." *Id.*

4. See The Federal Vocational Rehabilitation Act of 1973, 29 U.S.C. §§ 706, 793, 794 (1982). The Federal Vocational Rehabilitation Act of 1973 affords protection to cancer victims employed by federal contractors or involved in federally funded programs. *Id.* Only two states, Vermont and California, have enacted statutes offering protection against cancer-related employment discrimination. VT. STAT. ANN. tit. 21, §§ 495, 495d (Supp. 1985); CAL. GOV'T CODE §§ 12926, 12940 (West 1980). For a more detailed discussion of these federal and state statutes, see *infra* notes 10-32 and accompanying text.

5. See The Federal Vocational Rehabilitation Act of 1973, 29 U.S.C. §§ 701-796i (1982). Section 706 of the Act defines "handicapped individual" as "any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an

enacted statutes that expressly prohibit cancer-related job discrimination by both public and private employers.<sup>6</sup> Forty-seven of the remaining states have provisions in their fair employment acts that prohibit discrimination against handicapped individuals.<sup>7</sup> In such states, there-

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impairment, or (iii) is regarded as having such an impairment." *Id.* § 706(7)(B). Section 793 of the Act requires that entities entering into contracts with the federal government "take affirmative action to employ and advance in employment qualified handicapped individuals." *Id.* § 793(a). Section 794 prohibits any program receiving federal aid from discriminating against handicapped persons. *Id.* § 794.

6. See VT. STAT. ANN. tit. 21, §§ 495, 495d(7)(c) (Supp. 1985); CAL. GOV'T CODE §§ 12926(f), 12940(a) (West 1980). Vermont and California have both included cancer in their statutory lists of protected handicaps. In Vermont, it is unlawful "[f]or any employer, employment agency or labor organization to discriminate against any individual because of his race, color, religion, ancestry, national origin, sex, place of birth, or age or against a qualified handicapped individual." VT. STAT. ANN. tit. 21, § 495(a)(1) (Supp. 1985). A qualified handicapped individual is defined in part as one having a "physical or mental impairment which substantially limits one or more major life activities." VT. STAT. ANN. tit. 21, § 495d(5)(A) (Supp. 1985). The term "physical or mental impairment" is in turn defined as including cancer. VT. STAT. ANN. tit. 21, § 495d(7)(C) (Supp. 1985).

In California, it is an unlawful employment practice for an employer, because of the . . . *medical condition* . . . of any person, to refuse to hire or employ the person or to refuse to select the person for a training program leading to employment, or to bar or to discharge such person from employment or from a training program leading to employment, or to discriminate against such person in compensation or in terms, conditions or privileges of employment.

CAL. GOV'T CODE § 12940(a) (West 1980) (emphasis added). "Medical condition" is defined in the statute as including "any health impairment related to or associated with a diagnosis of cancer, for which a person has been rehabilitated or cured, based on competent medical evidence." CAL. GOV'T CODE § 12926(f) (West 1980).

7. Forty-nine states and the District of Columbia have enacted laws to protect the handicapped from employment discrimination. ALA. CODE § 21-7-8 (1984); ALASKA STAT. §§ 18.80.220 (1986), 47.80.010 (1984); ARIZ. REV. STAT. ANN. §§ 41-1461 to 41-1463 (1986); ARK. STAT. ANN. § 82-2901 (Supp. 1985); CAL. GOV'T CODE § 12940 (West 1980); COLO. REV. STAT. §§ 24-34-401 to 24-34-406, 24-34-801 (1982 & Supp. 1986); CONN. GEN. STAT. ANN. §§ 46a-51 to 46a-99 (West 1986); DEL. CODE ANN. tit. 16, § 9501 (1983); D.C. CODE ANN. §§ 6-1705, 6-1709 (1981); FLA. STAT. ANN. §§ 760.01-760.37 (West 1986); GA. CODE ANN. §§ 34-6A-1 to 34-6A-6 (1982); HAWAII REV. STAT. §§ 378-1 to 378-9 (1985); IDAHO CODE § 56-707 (Supp. 1986); ILL. ANN. STAT. ch. 68, §§ 1-103, 2-101 to 2-105 (Smith-Hurd Supp. 1986); IND. CODE ANN. §§ 22-9-1-1 to 22-9-1-13 (West 1981 & Supp. 1986); IOWA CODE ANN. § 601D.2 (West 1975); KAN. STAT. ANN. §§ 39-1105, 44-1001 to 44-1013 (1986); KY. REV. STAT. §§ 207.130-207.240 (1982); LA. REV. STAT. ANN. §§ 46:1951, 46:2251-46:2256 (West 1982 & Supp. 1986); ME. REV. STAT. ANN. tit. 5, §§ 781-790, 4551-4553, 4571-4573 (1979 & Supp. 1986); MD. ANN. CODE art. 49B, §§ 14-18 (1986); MASS. GEN. LAWS. ANN. ch. 151B, §§ 1-10 (West 1982 & Supp. 1986); MICH. COMP. LAWS ANN. §§ 37.1101-37.1209 (West 1985); MINN. STAT. ANN. §§ 363.01-363.14 (West 1966 & Supp. 1987); MISS. CODE ANN. §§ 25-9-149 (Supp. 1986), 43-6-15 (1981); MO. ANN. STAT. §§ 213.010-213.126 (Vernon Supp. 1987); MONT. CODE ANN. §§ 49-2-101 to 49-2-601 (1985); NEB. REV. STAT. §§ 48-1101 to 48-1126 (1984); NEV. REV. STAT. §§ 613.310-613.430 (1986); N.H. REV. STAT. ANN.

fore, claims of job discrimination brought by cancer patients necessarily have attempted to show that the results of cancer and cancer treatments constitute a handicap.<sup>8</sup>

This note will discuss the existing protections afforded cancer victims faced with discriminatory practices. It will then examine the states' judicial treatment of cancer-related discrimination. Next, it will analyze the Cancer Patients Employment Rights Act,<sup>9</sup> a federal bill presently before the House of Representatives. Finally, this note will suggest that the federal bill should be enacted to assure that all cancer patients receive adequate, consistent protection.

## BACKGROUND

### A. Existing Protections Under Federal and State Statutes

The scope of federal and state statutes that expressly prohibit job

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§§ 354-A:1 to 354-A:14 (1984 & Supp. 1986); N.J. STAT. ANN. §§ 10:5-1 to 10:5-42 (West 1976 & Supp. 1986); N.M. STAT. ANN. §§ 28-1-1 to 28-1-14, 28-10-1 to 28-10-12 (1983); N.Y. EXEC. LAW §§ 290-301 (McKinney 1982 & Supp. 1987); N.C. GEN. STAT. §§ 143-422.1 to 143-422.3 (1983), 168A-1 to 168A-12 (Supp. 1985); N.D. CENT. CODE §§ 14-02.4-01 to 14-02.4-21 (Supp. 1985); OHIO REV. CODE ANN. §§ 4112.01 to 4112.99 (Page 1980 & Supp. 1985); OKLA. STAT. ANN. tit. 25 §§ 1101-1801 (West 1987); OR. REV. STAT. §§ 659.010-659.121, 659.400-659.435 (1985); PA. STAT. ANN. tit. 43, §§ 951-962.2 (Purdon 1964 & Supp. 1986); R.I. GEN. LAWS §§ 28-5-1 to 28-5-39 (1986); S.C. CODE ANN. §§ 43-33-510 to 43-33-580 (Law. Co-op. 1985); S.D. CODIFIED LAWS ANN. § 3-6A-15 (1985); TENN. CODE ANN. § 8-50-103 (Supp. 1986); TEX. REV. CIV. STAT. ANN. art. 5221k (Vernon Supp. 1987); UTAH CODE ANN. §§ 34-35-1 to 34-35-8 (1986); VT. STAT. ANN. tit. 21, §§ 495-497e (1978 & Supp. 1985); VA. CODE §§ 51.01-40 to 51.01-46 (Supp. 1987); W. VA. CODE §§ 5-11-1 to 5-11-19 (1979 & Supp. 1986); WASH. REV. CODE ANN. §§ 49.60-010 to 49.60-330 (Supp. 1986); WIS. STAT. ANN. §§ 16.765 (West 1986), 111.31-111.395 (West 1974 & Supp. 1986).

8. See *Lyons v. Heritage House Restaurants*, 89 Ill. 2d 163, 432 N.E.2d 270 (1982). In *Lyons*, the Illinois Supreme Court held that since the plaintiff's uterine cancer did not "substantially hinder" her performance of "major life functions," her condition was not a handicap within the meaning of either the state constitution or the Illinois statute prohibiting employment discrimination against handicapped persons. *Id.* at 171, 432 N.E.2d at 274; see also *Kubik v. CNA Financial Corp.*, 96 Ill. App. 3d 715, 422 N.E.2d 1 (1981) (colon cancer not within statutory definition of "handicap"); *Goldsmith v. New York Psychoanalytic Inst.*, 743 A.D.2d 16, 425 N.Y.S.2d 561 (1980) (Hodgkin's disease constituted "disability" under New York law); *Chrysler Outboard Corp. v. Department of Indus., Labor and Human Relations*, 14 Fair Empl. Prac. Cas. 344 (1976) (leukemia included within definition of "handicap" under Wisconsin law). For a further discussion of *Lyons*, see *infra* notes 43-46 and accompanying text. For a further discussion of *Kubik*, see *infra* notes 39-42 and accompanying text. For a further discussion of *Goldsmith*, see *infra* notes 55-60 and accompanying text. For a further discussion of *Chrysler*, see *infra* notes 47-54 and accompanying text.

9. H.R. 1294, 99th Cong., 1st Sess., 131 CONG. REC. 22,815 (1985). For a discussion of this Act, see *infra* notes 87-131 and accompanying text. See also Hoffman, *Employment Discrimination Based on Cancer History: The Need for Federal Legislation*, 59 TEMP. L.Q. 1, 21-32 (1986) (discussing purpose and scope of Cancer Patients Employment Rights Act).

discrimination against cancer victims is extremely narrow.<sup>10</sup> Limited and somewhat ambiguous protection is provided by the Federal Vocational Rehabilitation Act of 1973 ("Rehabilitation Act").<sup>11</sup> Under the Rehabilitation Act, government contractors have a duty to "take affirmative action to employ and advance in employment qualified handicapped individuals."<sup>12</sup> Moreover, any entity receiving federal financial assistance has a duty not to discriminate against "otherwise qualified handicapped individual[s]."<sup>13</sup> For purposes of these non-discrimination provisions, a handicapped individual is defined as one "who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment."<sup>14</sup>

Both the legislative history of the Rehabilitation Act and regulations interpreting its provisions indicate that Congress intended this statutory definition to extend to cancer survivors.<sup>15</sup> Those with a cancer history apparently were intended to fit within the definition's second prong be-

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10. For a detailed discussion of existing statutory provisions, see *infra* notes 11-32 and accompanying text.

