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Cancer-Based Employment Discrimination: Whether the Proposed Amendment to Title VII Will Provide An Effective Anti-Discrimination Remedy

Katherine J. Streicher
Indiana University School of Law

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INTRODUCTION

More than 800,000 individuals in the United States are diagnosed annually as having cancer, and of this number approximately 400,000 will be cured.[1] Yet employer ignorance concerning a cancer patient's ability to perform a job, or an employer's belief that employees with a cancer history will lead to higher insurance premiums,[2] results in discrimination. For example, the American Cancer Society estimates that approximately 90% of all cancer patients encounter employment discrimination when they re-enter the workforce after treatment.[3]

Despite the extent of cancer-based employment discrimination, very few laws effectively protect the rights of the cancer victim.[4] A Congressional bill, the Cancer Patients Employment Rights Act of 1985,[5] aims to combat this inadequacy by amending Title VII of the Civil Rights Act of 1964[6] to include employees with a cancer history as a protected class.[7]

If enacted as an amendment to Title VII, the bill will become part of an anti-discrimination effort that has the advantages and disadvantages of twenty years of interpretation.[8] A basic presumption of the bill is that both em-

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1. *Employment Discrimination Against Cancer Victims and the Handicapped: Hearings on H.R. 1294 Before the Subcommittee on Employment Opportunities,* 99th Cong., 1st Sess. (1985), at 2 [hereinafter *Hearings*].
2. Tarr, *Cancer Patients Confront Job Bias,* NAT'L L.J., Sept. 16, 1985, at 1, col. 1.
3. *Hearings, supra* note 1, at 4.
4. Tarr, *supra* note 2, at 1.
5. *Hearings, supra* note 1, at 5.
6. Public L. No. 88-352, 78 Stat. 241 (1964) (codified as amended 42 U.S.C. § 2000 (1982)).
7. The proposed amendment to Title VII provides in relevant part that:

> It shall be unlawful employment practice for an employer, employment agency or labor organization to:
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> (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 an 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
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> (B) reveal any confidential medical information concerning such an employee or prospective employee without the express written consent of such employee or prospective employee.

See Hearings, supra note 1, at 3.

8. *Hearings, supra* note 1, at 23 (prepared statement of the Legal Aid Society of San Francisco).

ployees with a cancer history and those unencumbered by the disease should have an equal opportunity to participate in the productive labor force. Yet the method by which this equality can be achieved is a subject of dispute when viewed in the context of previous Title VII litigation.[9]

This Note will illustrate the need for an amendment to Title VII to protect the employee with a cancer history, and will then attempt to set out an effective standard for determining how discrimination should be defined under the proposed Act. Part I will survey the current case law as it pertains to cancer-based employment discrimination, indicating the need for uniform legislation. Part II will analyze and discuss the proposals and statutory language of the Cancer Patients Employment Rights Act itself, illustrating both the breadth and inherent limitations of the bill's coverage. Part III will critique the proposed legislation, indicating the need for a more expansive discrimination standard. Although the bill contemplates both an equal opportunity and a reasonable accommodation model of employment discrimination, it fails to mandate the measure of institutional accommodation necessary to effectively integrate the cancer survivor into the workforce. Finally, this Note will attempt to correct the shortcomings of the bill as drafted by proposing an alternative statutory definition of employment discrimination, one that will put an explicit obligation on the employer to accommodate the special needs of an employee with a cancer history.

I. THE CURRENT STATUS OF CANCER-BASED EMPLOYMENT DISCRIMINATION

Five million Americans in the United States presently have cancer or a history of cancer.[10] Of these five million patients, three million have passed the five-year mark of their diagnosis without relapse, which medical authorities consider clinically cured.[11] Yet 90% of these employees will encounter discrimination when they re-enter the workforce.[12] The type of discrimination confronted by the cancer patient takes on a variety of forms, ranging from job denial, wage reduction, and exclusion from and reduction in benefits to promotion denial and outright dismissal.[13] The problem is

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9. Kay, *Models of Equality*, 1985 U. ILL. L. REV. 39.

10. *Hearings, supra* note 1, at 5.

11. *Id.*

12. *Id.* at 4.

13. *Id.* at 6 (statement of Mario Biaggi, representative in Congress from the State of New York).