11. 29 U.S.C. §§ 701-796 (1982); see also Hoffman, *supra* note 9, at 10-14 (discussing protection afforded cancer patients by Rehabilitation Act).

12. 29 U.S.C. § 793(a) (1982). This statute provides:

Any contract in excess of \$2,500 entered into by any Federal department or agency for the procurement of personal property and nonpersonal services (including construction) for the United States shall contain a provision requiring that, in employing persons to carry out such contract the party contracting with the United States shall take affirmative action to employ and advance in employment qualified handicapped individuals as defined in section 706(7) of this title.

*Id.*

13. 29 U.S.C. § 794 (1982). This statute provides:

No otherwise qualified handicapped individual in the United States, as defined in section 706(7) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.

*Id.*

14. 29 U.S.C. § 706(7)(B) (1982).

15. See S. REP. NO. 1297, 93d Cong., 2d Sess., reprinted in 1974 U.S. CODE CONG. & AD. NEWS 6373, 6389; 41 C.F.R. § 60-741 app. A (1985). Reporting on the Rehabilitation Act's 1974 amendments, which added the definition of "handicapped individual" currently used for purposes of the Act's non-discrimination provisions, the Senate explained that the phrase, "has a record of such an impairment," "is intended to make clearer that the coverage of sections 503 and 504 [29 U.S.C. §§ 793, 794] extends to persons who have recovered—in whole or in part—from a handicapping condition, such as . . . cancer." S. REP. NO. 1297, 93d Cong., 2d Sess., reprinted in 1974 U.S. CODE CONG. & AD. NEWS at 6389.

Similarly, the regulations implementing the Act's 1974 amendments include persons who have had cancer in the category of those who experience "difficulty in securing, retaining, or advancing in employment" because of previous impairment. 41 C.F.R. § 60-741 app. A (1985). These individuals in turn are deemed

cause they have "a record of . . . an impairment [which substantially limits major life activities]." <sup>16</sup>

The Rehabilitation Act also defines the term "severe handicap" to include disabilities that result from cancer and that require "multiple services over an extended period of time."<sup>17</sup> While the non-discrimination provisions of the Rehabilitation Act do not offer express protection to the severely handicapped,<sup>18</sup> a review of the Rehabilitation Act's legislative history and general structure indicates that those with severe handicaps are included within the general class of handicapped individuals.<sup>19</sup>

It appears that both cancer victims and cancer survivors fit within the definition of "handicapped individuals" under the Rehabilitation Act and thus should qualify for the Act's protections.<sup>20</sup> In reality, however, very few cases filed under the Rehabilitation Act have been filed by cancer patients.<sup>21</sup> Moreover, it is important to note that even when a cancer victim invokes the Act's protection, he or she may be unable to pursue a direct action against the offending federal contractor; some federal courts hold that such actions may be brought only by the United States Department of Labor.<sup>22</sup>

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to be handicapped within the meaning of the Act since they have "a record of . . . an impairment." *See id.*

16. For the legislative history of the Rehabilitation Act, see *supra* note 15.

17. 29 U.S.C. § 706(13) (1982).

18. *See* 29 U.S.C. §§ 793, 794 (1982).

19. A major concern of the drafters of the Rehabilitation Act was to provide adequately for individuals with the most severe handicaps. S. REP. NO. 318, 93d Cong., 1st Sess. 18, *reprinted in* 1973 U.S. CODE CONG. & AD. NEWS 2076, 2078. The Act's legislative history emphasized the intent to make vocational rehabilitation services available to the severely handicapped. *See id.* at 2092-95. The Senate Report acknowledged, however, that "there are handicapped individuals whose handicaps are so severe . . . that they may never achieve employment." *Id.* at 2092. This language logically supports the inference that those with severe handicaps are considered to be handicapped individuals within the meaning of 29 U.S.C. § 706(7).

This inference finds further support in several sections of the Act itself. Particular services governed by the Act are to be provided "to handicapped individuals, especially those with the most severe handicaps." *See, e.g.*, 29 U.S.C. §§ 772(b)(1), 777a(a)(1) (1982).

20. For a discussion of the definition of "handicapped individual" under the Rehabilitation Act, see *supra* notes 14-16 and accompanying text.

21. *See Hearings, supra* note 2, at 29 (testimony of Michael L. Speker, Board of Directors, One Fourth/The Alliance for Cancer Patients and Their Families). In his testimony before the House Subcommittee on Employment Opportunities during a hearing on the Cancer Patients Employment Rights Act, Michael L. Speker stated that only 1.3 percent of the suits filed under the Rehabilitation Act have been filed by cancer patients. *Id.* None of these cases have generated reported opinions. Speker hypothesized that one of the reasons for this dearth of litigation is poor administrative handling of claims. *Id.*

22. The Rehabilitation Act provides in pertinent part:

If any handicapped individual believes any contractor has failed or refuses to comply with the provisions of his contract with the United

Apart from the Federal Rehabilitation Act, only two states, Vermont and California, have enacted statutes expressly protecting cancer victims from employment discrimination.<sup>23</sup> These state statutes offer blanket protection, although their scope is necessarily circumscribed by state borders.<sup>24</sup> In Vermont, all employers are prohibited from discriminating against qualified handicapped individuals.<sup>25</sup> Persons with physical impairments, including cancer, are subsumed under the statutory definition of handicapped individuals.<sup>26</sup>

In California, similarly, it is unlawful for an employer to discriminate on the basis of a medical condition, which is defined as "any health impairment related to or associated with a diagnosis of cancer, for which a person has been rehabilitated or cured, based on competent medical

States, relating to employment of handicapped individuals, such individual may file a complaint with the Department of Labor. The Department shall promptly investigate such complaint and shall take such action thereon as the facts and circumstances warrant, consistent with the terms of such contract and the laws and regulations applicable thereto.

29 U.S.C. § 793(b) (1982). This section has been interpreted by some courts as giving no private right of action. See *Hodges v. Atchison, T. & S.F. Ry.*, 728 F.2d 414 (10th Cir.) (Rehabilitation Act does not expressly or impliedly grant private right of action), *cert. denied*, 105 S. Ct. 97 (1984); see also *Painter v. Horne Bros.*, 710 F.2d 143 (4th Cir. 1983); *Davis v. Ohio Barge Line*, 697 F.2d 549 (3d Cir. 1983). *But see* *Cal. Paralyzed Veterans Ass'n v. FCC*, 496 F. Supp. 125 (C.D. Cal. 1980) (Rehabilitation Act creates implied private right of action), *aff'd*, 721 F.2d 667 (9th Cir. 1983), *cert. denied*, 105 S. Ct. 121 (1984).

A private right of action has been held to exist, however, for those alleging a violation of the Act's prohibition of discrimination against participants in or applicants to federally funded programs. See, e.g., *Carter v. Orleans Parish Public Schools*, 725 F.2d 261 (5th Cir. 1984); *Doe v. New York Univ.*, 666 F.2d 761 (2d Cir. 1981).

23. VT. STAT. ANN. tit. 21, §§ 495, 495d (Supp. 1985); CAL. GOV'T CODE §§ 12926, 12940 (West 1980).

24. Unlike the Federal Rehabilitation Act discussed above, the Vermont and California statutes impose a duty not to discriminate upon *all* employers. See VT. STAT. ANN. tit. 21, § 495 (Supp. 1985); CAL. GOV'T CODE § 12940 (West 1980). The federal statute, however, imposes that duty only on government contractors and recipients of federal funds. See 29 U.S.C. §§ 793, 794 (1982).

25. VT. STAT. ANN. tit. 21, § 495 (Supp. 1985). This statute provides in pertinent part that "(a) It shall be an unlawful employment practice, except where a bona fide occupational qualification requires persons of a particular . . . physical or mental condition: (1) For any employer, employment agency or labor organization to discriminate against . . . a qualified handicapped individual." *Id.*

26. See VT. STAT. ANN. tit. 21, §§ 495d(5), (7)(C) (Supp. 1985). The Vermont statute mirrors the Federal Rehabilitation Act by defining "handicapped individual" as any person who "(A) has a physical or mental impairment which substantially limits one or more major life activities; (B) has a history or record of such an impairment; or (C) is regarded as having such an impairment." *Id.* § 495d(5). The statute, however, goes on to define "physical or mental impairment" as including "such diseases and conditions as . . . cancer." *Id.* § 495d(7)(C).

evidence."<sup>27</sup> The California statute was successfully invoked by the state's Department of Fair Employment and Housing on behalf of a woman with a history of colon cancer who alleged that she had been wrongfully dismissed because of her cancer history.<sup>28</sup> The California Fair Employment and Housing Commission found that the woman had both a "medical condition" and a "physical handicap" as defined in the state act.<sup>29</sup> The Commission, therefore, found that she was protected by two statutory provisions: the provision expressly protecting cancer victims and the provision protecting those who are perceived to be physically handicapped.<sup>30</sup> After concluding that her employer had discriminated against her because of the woman's medical condition and perceived physical handicap, the Commission rejected the employer's affirmative defense that accommodating her needs would impose undue hardship.<sup>31</sup> Accordingly, the Commission awarded the woman both re-

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27. CAL. GOV'T CODE § 12926(f) (West 1980). This provision has been interpreted as serving to "put employers and employees on notice that the horror of imminent death which has come to be associated with [cancer] is not justification for discrimination." Department of Fair Employment and Housing v. Kingsburg Cotton Oil Co., No. FEP 80-81-C7-058 (Fair Employment and Housing Comm'n Cal., Dec. 7, 1984) at 20 (quoting Department of Fair Employment and Housing v. Interstate Boards, FEHC Dec. No. 78-05 (Fair Employment and Housing Comm'n Cal. 1978) at 11).

28. Department of Fair Employment and Housing v. Kingsburg Cotton Oil Co., No. FEP 80-81-C7-058 (Fair Employment and Housing Comm'n Cal., Dec. 7, 1984). The complainant in *Kingsburg*, Virginia C. Austin, was fired from her job of 23 years when she returned from a one-week hospital stay which was unrelated to her previous cancer treatment. *Slip. op.* at 13. Although her employer asserted that the reason for Austin's termination was her "excessive absenteeism" resulting from hospitalizations unrelated to cancer, the Commission found that this assertion was unsupported by the evidence." *Id.* at 14, 21. The Commission concluded that Austin's employer "did have in mind her prior cancer-related absences when he terminated her employment." *Id.* at 21.

29. *Slip. op.* at 18-20. Austin's employer, Kingsburg Cotton Oil, did not contest the fact that Austin was a rehabilitated cancer victim at the time of her dismissal and thus had a "medical condition" as defined by § 12926(f) of the California Fair Employment and Housing Act. *Id.* at 18. The Commission read the "medical condition" and "physical handicap" provisions of the Act to overlap. *Id.* at 20. The California "physical handicap" provision extends "to those who are presently physically handicapped, those who are perceived as having or having had a health impairment constituting a physical handicap, as well as those who are perceived as having an increased likelihood of becoming physically handicapped." *Id.* at 19. The Commission concluded that in speculating that Austin would "continue to miss considerable amounts of time from work," Kingsburg thought that Austin would suffer future impairment. *Id.* at 20. Thus, the Commission concluded that Kingsburg perceived that the complainant was physically handicapped and, therefore, finally concluded that the complainant fell within the category of those with a "physical handicap" under the Act. *Id.*

30. *Id.*

31. *Id.* at 27, 32. The Commission found that Austin was fired both because of her past cancer-related absences and those her employer anticipated in the future. *Id.* at 27. Kingsburg asserted by way of affirmative defense that Austin was unable to perform her job because of her medical condition and/or physical handicap and that she could not have been accommodated without imposing



instatement and compensatory damages.<sup>32</sup>

B. *Judicial Treatment of Cancer-related Discrimination Absent Specific Statutory Coverage*

Many cancer victims do not qualify for the express statutory protections discussed above.<sup>33</sup> When such patients have encountered discrimination, they therefore have sought relief under their states' fair employment acts and human rights laws, which generally prohibit discrimination against handicapped or disabled individuals.<sup>34</sup> Such suits have spawned inconsistent results.<sup>35</sup>

The Illinois courts have faced two cases in which cancer victims have attempted to show that they were handicapped within the meaning of both the state constitution and a state statute that prohibits discrimination against handicapped persons.<sup>36</sup> In determining whether cancer

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undue hardship on Kingsburg. *Id.* at 28. The Commission found that this defense was without merit. *Id.* at 32. There was no evidence that Austin's absences caused Kingsburg a serious loss, nor was there evidence that she failed to perform her duties satisfactorily. *See id.* at 28-30. Moreover, the Commission found that the only accommodation necessary was covering "for Austin when she was absent just as [Kingsburg] did for other absent employees." *Id.* at 32. The Commission concluded that this accommodation would not have imposed undue hardship on Kingsburg. *Id.*

32. *Id.* at 39-40. The Commission awarded Austin reinstatement, back pay, all benefits of her employment that would have accrued during the liability period, and compensatory damages for emotional distress. *Id.*

33. For a discussion of the limited express protection under federal law, see *supra* notes 11-22 and accompanying text. For a discussion of express protection under state statutes, see *supra* notes 23-32 and accompanying text.

34. *See, e.g.,* *Lyons v. Heritage House Restaurants*, 89 Ill. 2d 163, 432 N.E.2d 270 (1982) (applying Illinois Equal Opportunities for the Handicapped Act and Illinois Constitution); *Kubik v. CNA Financial Corp.*, 96 Ill. App. 3d 715, 422 N.E.2d 1 (1981) (applying Illinois Equal Opportunities for the Handicapped Act and Illinois Constitution); *Goldsmith v. New York Psychoanalytic Inst.*, 73 A.D.2d 16, 425 N.Y.S.2d 561 (1980) (applying New York Human Rights Law); *Chrysler Outboard Corp. v. Department of Indus., Labor and Human Relations*, 14 Fair Empl. Prac. Cas. 344 (1976) (applying Wisconsin Fair Employment Act).

35. The Illinois courts, in *Lyons* and *Kubik* respectively, found that neither uterine nor colon cancer was a protected handicap under the Illinois statute or Constitution. *See Lyons*, 89 Ill. 2d at 170-71, 432 N.E.2d at 274; *Kubik*, 96 Ill. App. 3d at 719, 422 N.E.2d at 4. On the other hand, the Wisconsin Circuit Court, in *Chrysler*, found that acute lymphocytic leukemia was a protected handicap under the Wisconsin statute. *See Chrysler*, 14 Fair Empl. Prac. Cas. at 345. Finally, in *Goldsmith*, the New York Supreme Court, Appellate Division, held that discrimination based on Hodgkin's disease violated the New York human rights laws. *See Goldsmith*, 73 A.D.2d at 26, 425 N.Y.S.2d at 568.

36. *Lyons v. Heritage House Restaurants*, 89 Ill. 2d 163, 432 N.E.2d 270 (1982); *Kubik v. CNA Financial Corp.*, 96 Ill. App. 3d 715, 422 N.E.2d 1 (1981). The provision of the Illinois Constitution applied in the two cases provides in pertinent part: "All persons with a physical or mental handicap . . . shall be free from discrimination unrelated to ability in the hiring and promotion practices of any employer." ILL. CONST. art. I, § 19. The Illinois Equal Opportunities for

is a protected handicap, the courts applied the "major life functions" test.<sup>37</sup> Under this test, the court must determine whether an individual cancer victim has a condition which is generally believed to impose severe barriers upon his or her ability to perform "major life functions."<sup>38</sup>

Applying this test in *Kubik v. CNA Financial Corp.*,<sup>39</sup> the Illinois Appellate Court found that the plaintiff had failed to establish a discrimina-

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the Handicapped Act ("Illinois Act") provided in pertinent part: "It is an unlawful employment practice for an employer . . . to refuse to hire, to discharge, or otherwise to discriminate against any individual . . . because of such individual's physical or mental handicap, unless it can be shown that the particular handicap prevents the performance of the employment involved." ILL. ANN. STAT. ch. 38, § 65-23 (Smith-Hurd 1977) (repealed by P.A. 81-1216, Art. 10, § 10-108, eff. July 1, 1980), *quoted in Lyons*, 89 Ill. 2d at 165, 432 N.E.2d at 271; *Kubik*, 96 Ill. App. 3d at 717, 422 N.E.2d at 3. The Illinois Act was repealed effective July, 1980, and was essentially replaced by the Illinois Human Rights Act (ILL. ANN. STAT. ch. 68, §§ 1-101 to -105 (Smith-Hurd Supp. 1986)). *See* 96 Ill. App. 3d at 716 n.1, 422 N.E.2d at 2 n.1. For a further discussion of the new Act, see *infra* note 37.

37. *See Lyons v. Heritage House Restaurants*, 89 Ill. 2d 163, 166-71, 432 N.E.2d 270, 272-74 (1982); *Kubik v. CNA Financial Corp.*, 96 Ill. App. 3d 715, 718-19, 422 N.E.2d 1, 4 (1981). Although both the Illinois Act and constitution prohibited discrimination against handicapped persons, neither contained a workable definition of the term "handicap," thus forcing the Illinois courts to develop one. *See Note, Cancer as a Protected Handicap in Illinois: Lyons v. Heritage House Restaurants, Inc.*, 60 CHI.-KENT L. REV. 715 (1984). The leading Illinois case to set forth a definition of handicap is *Advocates for the Handicapped v. Sears, Roebuck & Co.*, 67 Ill. App. 3d 512, 385 N.E.2d 39 (1978), *cert. denied*, 444 U.S. 981 (1979). In *Advocates*, the court defined handicap as the "class of physical and mental conditions which are generally believed to impose severe barriers upon the ability of an individual to perform major life functions." 67 Ill. App. 3d at 516-17, 385 N.E.2d at 43. The *Lyons* and *Kubik* courts applied this definition rather than the circular definition of handicap which appeared in the Illinois Act. *See* ILL. ANN. STAT. ch. 38, § 65-22 (Smith-Hurd 1977) (handicap defined as "a handicap unrelated to one's ability to perform jobs or positions available to him for hire or promotion") (repealed by P.A. 81-1216, Art. 10, § 10-108, eff. July 1, 1980).

The Illinois Human Rights Act, which essentially replaced the Illinois Equal Opportunities for the Handicapped Act, includes a new statutory definition of handicap. However, this new Act became effective subsequent to the dates of the Acts in question in *Lyons* and *Kubik*. *See Lyons*, 89 Ill. 2d at 165, 432 N.E.2d at 271. The current statutory definition states:

"Handicap" means a determinable physical or mental characteristic of a person, including, but not limited to, a determinable physical characteristic which necessitates the person's use of a guide, hearing or support dog, the history of such characteristic, or the perception of such characteristic by the person complained against, which may result from disease, injury, congenital condition of birth or functional disorder and which characteristic: (1) . . . [I]s unrelated to the person's ability to perform the duties of a particular job or position.

ILL. ANN. STAT. ch. 68, § 1-103(I) (Smith-Hurd Supp. 1986). Since its enactment, this definition has been neither applied nor interpreted by an Illinois court in a reported opinion.

38. *Advocates*, 67 Ill. App. 3d at 516-17, 385 N.E.2d at 43.

39. *Kubik*, 96 Ill. App. 3d 715, 422 N.E.2d 1.

tion claim.<sup>40</sup> The plaintiff in *Kubik* had been discharged from his job after a malignant tumor had been removed from his colon.<sup>41</sup> Although the plaintiff alleged in his complaint that he was unable to perform major life functions because of his cancer, the court found that this bare allegation was insufficient to establish a handicap.<sup>42</sup>

In the second case, *Lyons v. Heritage House Restaurants*,<sup>43</sup> the plaintiff allegedly had been dismissed from her position as manager of kitchen operations after her employer learned that she had developed uterine cancer.<sup>44</sup> Reversing the appellate court's decision, the Illinois Supreme Court held that the plaintiff had not established a handicap because she had failed to allege that her uterine cancer substantially hindered her in major life functions or that her employer perceived her cancer as creating such a hindrance.<sup>45</sup> In reaching this conclusion, the court noted that the plaintiff had not claimed to be hampered in such major life activities as "caring for [herself], performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, [or] working."<sup>46</sup>

In contrast, a Wisconsin court, applying a different definition of handicap,<sup>47</sup> concluded in *Chrysler Outboard Corp. v. Dep't of Industry, Labor and Human Relations*<sup>48</sup> that a cancer patient had established a handicap. The plaintiff in *Chrysler*, who suffered from acute lymphocytic leukemia, alleged that the defendant's refusal to hire him was discriminatory because it was based on his medical condition.<sup>49</sup> Chrysler admitted that its

40. *Id.*

41. *Id.* at 716, 422 N.E.2d at 2. The plaintiff had been employed by the defendant for several years and had received raises and promotions. *Id.*

42. *Id.* at 716, 719, 422 N.E.2d at 2, 4. In his amended complaint and affidavit, the plaintiff alleged

that he had a malignant tumor on his colon which was successfully removed; that doctors would not consider him cured until five years had passed without a recurrence; and that he "was physically handicapped in that his physiological condition limited and is regarded as limiting certain of his major life functions."