> Work related discrimination can be classified into three categories:
> (1) The most serious includes dismissal, demotion, discontinued health care and/or life insurance, reassignment of hours or location of work, or no salary increases as given to other employees.
> (2) Work problems arising from attitudes of co-workers, e.g., shunning, mim-

especially prevalent among blue-collar workers. A University of California study of 345 cancer patients returning to work concluded that 84% of the blue-collar workers, as well as more than 50% of the white-collar workers, suffered some form of cancer-based discrimination.[14]

Despite the extent of cancer-based job discrimination, few laws adequately protect the cancer victim.[15] To date, only two states, California[16] and Vermont,[17] have legislation which specifically prohibits cancer-based job discrimination. On the federal level, the Rehabilitation Act of 1973 provides limited protection to "otherwise handicapped" federal employees, employees of federal contractors and employees of federally funded companies and organizations.[18] Since its enactment, however, much controversy has surrounded the issue of whether the Act's coverage extends to rehabilitated cancer patients who do not have a resulting physical impairment which

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icry, overt hostility.

(3) Problems stemming from workers' own attitudes, anxieties, defensiveness, fearfulness about how they should be perceived by others which has led to avoidance or alienation by co-workers.

See F. FELDMAN, EMPLOYMENT ISSUES, CONCERNS AND ALTERNATIVES FOR CANCER PATIENTS 15-19 (1982).

14. Kotulak, *Cancer Patients Face Bias on the Job and in School,* Chicago Tribune, Dec. 5, 1985, at 2, col. 3. Additionally, the California division of the American Cancer Society commissioned a study of 810 cancer patients randomly selected throughout the state. Patients aged from 20 to 70 years were interviewed 6 to 24 months after their cancer diagnosis, a time delay which eliminated some of the more lethal cancer sites such as leukemia and lung cancer, where death frequently intervened before the interview.

The study found that the more a patient earned at the time of cancer diagnosis, the more likely the patient would be working after treatment. Only 3% of those earning more than $25,000 per year were not working after diagnosis, in contrast to 7% of the $15,000-$25,000 group and 11% of the less than $7,500 group. *See* GREENLEIGH ASSOCIATES, REPORT ON THE SOCIAL, ECONOMIC AND PSYCHOLOGICAL NEEDS OF CANCER PATIENTS IN CALIFORNIA: MAJOR FINDINGS AND IMPLICATIONS (1979) *cited in Hearings, supra* note 1, at 17.

15. Hoffman, *Employment Discrimination Based on Cancer History: The Need for Federal Legislation,* 59 TEMP. L.Q. 1, 14 (1986).

16. In California, the Fair Employment and Housing Act, CAL. GOV. CODE § 12921 (West 1981) states: "The opportunity to seek, obtain and hold employment without discrimination because of race, religious creed, color, national origin, ancestry, physical handicap, medical condition, marital status, sex or age is hereby recognized and declared to be a civil right." The Act defines "medical condition" 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." *Id.* § 12926(F).

17. Similarly, Vermont's Fair Employment Practices Act, as amended in 1981, VT. STAT. ANN. tit. 21, § 495 (1985), prohibits discrimination on the basis of a physical or mental condition. "The term physical or mental impairment includes but is not limited to such diseases and conditions as orthopedic, visual, speech and hearing impairments, ceberal palsy, epilepsy, . . . cancer . . . ." *Id.* § 495(d)(7).

18. 29 U.S.C. § 794 (1982). Section 504 provides in relevant part:

> No otherwise handicapped individual in the United States . . . shall, solely by reason of his handicap, be excluded from 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 an Executive agency or by the United States Postal Service.

substantially limits "major life activities."[19] Unfortunately, this issue has not yet been resolved by the federal courts.[20]

In the absence of an effective state or federal remedy, plaintiffs have been filing cancer-based discrimination claims in state courts under state laws.[21] Only four of these cases have produced court rulings, and the results have been mixed. Although two of the suits filed have been successful,[22] state

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19. As indicated by the Illinois Supreme Court in Lyons v. Heritage House Restaurants, Inc., 89 Ill. App. 2d 163, 432 N.E.2d 270 (1982), the Federal Rehabilitation Act of 1973 does not specifically include cancer in its list of handicaps. The Act defines the term "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 impairment, or (iii) is regarded as having such impairment. 29 U.S.C. § 706(7)(B)(1982).

The only place in the Act where cancer is mentioned is in § 706(13), where the Act defines severe handicaps. The Act provides that the term "severe handicap" means "any disability which requires multiple services over an extended period of time and *results from* amputation, blindness, *cancer* . . . . 29 U.S.C. § 706(13) (emphasis added).

Although cancer itself is not defined as a handicap, this section indicates that it may result in a disability severe enough to be covered by the Act. This section offers narrow protection, however, because only a small percentage of cancer survivors are left with a disability that requires multiple services over an extended period of time. Hoffman, *supra* note 15, at 11.