*Id.* at 719, 422 N.E.2d at 4. The court determined that these allegations were insufficient because they did not "assert a physical handicap under the *Advocates* interpretation of that term." *Id.*

43. 89 Ill. 2d 163, 432 N.E.2d 270 (1982).

44. *Id.* at 164, 432 N.E.2d at 271. The plaintiff asserted that her condition would not have affected her ability to perform her duties. *Id.* She sued her employer for damages consisting of the loss of salary, insurance benefits and use of the company car. *Id.*

45. *Id.* at 170-71, 432 N.E.2d at 274. Since the court found that plaintiff was not handicapped, she did not qualify for the protections of article I, § 19 of the 1970 Illinois Constitution or the Equal Opportunities for the Handicapped Act. *Id.* For the text of the operative provisions, see *supra* note 36.

46. 89 Ill. 2d at 170, 432 N.E.2d at 274 (citing 45 C.F.R. § 84.3(j)(2)(ii) (1980)).

47. For a discussion of the definition of handicap applied by the Wisconsin court, see *infra* notes 51-52 and accompanying text.

48. 14 Fair Empl. Prac. Cas. 344 (1976).

49. *Id.*

negative hiring decision was prompted by two concerns related to the plaintiff's leukemia: the risks of lost work time and increased insurance costs.<sup>50</sup>

Addressing the preliminary question of handicap, the *Chrysler* court followed a prior decision defining a handicap as "a disadvantage that makes achievement unusually difficult; esp[ecially]: a physical disability that limits the capacity to work."<sup>51</sup> The court concluded that the plaintiff was handicapped under this definition because his illness made it hard for him to find work, thus making achievement unusually difficult.<sup>52</sup> The court proceeded to reject the defendant's asserted reasons for refusing to hire the plaintiff.<sup>53</sup> Having found that leukemia constituted a handicap under state law and having rejected Chrysler's defenses, the court awarded the plaintiff relief.<sup>54</sup>

In *Goldsmith v. New York Psychoanalytic Institute*,<sup>55</sup> a New York court also found that a cancer victim was protected from discrimination under state law.<sup>56</sup> In *Goldsmith*, the plaintiff's Hodgkin's disease had been in

50. *Id.* Chrysler's hiring decision was made on the recommendation of its medical consultant. *Id.* The medical consultant found that because of the plaintiff's disease, the plaintiff was at high risk of suffering infection from minor injuries, of enduring prolonged recuperation from injuries, and of suffering complications arising from injuries, all of which would lead to lost work time. *Id.*

51. *Id.* at 345 (quoting *Chicago, M., St. P. & Pac. R.R. v. State Dep't of Indus., Labor & Human Relations*, 62 Wis. 2d 392, 398, 215 N.W.2d 443, 446 (1974)). Lacking a statutory definition of "handicap," the Wisconsin Supreme Court in *Chicago* adopted this dictionary definition of the term. 62 Wis. 2d at 398, 215 N.W.2d at 446 (quoting WEBSTER'S NEW INTERNATIONAL DICTIONARY 1027 (Merriam 3d ed. 1961)). The *Chicago* court held that asthma makes achievement unusually difficult and thus is a protected handicap under the Wisconsin Fair Employment Act. 62 Wis. 2d at 398, 215 N.W.2d at 446.

Wisconsin's current statutory definition of handicap, enacted after *Chrysler* was decided, combines the language of the *Chicago* definition with that found in the Federal Rehabilitation Act: "'Handicapped individual' means an individual who: (a) Has a physical or mental impairment which makes achievement unusually difficult or limits the capacity to work; (b) Has a record of such an impairment; or (c) Is perceived as having such an impairment." WIS. STAT. ANN. § 111.32(8)(a)-(c) (West Supp. 1985).

52. 14 Fair Empl. Prac. Cas. at 345.

53. *Id.*

54. *Id.* The court noted that the Wisconsin statute allowed employers to refuse to hire any person who because of a handicap is unable to efficiently perform the duties of the job. *Id.* The court went on to find, however, that the defendant did not contend that the plaintiff would be unable to perform the duties of the job for which he applied. *Id.* Rather, the defendant asserted that its refusal to hire the plaintiff was a sound business decision in light of a higher risk of absenteeism and increased insurance costs. *Id.* Dismissing these reasons for the defendant's hiring decision, the court commented that if an employer discriminates against the handicapped, his intent and motives are irrelevant. *Id.*

55. *Goldsmith v. New York Psychoanalytic Inst.*, 73 A.D.2d 16, 425 N.Y.S.2d 561 (1980).

56. *Id.* at 19-20, 425 N.Y.S.2d at 564. This determination was made by the State Division of Human Rights. *Id.* At the time that the alleged discriminatory acts in *Goldsmith* occurred, the New York Human Rights Law defined disability as

remission for several years<sup>57</sup> when, despite her outstanding qualifications, she was denied admission to the defendant institute's research program for advanced students.<sup>58</sup> Finding substantial support in the record, the New York Supreme Court affirmed an administrative determination that Hodgkin's disease constituted a disability within the meaning of the New York Human Rights Law and that the defendant had unlawfully discriminated against the plaintiff.<sup>59</sup> Like the Wisconsin court in *Chrysler*, the *Goldsmith* court found the purposes for the defendant's discriminatory practices irrelevant and held that the defendant had violated plaintiff's right to the "equal opportunity to enjoy a full and productive life."<sup>60</sup>

#### ANALYSIS

##### A. *Inadequacy of Existing Protections*

Because specific statutory protection for cancer patients and survivors is very limited,<sup>61</sup> most of them are protected from job discrimination only if they demonstrate that they are handicapped or disabled

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a physical, mental or medical impairment resulting from anatomical, physiological or neurological conditions which prevents the exercise of a normal bodily function or is demonstrable by medically accepted clinical or laboratory diagnostic techniques, provided, however, that in all provisions of this article dealing with employment, the term shall be limited to physical, mental or medical conditions which are unrelated to the ability to engage in the activities involved in the job or occupation which a person claiming protection of this article shall be seeking.

N.Y. EXEC. LAW § 292(21) (McKinney 1976).

57. 73 A.D.2d at 17, 425 N.Y.S.2d at 563.

58. *Id.* Defendant's program was designed to train psychoanalysts. *Id.* Plaintiff held a Ph.D in psychology, and her application to defendant's program "was supported by eminent and renowned psychiatrists, some of whom [were] members of the Institute." *Id.* The Institute's stated reasons for not accepting the plaintiff were that her need for chemotherapy would interfere with the mental functions needed for analysis, and that placing a patient with an analyst who had a chronic and potentially fatal illness would be detrimental to the patient. *Id.* at 19, 425 N.Y.S.2d at 564. The court indicated parenthetically that these concerns were not only irrelevant but were also vitiated by evidence that the plaintiff's prognosis was favorable. *Id.* at 27, 425 N.Y.S.2d at 569.

59. *Id.* at 21-25, 425 N.Y.S.2d at 565-68. In reviewing the administrative agency's decision, the New York Supreme Court did not focus on the plaintiff's status as a member of a protected class, as did both the Illinois and Wisconsin courts. *Id.* See *Lyons*, 89 Ill. 2d 163, 432 N.E.2d 270; *Kubik*, 96 Ill. App. 3d 715, 422 N.E.2d 1; *Chrysler*, 14 Fair. Empl. Prac. Cas. 344. Instead, the *Goldsmith* court conducted a detailed factual inquiry into the circumstances of the alleged discrimination and concluded that the agency's finding that the defendant's discriminatory actions violated state human rights law was supported by substantial evidence in the record and thus was not arbitrary or capricious. 73 A.D.2d at 21-25, 425 N.Y.S.2d at 565-68.

60. *Id.* at 26, 425 N.Y.S.2d at 568 (quoting N.Y. EXEC. LAW § 290(3) (McKinney 1982) (policy section of New York Human Rights Law)).

61. For a discussion of the federal and state statutes expressly protecting cancer victims, see *supra* notes 10-32 and accompanying text.

within the meaning of the applicable state statute. It is suggested, however, that these state anti-discrimination statutes provide inadequate protection for cancer victims.

Specifically, cancer patients have been granted uneven protection under these state statutes.<sup>62</sup> Plaintiffs with histories of uterine and colon cancer have been denied the protection of the Illinois Fair Employment Law.<sup>63</sup> In Wisconsin and New York, however, plaintiffs with histories of leukemia and Hodgkin's disease have been granted relief under state anti-discrimination statutes.<sup>64</sup> Although these cases appear inconsistent, it is submitted that they were not incorrectly decided under the applicable laws. Each court applied a different definition of handicap or disability, and each plaintiff was afflicted with a different disease.<sup>65</sup>

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62. For a discussion of relevant cases, see *supra* notes 33-60 and accompanying text.

63. *Lyons*, 89 Ill. 2d 163, 432 N.E.2d 270; *Kubik*, 96 Ill. App. 3d 715, 422 N.E.2d 1. For a discussion of *Lyons*, see *supra* notes 43-46 and accompanying text. For a discussion of *Kubik*, see *supra* notes 39-42 and accompanying text.

64. *Chrysler*, 14 Fair Empl. Prac. Cas. 344; *Goldsmith*, 73 A.D.2d 16, 425 N.Y.S.2d 561. For a discussion of *Chrysler*, see *supra* notes 47-54 and accompanying text. For a discussion of *Goldsmith*, see *supra* notes 55-60 and accompanying text.

65. In both Illinois cases, the major life function test was applied in order to determine whether cancer was a handicap. *Lyons*, 89 Ill. 2d at 170-71, 432 N.E.2d at 274; *Kubik*, 96 Ill. App. 3d at 718-19, 422 N.E.2d at 3-4. In *Chrysler*, the Wisconsin court defined handicap as "a disadvantage that makes achievement unusually difficult; esp: a physical disability that limits the capacity to work." 14 Fair Empl. Prac. Cas. at 345 (quoting *Chicago, M., St. P. & Pac. R.R. v. Department of Indus., Labor & Human Relations*, 62 Wis. 2d 392, 398, 215 N.W.2d 443, 446 (1974)). Finally, in *Goldsmith*, the New York court apparently relied on the following definition of disability found in the state Human Rights Law:

The term "disability" means a physical, mental or medical impairment resulting from anatomical, physiological or neurological conditions which prevents the exercise of a normal bodily function or is demonstrable by medically accepted clinical or laboratory diagnostic techniques, provided, however, that in all provisions of this article dealing with employment, the term shall be limited to physical, mental or medical conditions which are unrelated to the ability to engage in the activities involved in the job or occupation which a person claiming protection of this article shall be seeking.

N.Y. EXEC. LAW § 292(21) (McKinney 1976). This definition has recently been amended and now reads as follows:

The term "disability" means (a) a physical mental or medical impairment resulting from anatomical, physiological or neurological conditions which prevents the exercise of a normal bodily function or is demonstrable by medically accepted clinical or laboratory diagnostic techniques or (b) a record of such an impairment or (c) a condition regarded by others as such an impairment, provided, however, that in all provisions of this article dealing with employment, the term shall be limited to disabilities which do not prevent the complainant from performing in a reasonable manner the activities involved in the job or occupation sought or held.

N.Y. EXEC. LAW § 292(21) (McKinney Supp. 1986).

Because there is no uniform definition of the term handicap or disability under the various state statutes, discrimination actions brought by the same cancer victim in two different states could yield conflicting results. It is submitted, for example, that a cancer patient who has undergone a successful colostomy would probably be protected under the New York Human Rights law, but might go unprotected under Wisconsin law. The New York law defines disability as "a physical . . . impairment resulting from anatomical, physiological or neurological conditions which prevents the exercise of a normal bodily function . . . ." <sup>66</sup> Such a plaintiff probably could establish a disability under this statute by arguing that his "impairment" (i.e., a colostomy) resulted from a "physiological condition" (i.e., cancer) and prevents the "exercise of a normal bodily function" (i.e., defecating normally). In Wisconsin, such a plaintiff would be required to establish that his colostomy was a "physical . . . impairment which makes achievement unusually difficult or limits the capacity to work." <sup>67</sup> If he is otherwise fit and fully able to perform the functions of the job he seeks, the plaintiff could have difficulty proving that he is handicapped under the Wisconsin statute. <sup>68</sup> It is

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Each plaintiff was afflicted with a different type of cancer. See *supra* notes 41, 44, 49 & 57 and accompanying text. The five-year survival rate for each type of cancer was not correlated to the finding of a handicap. See *infra* note 74. For example, the plaintiff in *Goldsmith* had a higher chance of survival than did the plaintiff in *Kubik*; *Goldsmith* was found disabled, while *Kubik* was not. See *supra* notes 42 & 59 and *infra* note 74 and accompanying text. For a further discussion of the five-year survival rates for different types of cancer, see *infra* note 74.

66. N.Y. EXEC. LAW § 292(21) (McKinney Supp. 1986).

67. WIS. STAT. ANN. § 111.32(8) (West Supp. 1985).

68. On the other hand, if the plaintiff asserts that his impairment limits his capacity to work, his employer might counter that the plaintiff is thus unqualified for the job. By placing the plaintiff in a position where he is forced to argue that his physical impairment has an adverse effect on his capacity to achieve and/or work, the Wisconsin statute brings the plaintiff close to arguing that he would be unable to adequately perform a particular job. This is a precarious position because Wisconsin employers are under no obligation to hire *unqualified* handicapped individuals. See WIS. STAT. ANN. § 111.32(5)(f) (West 1974 & Supp. 1985).

The Illinois "major life functions" test poses a problem similar to that posed by the Wisconsin statute. By proving an impairment of a major life function, Illinois plaintiffs have come very close to arguing impairment of a work-related function. See *Kubik*, 96 Ill. App. 3d 715, 422 N.E.2d 1 (1981); Cf. *Kirby v. Ill. Central Gulf R.R.*, 117 Ill. App. 3d 1070, 454 N.E.2d 816 (1983) (complaint alleging that spina bifida posed no barrier to plaintiff's work performance dismissed). In Illinois, as in Wisconsin, an employer is under no obligation to hire employees who cannot perform their jobs. See ILL. ANN. STAT. ch. 68, § 1-103(I)(1) (Smith-Hurd Supp. 1986). For a further discussion of the major life functions test and the problems it poses, see Note, *supra* note 37, at 727.

Although Illinois has recently adopted a new statutory definition of handicap, it is submitted that the new definition, like its predecessor, is circular and, therefore, unworkable. See ILL. ANN. STAT. ch. 68, § 1-103(I) (Smith-Hurd Supp. 1986) (handicap defined as "determinable physical or mental characteristic . . . which . . . is unrelated to the . . . ability to perform the duties of a particular job

submitted that this inconsistency is an inevitable result of the states' different definitions of handicap or disability.

Another reason why the state anti-discrimination statutes are inadequate to protect cancer victims is the fact that cancer is not merely one disease.<sup>69</sup> Cancer has been defined as "many different illnesses requiring a wide range of treatment."<sup>70</sup> Because cancer includes "many illnesses", case-by-case adjudication of claims brought under state fair employment acts will not produce strong precedents. It is suggested, for example, that a state court's finding that leukemia is a protected handicap might have little precedential value in a later case brought by a breast cancer patient.

A final reason why the state statutes provide inadequate protection to cancer victims is that many cancer victims are not disabled at all and thus cannot benefit from existing anti-discrimination laws.<sup>71</sup> Without a disability and without a legal remedy, most cancer patients, nevertheless, face the discriminatory attitudes of employers and co-workers.<sup>72</sup>

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or position"). Thus, it is suggested that Illinois courts will continue to apply the major life functions test.

69. See *Hearings*, *supra* note 2, at 18, 20.

70. *Hearings*, *supra* note 2, at 20. Individuals with different forms of cancer have varying survival rates. See *infra* note 74. Moreover, different forms of cancer have significantly different effects on productive employment. *Hearings*, *supra* note 2, at 18. A study conducted by Greenleigh Associates and published by the American Cancer Society indicates that one-seventh of those with prostate cancer lost job income, while one-half of those with lung cancer suffered such a loss. *Id.*

71. *Hearings*, *supra* note 2, at 15, 29, 38, and 41. Dr. McKenna compared the disability question to a Catch-22 situation. *Id.* at 15. He recounted the dilemma of a man who had undergone a laryngectomy for cancer of the larynx. *Id.* The man was refused new employment by 26 employers but yet was unable to collect disability payments because he no longer had cancer. *Id.*

72. See *id.* at 32-33. See also King, *After Cancer: Trouble on the Job?*, *CANCER NEWS*, Autumn 1984, at 6; Canellos, *Ill-Founded Notions: Job Discrimination Against Cancer Patients*, *Boston Phoenix*, Jan. 15, 1985, at 1. According to studies performed by Frances Feldman for the American Cancer Society, the myth that cancer is contagious has resulted in both dismissals and behavioral abuse by co-workers. Canellos, *supra*, at 4.

Unlike other serious diseases, cancer carries with it a stigma and a host of phobias that may be felt by co-workers as well as employers. According to Dr. McKenna, President of the American Cancer Society, the prognoses of cancer victims are often viewed with pessimism. See *Hearings*, *supra* note 2, at 20, 32-33. Dr. McKenna compared a person having a cancer history to one having a history of heart disease. *Id.* at 32-33. He stated: "Cancer is singled out from all the other diseases. Most people are very optimistic about heart disease . . . . You either win or lose, but you go back to work. You never think you could get another heart attack, which a significant number of people do. . . ." *Id.* at 32. McKenna noted that while employers rarely discriminate against a former heart patient, employers often discriminate against former cancer patients. *Id.* at 33. The myth that cancer is uniquely fatal has prompted employers to assume that a cancer patient has no future and thus should be written off the company's long-range plans. King, *supra*, at 6.



B. *The Need for Protection*

Recent statistical studies have highlighted the extent of cancer-related job discrimination and the often erroneous beliefs upon which discriminatory actions are based.<sup>73</sup> It is important to note at the outset that a diagnosis of cancer is not the equivalent of a death sentence. Depending on the location of the cancer, five year survival rates are as high as ninety-three percent.<sup>74</sup> Moreover, cancer patients are not characterized by decreased work performance or absenteeism.<sup>75</sup> In fact, cancer-related job absences are infrequent when compared with lengthy absences caused by other illnesses.<sup>76</sup> A major insurance company has selectively employed cancer victims since 1957.<sup>77</sup> After fourteen years of this practice, the company found no significant differences between the turnover rates, absenteeism and work performance of the cancer victims and other employees.<sup>78</sup> The company concluded that “ ‘the selective employment of persons with cancer history, in positions for which they are

73. For a discussion of these studies, see *infra* notes 74-82 and accompanying text.

74. *Learning to Survive*, *supra* note 1, at 73. A table showing the five-year survival rates for diagnoses made between 1976 and 1981 of 20 types of cancer indicates a great disparity between different types of cancer. *Id.* Survival rates range from 93% (thyroid) to 2% (pancreas). *Id.*

It is interesting to note the survival rates for the four types of cancer which afflicted plaintiffs in the state court cases discussed *supra* notes 28-60 and accompanying text. As set forth in the *Newsweek* study, the survival rate for uterine cancer is 85% (*Lyons*); for Hodgkin's disease 73% (*Goldsmith*); for colon cancer 52% (*Kingsburg and Kubik*) and for leukemia 32% (*Chrysler*). *Id.* The study also revealed the following survival rates for 16 other types of cancer: thyroid (93%), testis (86%), melanoma (80%), breast (74%), bladder (73%), prostate (70%), cervix (67%), kidney (50%), rectum (49%), non-Hodgkin's lymphoma (48%), ovary (38%), brain (23%), stomach (16%), lung (13%), esophagus (5%) and pancreas (2%). *Id.* The sources for the *Newsweek* study were the National Cancer Institute and the American Cancer Society. *Id.*