20. Clearly, the "regarded as having such an impairment" language in the definition of "handicapped individual" is more applicable to the cancer survivor. *See* 29 U.S.C. § 706 (7)(B)(iii) (1982). The regulations that accompany the Act note that people with a cancer history often experience employment discrimination based on a misconception about their illness long after they are fully recovered. The regulations provide that:

> *'Has record of such an impairment'* means that an individual may be completely recovered from a previous physical or mental impairment. It is included because of the attitude of employers, supervisors and co-workers toward that previous impairment may result in an individual experiencing difficulty in securing, retaining or advancing in employment. The mentally restored who have heart attacks or *cancer* often experience such difficulty.

41 C.F.R. § 60-741.54 App. A.(1984) (emphasis added) *cited in* Hoffman, *supra* note 15, at 12.

Thus, as the regulations provide, when an employer regards an employee's cancer history as an "impairment which substantially limits one or more of" the employee's "major life activities," regardless of whether the employee is actually impaired, that employee should be considered a "handicapped individual" under the Act. *Id.*

This conclusion, however, remains unsupported by judicial interpretation largely because many cancer patients are reluctant to pursue their discrimination remedy under the Rehabilitation Act in federal courts. One author found that only 1.3% of all complaints filed under the Rehabilitation Act between 1974 and 1978 involved cancer patients. Barofsky, *Job Discrimination: A Measure of the Social Death of the Cancer Patient,* in PROCEEDINGS OF WESTERN STATES CONFERENCE ON CANCER REHABILITATION 146 (1982), *cited in id.* at 13. The reasons why many cancer patients do not file discrimination suits include an uncertainty over the applicability of state and federal laws, an exhaustion of physical and financial resources and a desire to avoid further attention on personal health history. *Id.*

21. Tarr, *supra* note 2, at 1.

22. *See, e.g.,* Goldsmith v. New York Psychoanalytic Inst., 22 FAIR EMPL. PRAC. DEC. (CCH) § 30, 764 (N.Y. App. Div. Feb. 21, 1980) (holding that a New York psychoanalytic institution's denial of admission to a woman with Hodgkin's disease solely because of her cancer history violated the New York Human Rights Law); Chrysler Outboard Corp. v. Department of Indus., Labor and Human Relations, 14 Fair Empl. Prac. Cas. (BNA) 344 (Wis. Cir. Ct., Dane County, Nov. 2, 1976) (holding that acute lymphocytic leukemia qualifed as a handicap under the Wisconsin Fair Employment Act).

handicap statutes on the whole provide the cancer patient with an inadequate form of relief. Recourse to this type of remedy imposes a disturbing irony on the employee with a cancer history. Although most cancer patients return from surgery or treatment with no particular handicap or disability,[23] they must nevertheless attempt to prove a disability in order to be entitled to state protection.[24]

The Illinois Supreme Court ruling in *Lyons v. Heritage House Restaurants, Inc.*[25] illustrates this dilemma. In *Lyons,* the defendant employer dismissed the plaintiff from her job as a kitchen manager after she was diagnosed as having cancer of the uterus. Lyons brought suit under the Illinois Constitution[26] and the Equal Opportunities for the Handicapped Act,[27] alleging that she was dismissed because her employer had learned of her cancer and that the discharge was a discriminatory action based on her employer's perception of her as "handicapped."

To show that she was still capable of carrying out her employment responsibilities, the plaintiff stated in her complaint that her physical condition had no effect on her ability to perform her job. It was this admission, however, which proved fatal to the plaintiff's case. Adopting the definition of "handicap" as earlier construed by the Illinois Court of Appeals in *Advocates for Handicapped v. Sears, Roebuck and Co.,*[28] the court held that a handicap under the Act is limited to "that 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."[29]

The Illinois Supreme Court dismissed the plaintiff's complaint, reasoning:

> The Plaintiff has not alleged that her cancer has hindered her in any of these [major life] activities or any other activities that her employer perceived her condition as causing a hindrance. In our judgment, she is

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23. A recent study indicates that most employees are able to return to their jobs after cancer treatment without hinderance. 78.8% of the women and 70.6% of the men were physically able to resume employment. *See* Bond, *Employability of Cancer Patients,* 74 ROCKY MTN. MED. J. 153 (1977).

24. Galvin, *Cancer as a Protected Handicap in Illinois,* 60 CHI-KENT L. REV. 715, 722 (1984).

25. 89 Ill. App. 2d 163, 432 N.E.2d 270 (1982).

26. The 1970 Illinois Constitution Article 1, section 19, states, "All persons with a physical or mental handicap . . . shall be free from discrimination unrelated to ability in the hiring and promotion practices of an employer." ILL. CONST. art. 1, § 19 (1970).

27. The Equal Opportunities for the Handicapped Act similarly provides:

> It is an unlawful employment practice for an employer:
>
> (1) 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. REV. STAT. ch. 38, § 65-23 (1982).