75. *Hearings*, *supra* note 2, at 18 (prepared statement of Robert J. McKenna, M.D., President, American Cancer Society). Dr. McKenna cited a study showing that the turnover rate, absenteeism, and work performance of a selected group of employees with a cancer history were comparable to that of the company population. *Id.*

76. *Id.* at 16-17. In a class of illnesses causing prolonged job absences, cancer is ranked 14th most frequent for men and 15th for women. *Id.* The length of sick leave due to cancer averaged 93.3 days for men and 108.3 days for women. *Id.*

77. *Id.* at 18. Between 1957 and 1971, the Metropolitan Life Insurance Company hired 74 applicants with a cancer history. *Id.* This number was slightly more than 6% of the company's new employees during the study period. *Id.*

78. *Id.* Of the cancer patients hired, 55% were still working at the end of the study; 3% were on disability; and 42% had left their jobs, “but most left voluntarily and for a variety of reasons.” Dotson, *Only a Ghost of a Chance*, TEXAS BUSINESS, Aug. 1977, at 18, 23. Less than 3% developed a recurrence of cancer. *Hearings*, *supra* note 2, at 18. During the study period, none of the cancer survivors were discharged and none died. Dotson, *supra*, at 23.

physically qualified, is a sound industrial practice.'"<sup>79</sup>

Despite these positive indications, cancer victims are facing dismissals, demotions, job rejection and hostility.<sup>80</sup> At a hearing on the Cancer Patients Employment Rights Act, Dr. Robert J. McKenna, President of the American Cancer Society, presented statistical evidence suggesting that twenty-five to forty-five percent of workers with a cancer history experience job rejection.<sup>81</sup> According to his data, over fifty percent of such workers encounter some discriminatory treatment on the job.<sup>82</sup>

The reasons for cancer-related job discrimination fall into two basic categories: fear of absenteeism and skyrocketing group health insurance premiums.<sup>83</sup> According to Dr. McKenna, some employers expect cancer victims to be absent frequently because of treatments, cancer recurrence, or complications from prior treatment.<sup>84</sup> Employers also face the more tangible risk that their group health insurance premiums will rise if they hire a cancer victim who might need expensive treatments in the future.<sup>85</sup> Insurance discrimination has been called an "economic excuse not to hire a cancer patient."<sup>86</sup>

### C. *The Cancer Patients Employment Rights Act*

It is evident that a federal statute is needed to adequately protect cancer patients and survivors from job discrimination.<sup>87</sup> Such a statute,

79. Dotson, *supra* note 78, at 23.

80. *Hearings, supra* note 2, at 19. Dr. McKenna classifies the work-discrimination encountered by cancer patients into three categories: 1) dismissals, demotions, and other actions taken by employers, 2) shunning and overt hostility of co-workers, and 3) hostility of the patient himself used as a defense against the anticipated actions of others. *Id.* It is suggested that this classification is very broad and that the inclusion of the third category of work-discrimination is debatable.

81. *Id.* Dr. McKenna cited three studies performed by Frances Feldman for the American Cancer Society. *Id.* These studies revealed that 22% of white-collar workers with a cancer history have faced job rejection. *Id.* With respect to blue-collar workers and youths with a cancer history, the figure was 45%. *Id.*

82. *Id.* The Feldman studies indicated that the occurrence of work-related problems encountered by the white-collar, blue-collar, and youth workers were 54%, 84% and 51% respectively. *Id.* The findings of the Feldman studies were subsequently confirmed by the Greenleigh study, which was also funded by the American Cancer Society. *See id.*

83. *See Hearings, supra* note 2, at 16.

84. *Id.* Excessive absenteeism would pose the greatest problem to smaller companies which would be unable to shift work from an employee who is undergoing cancer treatment to one who is not. *Boston Globe*, Nov. 28, 1983, at 43.

85. *Hearings, supra* note 2, at 50-51 (prepared statement of Ivan Barofsky, Ph.D., Institute of Social Oncology). Most group health plans have experience-adjusted premiums which fluctuate according to how much insurance the group uses. Canellos, *supra* note 72, at 4.

86. Canellos, *supra* note 72, at 4 (citing Sarah Splaver, President, Cancer Hopefuls United for Mutual Support).

87. To illustrate the need for a federal law expressly protecting cancer pa-

the Cancer Patients Employment Rights Act, has been introduced by Rep. Mario Biaggi in the House of Representatives.<sup>88</sup> The stated purposes of the Act are fourfold: 1) to discourage cancer-related job discrimination; 2) to encourage employers to make reasonable accommodations for persons with a cancer history; 3) to publicize the "employability" of those with a cancer history; and 4) to encourage further legislation to protect cancer victims from other types of discrimination.<sup>89</sup>

The Cancer Patients Employment Rights Act would not affect rights or remedies provided under the Rehabilitation Act of 1973.<sup>90</sup> Rather, the Act would amend Title VII of the Civil Rights Act to specifically include those with a cancer history as a protected class.<sup>91</sup> The Act con-

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tients from job discrimination, a proponent of the Cancer Patients Employment Rights Act, a bill presently before Congress, advanced the following telling statistics. *Hearings, supra* note 2, at 37. While only 1% of all actions brought between 1974 and 1978 under the Federal Rehabilitation Act have been brought by cancer victims, 10% of the discrimination complaints filed in California are filed by persons with a cancer history. *Id.* at 37. According to the proponent of these statistics, they show "that the current Federal law isn't really adequate to handle the situation." *Id.* It is submitted that this statistical discrepancy may have resulted from the fact that California cancer victims, unlike those protected under the Federal Rehabilitation Act, enjoy clear and specific protection. See CAL. GOV'T CODE § 12926(f) (West 1980).

The strength of that protection was exhibited in *Department of Fair Employment and Housing v. Kingsburg Cotton Oil Co.*, No. FEP 80-81-C7-058 (Fair Employment and Housing Comm'n Cal. Dec. 7, 1984). In *Kingsburg*, the plaintiff had a history of colon cancer. *Slip op.* at 7. While the defendant employer disputed the plaintiff's allegation of physical handicap, the defendant did not contest the plaintiff's allegation that she had a medical condition within the meaning of the California Fair Employment and Housing Act. *Id.* at 18-20. The term "medical condition" is defined in the California Act as "any health impairment related to or associated with a diagnosis of cancer, for which a person has been rehabilitated or cured, based on competent medical evidence." CAL. GOV'T CODE § 12926(f) (West 1980). It would thus appear that a showing of rehabilitated or cured cancer, based on competent medical evidence, indisputably triggers the protections of the California Act. It is submitted that such an automatic trigger is needed under federal law in order to protect all cancer victims. For a further discussion of the California statute and the *Kingsburg* case, see *supra* notes 28-32 and accompanying text.

88. H.R. 1294, 99th Cong., 1st Sess., 131 CONG. REC. 22,815 (1985). The bill was introduced on February 27, 1985, and was referred to the Committee on Education and Labor. 131 CONG. REC. at 22,815.

89. H.R. 1294 § 2(b)(1)-(4).

90. H.R. 1294. Section 4 of the bill provides that "[t]he amendments made by this Act do not affect any right, remedy, obligation, or responsibility under the Rehabilitation Act of 1973." H.R. 1294 § 4. For a discussion of the Rehabilitation Act as it relates to cancer victims, see *supra* notes 11-22 and accompanying text.

91. H.R. 1294 § 3(a). The term "cancer history" is defined as "the status of any individual who has, or has had cancer, or who is diagnosed as having, or having had cancer. For the purposes of this subsection the term 'cancer' means any disease characterized by uncontrolled growth and spread of abnormal cells." *Id.*

tains three basic substantive provisions.<sup>92</sup> First, it would prohibit employers from requiring a person with a cancer history to meet unnecessarily high medical standards or to reveal unnecessary medical information as a condition of employment.<sup>93</sup> Second, it would prohibit labor organizations from requiring persons with a cancer history to submit to unnecessary examinations or reveal unnecessary medical information.<sup>94</sup> Finally, it would require that employers make a good faith effort at reasonable accommodation of employees with a cancer history.<sup>95</sup> By in-

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Title VII presently provides for equal employment opportunity by prohibiting discrimination because of race, color, religion, sex or national origin. 42 U.S.C. § 2000e-2 (1982). In addition to the Cancer Patients Employment Rights Act, there is now another bill before the House which would amend Title VII. That bill would make the handicapped a protected class under Title VII. H.R. 370, 99th Cong., 1st Sess., 131 CONG. REC. 2,104 (1985).

92. H.R. 1294 § 3(b). These provisions would be appended to § 704 of Title VII (42 U.S.C. § 2000e-3 (1982)), which deals with "[o]ther unlawful employment practices." *Id.* The Act would also extend the basic provisions of Title VII to individuals with a cancer history. H.R. 1294 § 3(c). The Title VII provisions affected are as follows: 42 U.S.C. § 2000e-2(a) (employer practices); 42 U.S.C. § 2000e-2(b) (employment agency practices); 42 U.S.C. § 2000e-2(c) (labor organization practices); 42 U.S.C. § 2000e-2(d) (training programs); 42 U.S.C. § 2000e-2(e)(1) (bona fide occupational qualification); 42 U.S.C. § 2000e-2(h) (bona fide seniority or merit system); 42 U.S.C. § 2000e-2(j) (preferential treatment not required); 42 U.S.C. § 2000e-3(b) (publications indicating preference or discrimination prohibited); 42 U.S.C. § 2000e-5(g) (relief available); 42 U.S.C. § 2000e-16(a) (discriminatory practices of federal government); 42 U.S.C. § 2000e-16(c) (civil actions).

For the text of the substantive provisions of the Cancer Patients Employment Rights Act, see *infra* notes 93-95 & 99 and accompanying text.

93. H.R. 1294 § 3(b). The Act would make it an unlawful employment practice for an employer, employment agency or labor organization to

- (A) require, as a condition of employment, an employee or prospective employee with a cancer history to meet medical standards which are unrelated to job requirements, or to require such employee or prospective employee to submit to a medical examination or reveal any medical information unless such examination or information is necessary to reveal qualifications essential to job performance; or
- (B) reveal any confidential medical information concerning such an employee or prospective employee without the express written consent of such employee or prospective employee.

*Id.*

94. *Id.* The Act provides:

It shall be an unlawful employment practice for a labor organization to require a member or potential member with a cancer history to submit to a medical examination or reveal any medical information relating to cancer history without the express written consent of such member or potential member unless such examination or information is necessary to reveal qualifications essential to membership in such labor organization.

*Id.*

95. *Id.* The Act provides:

It shall be an unlawful employment practice for an employer to fail to make a good faith effort to explore whether reasonable accommodations may be made for an employee or prospective employee with a

cluding people with a cancer history among those protected by Title VII, the Act would give cancer patients and survivors a private right of action against their employers.<sup>96</sup>

In order to prove a *prima facie* case under Title VII, a complainant would have to show (1) that he or she has a cancer history; (2) that he or she is qualified for a particular job; (3) that, despite his or her qualifications, he or she was rejected, fired, or otherwise discriminated against by an employer; and (4) that, after his or her rejection, termination, demotion, etc., the employer continued to seek employees from persons of complainant's qualifications.<sup>97</sup>

Several defenses would be available to employers. First, an employer could rebut a *prima facie* case by articulating "some legitimate, nondiscriminatory reason" for the allegedly discriminatory action.<sup>98</sup> Further, the Act itself provides that an employer would not be guilty of an unlawful employment practice if he could establish either that a cancer victim could not reasonably be accommodated without undue hardship or that the cancer victim would be unable to safely perform the job requirements.<sup>99</sup> Two general Title VII defenses also would be available

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cancer history which would enable the employee or prospective employee to fulfill the job requirements. Whether an accommodation is reasonable shall be determined according to the facts and circumstances of the particular case. Factors relevant to the determination of reasonableness include administrative costs, cost of the physical accommodations, the cost of disruption of existing work practices, the size of the employer's business, and the safety of existing and potential employees.

*Id.*

96. 42 U.S.C. § 2000e-5(f)(1) (1982). Under Title VII, an aggrieved person may bring a civil action against his or her employer or prospective employer if one of three conditions is met. *Id.* These conditions are 1) the dismissal of a charge filed with the Equal Employment Opportunity Commission, 2) the Commission's failure to bring a civil action within 180 days of the filing of such charge, or 3) the Commission's failure to enter into a conciliation agreement to which the aggrieved person is a party. *Id.* Cancer victims in some jurisdictions who are employed by Federal contractors presently do not enjoy a private right of action under the Federal Rehabilitation Act. *See supra* note 22 and accompanying text.

97. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). In *McDonnell Douglas*, the United States Supreme Court established the elements of a *prima facie* case for Title VII individual disparate treatment claims. *See id.*

98. *Id.* The burden would then shift back to the plaintiff to prove that the employer's stated reason for his action was in fact a pretext. *Id.* at 804.

99. H.R. 1294 § 3. The Act provides:

Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to fail or refuse to hire, or to discharge or classify, an employee or prospective employee with a cancer history if—

(A) the employer demonstrates that such employer is unable to reasonably accommodate an employee or prospective employee to enable such employee or prospective employee to fulfill the job requirements without undue hardship to the employer; or

(B) the employee or prospective employee is unable to perform the

to employers accused of discriminating against cancer victims: the bona fide occupational qualification defense<sup>100</sup> and the bona fide seniority or merit system defense.<sup>101</sup> Under the bona fide occupational qualification (bfoq) defense, an employer would prevail if he established that the absence of a cancer history is a "bona fide occupational qualification reasonably necessary to the normal operation of [his] business or enterprise."<sup>102</sup> It is submitted that it would be extremely difficult for defendant employers to prove this defense, especially since the bfoq defense has been deemed "only the narrowest of exceptions to the general rule requiring equality of employment opportunities."<sup>103</sup> Under the bona fide seniority or merit system defense, an employer would prevail if he could establish that his allegedly discriminatory actions were taken pursuant to a bona fide seniority or merit system and that the system itself was not "the result of an intention to discriminate."<sup>104</sup>

#### D. *Analysis of the Act*

It is submitted that the Cancer Patients Employment Rights Act would provide much needed federal protection for cancer patients and survivors.<sup>105</sup> It is submitted, however, that while some provisions

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job requirements in a manner which would not endanger the safety of such employee, prospective employee, or others, regardless of the availability of reasonable accommodations.

*Id.*

100. 42 U.S.C. § 2000e-2(e)(1) (1982). This section provides that it is not an unlawful employment practice to discriminate "on the basis of . . . religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise . . ." *Id.*

101. 42 U.S.C. § 2000e-2(h) (1982). This section provides:

Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin.

*Id.*

102. 42 U.S.C. § 2000e-2(e)(1) (1982).

103. *Dothard v. Rawlinson*, 433 U.S. 321, 333 (1977) (holding that being male was a bona fide occupational qualification for "contact" positions in maximum security male prison). It is hard to imagine a situation where the absence of a cancer history would be a bona fide occupational qualification.

104. 42 U.S.C. § 2000e-2(h) (1982).

105. It has been argued that the extension of Title VII protections to the handicapped would be "too complicated, expensive, and time-consuming";

should be enacted as proposed, others require changes that would impose more stringent obligations on employers.<sup>106</sup>

### 1. *Scope of Protected Class*

It is suggested that the Act properly circumscribes the class of persons protected.<sup>107</sup> The Act's definition of "cancer history" extends to those who have or have had cancer and to those diagnosed as having or having had cancer.<sup>108</sup> Thus, individuals who have recovered from the disease but who still suffer from its stigma would enjoy the same protection as those currently undergoing treatment.<sup>109</sup> Moreover, individuals who never in fact have had cancer but who have been diagnosed as having cancer would also be protected. In commenting on the Act, the Legal Aid Society of San Francisco ("Society") has suggested that the definition of cancer history should be expanded to include those with precancerous conditions, those erroneously perceived as having cancer, and those deemed to be future cancer risks.<sup>110</sup> It is submitted, however, that such an expansion would sweep too broadly. The Society has offered no statistics or case histories showing that the additional classes it

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since "[h]andicaps vary greatly in nature and severity," the federal courts would be forced to make individual determinations on the innumerable claims brought before them. Peck, *Employment Problems of the Handicapped: Would Title VII Remedies Be Appropriate and Effective?*, 16 U. MICH. J.L. REF. 343, 362, 380 (1983). But see Hoffman, *supra* note 9, at 32-34 (recommending adoption of Cancer Patients Employment Rights Act and suggesting it would save federal funds).

It is submitted that although the Cancer Patients Employment Rights Act would undoubtedly spawn a great deal of litigation, its value to the growing class of unprotected cancer survivors far outweighs any administrative cost or inconvenience it may cause.

106. The following discussion will substantially track a statement prepared by the Legal Aid Society of San Francisco ("Society") and presented at the June 6, 1985 Hearings on the Act. See *Hearings, supra* note 2, at 21-27.

107. H.R. 1294 § 3(a). For the text of this section, see *supra* note 91.

108. H.R. 1294 § 3(a). For the text of this section, see *supra* note 91.

109. Cancer survivors have allegedly been victims of discriminatory acts. See *Department of Fair Employment & Housing v. Kingsburg Cotton Oil Co.*, No. FEP 80-81-C7-058 (Fair Employment & Housing Comm'n Cal. Dec. 7, 1984) ("rehabilitated" victim of colon cancer); *Goldsmith*, 73 A.D.2d 16, 425 N.Y.S.2d 561 (five-year "survivor" of Hodgkin's disease).

110. *Hearings, supra* note 2, at 23-24 (prepared statement, Legal Aid Society of San Francisco). In support of its suggestion of an expanded definition of cancer history, the Society advanced the cases of several hypothetical plaintiffs who would not fall within the Act's protections because of its present limited definition of cancer history. *Id.* According to the Society, the following plaintiffs, deserving of protection, would not find protection under the Act as drafted: 1) a woman with a family history of cancer who was at risk of developing the disease herself; 2) a man rumored to have cancer; 3) a man whose employer mistakenly believed he had cancer; and 4) a woman who has a breast examination. *Id.* In order to bring these hypothetical plaintiffs within the Act's ambit, the Legal Aid Society suggested that language similar to that in the California Fair Employment and Housing Act be adopted, i.e., "related to or associated with . . . cancer." *Id.* at 24. See CAL. GOV'T CODE § 12926(f) (West 1980).

seeks to protect have suffered employment discrimination. Lacking such a demonstration, it is suggested that the definition of cancer history is adequate as drafted because it extends to all individuals who have had or have been diagnosed as having the disease.

## 2. *Disclosure of Medical History*

It is submitted that the Act provides sufficient safeguards against the disclosure of unnecessary medical records.<sup>111</sup> The Act makes it an unlawful employment practice for employers to require individuals with a cancer history to "meet medical standards which are unrelated to job requirements," or to "submit to a medical examination or reveal any medical information unless such examination or information is necessary to reveal qualifications essential to job performance."<sup>112</sup> In this respect, the Act tracks the language used in regulations promulgated under the Federal Rehabilitation Act which limit the use and scope of pre-employment examinations and inquiries.<sup>113</sup> It is submitted that such an approach is beneficial because it will force employers to articulate job-related medical qualifications and will minimize the risk of unwarranted invasions into the privacy of cancer patients and survivors.<sup>114</sup>

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111. H.R. 1294 § 3(b). For the text of this provision, see *supra* notes 93-95.

112. H.R. 1294 § 3(b).

113. See 29 C.F.R. § 1613.706(a)-(d) (1985); 45 C.F.R. § 84.14(a) (1985). The former regulation sets forth standards for equal employment opportunity in the federal government. 29 C.F.R. § 1613. It provides in pertinent part that an agency may not conduct a preemployment medical examination and may not make preemployment inquiry of an applicant as to whether the applicant is a handicapped person or as to the nature or severity of a handicap. An agency may, however, make preemployment inquiry into an applicant's ability to meet the medical qualification requirements, with or without reasonable accommodation, of the position in question, i.e., the minimum abilities necessary for safe and efficient performance of the duties of the position in question.

29 C.F.R. § 1613.706(a). There are two exceptions to this general rule. Pre-employment examinations of the handicapped may be conducted if "[a]ll entering employees are subjected to such an examination regardless of handicap." *Id.*, § 1613.706(b). Also, employers may request applicants to voluntarily fill out questionnaires designed to evaluate the employers' affirmative action programs. *Id.*, § 1613.706(c).

Part 84 of Title 45 of the Code of Federal Regulations regulates handicap discrimination in federally funded programs. 45 C.F.R. § 84.11-14 (1985). The regulation provides in pertinent part that

[a] recipient may not conduct a preemployment medical examination or may not make preemployment inquiry of an applicant as to whether the applicant is a handicapped person or as to the nature or severity of a handicap. A recipient may, however, make preemployment inquiry into an applicant's ability to perform job-related functions.

45 C.F.R. § 84.14(a). Exceptions exist for 1) the voluntary disclosure of medical information for purposes of remedial or affirmative action and for 2) the conducting of medical tests required of all applicants. 45 C.F.R. § 84.14(b)-(c).

114. See *Doe v. Syracuse School Dist.*, 508 F. Supp. 333 (N.D.N.Y. 1981). In *Doe*, the plaintiff, who had had a nervous breakdown in the past, applied to



### 3. *Requirements for Reasonable Accommodation*

It is submitted that the Act should be reworded to impose an affirmative duty on employers to provide reasonable accommodation for individuals with a cancer history.<sup>115</sup> As drafted, the Act merely requires employers "to make a good faith effort to *explore* whether reasonable accommodations may be made."<sup>116</sup> It is submitted that this language is insufficient, because even if employers discover reasonable accommodations in their "explorations", they are under no duty to make such accommodations. Moreover, by asserting that their "explorations" had been fruitless, employers might successfully defend a discrimination action brought by a protected individual with a cancer history.

The Society has suggested that the Act should require employers to provide reasonable accommodation to individuals with a cancer history unless such accommodation would cause an undue hardship.<sup>117</sup> Furthermore, the Society has suggested that the meaning of undue hardship should be clarified by providing a statutory list of factors to be considered in determining whether accommodation would impose an undue hardship on the employer.<sup>118</sup> It is submitted that the notion of undue hardship is adequately set forth through the Act's list of "factors relevant to the determination of reasonableness."<sup>119</sup> Relevant factors in-

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the defendant school district for the position of teacher's assistant and substitute teacher. *Id.* at 335. During the course of his application, the plaintiff was asked whether he had ever experienced "migraine, neuralgia, nervous breakdown, or psychiatric treatment." *Id.* The district court found that this inquiry violated 45 C.F.R. § 84.14, which prohibits recipients of federal funding from conducting pre-employment inquiries regarding handicap unless such inquiries relate to an applicant's ability to perform job-related duties. *Id.* at 336-37. Since the defendant school district admitted in its pleadings that "a history of treatment for mental or emotional problems is not an indication of plaintiff's present fitness for a position as a teacher's assistant or substitute teacher," its inquiry regarding the plaintiff's emotional history was impermissible. *Id.* at 337. It is submitted that *Doe* bodes well for cancer survivors since the provisions of the Cancer Patients Employment Rights Act regarding pre-employment inquiries are so similar to the regulation applied in *Doe*. Compare H.R. 1294 § 3(b) (employers may seek only that medical information "necessary to reveal qualifications essential to job performance") with 45 C.F.R. § 84.14(a) (pre-employment inquiry limited to "applicant's ability to perform job-related functions").

115. See 29 C.F.R. § 1613.704(a) (1985) (requiring federal agencies to make "reasonable accommodation to the known physical or mental limitations of a qualified handicapped applicant or employee"); 45 C.F.R. § 84.12(a) (1985) (requiring same of recipients of federal funds).

116. H.R. 1294 § 3(b) (emphasis added).

117. *Hearings, supra* note 2, at 25 (statement of Legal Aid Society of San Francisco). See *infra* note 118.

118. *Hearings, supra* note 2, at 25. The suggested factors to be considered in determining whether accommodation imposes an undue hardship on an employer include the overall size of the establishment, the type of operation being conducted, the nature and cost of accommodation, and the availability of tax incentives and public and private assistance for providing such accommodation. *Id.*

119. H.R. 1294 § 3(b).

clude "administrative costs, cost of the physical accommodations, the cost of disruption of existing work practices, the size of the employer's business, and the safety of existing and potential employees."<sup>120</sup> It is submitted that if a court examines each of these factors and concludes that accommodation is not reasonable, the court has necessarily determined that such accommodation imposes an undue hardship.<sup>121</sup>

A final suggestion of the Society regarding reasonable accommodation merits brief mention. The Society noted that, in the religious discrimination context, "cases have essentially held that an accommodation which imposes anything more than a 'de minimus' cost in wages or loss of efficiency would be an impermissible hardship to the employer."<sup>122</sup> The Society proposed that the Act explicitly assert that the de minimus standard does not apply under its provisions.<sup>123</sup> It is submitted that this proposal should be followed. A de minimus standard is not suitable because it would render an employer's duty to accommodate individuals with a cancer history almost meaningless.

#### 4. *Statutory Defenses*

It is submitted that the statutory defenses afforded employers under the present bill must be revised in order to limit their scope. Under the Act as drafted, employers can avoid liability (1) if they "demonstrate" that a person with a cancer history is unable "to fulfill the job requirements without undue hardship to the employer," or (2) if the cancer victim is unable to safely perform "job requirements."<sup>124</sup> It is submitted that the Act must clearly establish that the employer has the burden of proving the second defense as well as the first.<sup>125</sup> This clarification

120. *Id.*

121. Although it is submitted that the adoption of the Society's "clarifications" regarding undue hardship would not substantively alter the Act, it is submitted that the adoption of the Society's recommendation that statutory examples of reasonable accommodation be inserted would be beneficial. *Hearings, supra* note 2, at 25. The regulations implementing the Rehabilitation Act provide the following examples of reasonable accommodation: making facilities accessible to the handicapped, job restructuring, and modification of work schedules. 29 C.F.R. § 1613.704(b); 45 C.F.R. § 84.12(b). It is submitted that the two latter accommodations would be especially helpful to the cancer patient or survivor and should be mentioned in the Act. Because of cancer-related surgery, individuals may be unable to perform all functions of a particular job; this inability could potentially necessitate job restructuring. Other cancer victims might be forced to undergo radiation or chemo-therapy during regular work hours; this would probably necessitate modification of work schedules.

122. *Hearings, supra* note 2, at 25. See *Trans World Airlines v. Hardison*, 432 U.S. 63 (1977) (costs incurred in allowing member of Worldwide Church of God to take Saturdays off constituted undue hardship under de minimis standard).

123. See *Hearings, supra* note 2, at 25.

124. H.R. 1294 § 3(b). For the full text of this provision, see *supra* notes 93-95.

125. See *Hearings, supra* note 2, at 26-27 (statement of Legal Aid Society of San Francisco). While the employer must demonstrate the incapacity defense,

could be accomplished by inserting the words "the employer demonstrates that" before the existing language of the safety defense.<sup>126</sup> It is further submitted that the term "job requirements" should be replaced by the term "essential job functions."<sup>127</sup> In its analysis of the Act, the Legal Aid Society of San Francisco correctly noted that, under the Act's current language, "cancer survivors who could perform all but the inessential job duties might not have any protection" because they technically could not fulfill the "job requirements" of a particular job.<sup>128</sup> This problem would be obviated if the essential job function test were used.

### 5. *Statutory Relief*

Finally, it is submitted that the relief provided under Title VII would afford cancer patients and survivors adequate protection. Under Title VII, the following remedies may be awarded: injunctive relief and "such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . or any other equitable relief as the court deems appropriate."<sup>129</sup> Traditionally, this language has been interpreted to preclude

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he has no obligation under the Act to demonstrate the safety defense. *Id.* See H.R. 1294 § 3(b).

126. The safety defense would then read:

[I]t shall not be an unlawful employment practice for an employer to fail or refuse to hire, or to discharge or classify, an employee or prospective employee with a cancer history if— (B) [the employer demonstrates that] the employee or prospective employee is unable to perform the job requirements in a manner which would not endanger the safety of such employee, prospective employee, or others, regardless of the availability of reasonable accommodations.

See H.R. 1294 § 3(b).

127. The essential job functions test appears in the regulations implementing the Rehabilitation Act. 29 C.F.R. § 1613.702(f) (1985). This test is used to show whether a particular selection criterion is discriminatory. *Prewitt v. United States Postal Service*, 662 F.2d 292, 307 (5th Cir. 1981). The Fifth Circuit asserted that

[t]he test is whether a handicapped individual who meets all employment criteria except for the challenged discriminatory criterion "can perform the essential functions of the position in question without endangering the health and safety of the individuals or others." If the individual can so perform, he must not be subjected to discrimination.

*Id.* at 307 (quoting 29 C.F.R. §§ 1613.702(f) & .703).

128. *Hearings, supra* note 2, at 26. To illustrate the difference between job requirements and essential job functions, the Society advanced the following case history:

[A]n individual with paralysis of his upper left arm and with a hearing disability applied for a job as a police dispatcher. His inability to change a teletype roll was not seen as an essential job function because others at his work station could load the teletype. In contrast, the requirement of normal hearing was related to an essential job task and thus there was no duty to accommodate.

*Id.*

129. 42 U.S.C. § 2000e-5(g) (1982).

recovery of compensatory or punitive damages.<sup>130</sup> In addition, the prevailing party in a Title VII action may be awarded costs and a reasonable attorney's fee.<sup>131</sup> It is submitted that cancer patients or survivors who seek the protections of the Act are entitled to no more than the traditional Title VII "make whole" relief. There is no rational basis for according cancer victims greater rights than those discriminated against because of race, color, religion, sex, or national origin. It is, therefore, submitted that there is no need to add a remedies provision to the Act.

#### CONCLUSION

Cancer patients and survivors are currently faced with job discrimination and are inadequately protected from such discrimination. Express statutory protection is limited,<sup>132</sup> and suits brought under state fair employment laws spawn inconsistent results.<sup>133</sup> Recent statistics have shown that cancer-related job discrimination is prevalent.<sup>134</sup> It is submitted that this growing problem must be addressed at the national level. The Cancer Patients Employment Rights Act, particularly if the changes discussed above are implemented,<sup>135</sup> is a workable solution to the problem of employment discrimination against cancer patients and survivors and is necessary to assure that every individual afflicted with cancer will enjoy the same protections upon returning to the job market.

*Lisa Bazemore*

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130. See B. SCHLEI & P. GROSSMAN, *EMPLOYMENT DISCRIMINATION LAW* 1452 (2d ed. 1983).

131. 42 U.S.C. § 2000e-5(k) (1982).

132. For a discussion of the limited express statutory protection, see *supra* notes 10-32 and accompanying text.

133. For a discussion of these inconsistent results, see *supra* notes 33-60 and accompanying text.

134. For a discussion of these statistics, see *supra* notes 73-82 and accompanying text.

135. For the text of the suggested changes, see *supra* notes 115-128 and accompanying text.