28. 67 Ill. App. 3d 512, 385 N.E.2d 39 (1978).

29. *Lyons,* 89 Ill. App. at 165, 432 N.E.2d at 272.

> not handicapped within the meaning of the Illinois Constitution or the Equal Opportunities for the Handicapped Act.[30]

A similar determination was made by the Illinois Court of Appeals in *Kubik v. C.N.A. Financial Corp.*[31] In that case the plaintiff, who had been employed by the defendant for a number of years, developed a malignant tumor on his colon. After the tumor was successfully removed, the plaintiff returned to work only to be told by the personnel manager that the company would not employ anyone with his "handicap" irrespective of his qualifications and capacity to perform the employment duties required of him.[32]

Although Kubik was judged physically unfit by his employer to maintain his position with CNA, his alleged "handicap" was not severe enough to afford him protection by the courts. As in *Lyons,* the Court of Appeals dismissed the plaintiff's complaint on the grounds that a medical condition consisting of a malignant tumor, successfully removed, failed to assert a "handicap" within the meaning of the Illinois Equal Opportunities of the Handicapped Act."[33]

The Illinois handicap statute thus provides the cancer victim with a largely ineffective remedy. In California, however, cases brought under the Fair Employment and Housing Act[34] have had more favorable results. The Act specifically protects the cancer victim by expressly providing protection for individuals with a "medical condition" or "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."[35]

In compliance with the statute, the Fair Employment and Housing Commission has recently made a notable ruling for employees with a cancer history. The case, *Department of Fair Employment and Housing v. Kingsburg Cotton Oil Company*[36] was brought by Virginia Austin, an employee of the defendant, who had been discharged from her position as a receptionist and saleswoman after twenty-three years of service.

In 1975, Austin underwent emergency surgery in which eighteen inches of her colon were removed due to cancer. Over the next five years she had subsequent bouts with the illness. Although the evidence at trial established that Austin was not absent more than any other employee in the office and

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30. *Id.* at 167, 432 N.E.2d at 274.
31. 96 Ill. App. 3d. 715, 422 N.E.2d 1 (1981).
32. *Id.* at 716, 422 N.E.2d at 2.
33. *Id.* at 718, 422 N.E.2d at 4.
34. CAL. GOV. CODE § 12921 (West 1981).
35. *Id.* at § 12926(f). As noted earlier, Vermont's Fair Employment Practices Act, VT. STAT. ANN. tit. 21, 495 (1985), similarly provides protection for the employee with a cancer history. No decision regarding cancer-based employment discrimination, however, has been decided under the statute.
36. Nos. FEP 80-81, C7-058 ase, N-19090, 84-30 (Cal. Fair Empl. & Hous. Comm'n. Nov. 16, 1983) [hereinafter *Kingsburg Cotton Oil Co.*].

was able to complete all of her work assignments, the defendant dismissed her in 1980 on the grounds of "excessive absenteeism."[37]

The Fair Employment and Housing Commission found that Austin was terminated in violation of the Act. The evidence established that Austin was not dismissed on grounds of absenteeism, which was used as a mere pretext, but as a result of the defendant's belief that Austin's health would continue to be impaired in the future.[38] Ruling that the " 'medical condition' provision of the Act is designed to provide protection for those who no longer suffer an extant health impairment but are perceived as being so impaired,"[39] the FEHC found that the defendant had unlawfully discriminated against Austin.[40]

The differing results in *Lyons, Kubik* and *Kingsburg* indicate the need for uniform federal legislation to protect the employee with a cancer history. As one commentator notes, the legal remedy available to a cancer survivor depends more on the happenstance of his residence than on the nature of the discriminatory act.[41] Consequently, uniform and equitable treatment of the cancer survivor is contingent on the passage of a uniform remedy, the most plausible being an amendment to Title VII of the Civil Rights Act.[42]

Since its enactment in 1964, Title VII's historic achievement in eradicating employment discrimination has resulted largely from a legislative willingness to develop a realistic understanding of labor market conditions and to create practical solutions to equality problems.[43] Title VII, as originally proposed in 1963, was enacted to combat the pervasive problem of racial discrimination in employment.[44] The Act was further amended in the 1970's in reaction to society's social and economic needs. For example, in 1972 the Act was

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37. *Id.* at 21.

38. *Id.* at 20.

39. *Id.* at 21.

40. *Id.* Discrimination is established under the Act if a preponderance of the evidence demonstrates a causal connection between the plaintiff's medical condition and the termination of employment. Based on the evidence, the Commission concluded that the plaintiff had made out a prima facie case of employment discrimination, stating:

> We are convinced by a preponderance of the evidence established that by late 1980, respondent knew Austin was in remission, but not cured, and it was displeased with her history of cancer related absences. It wrongly perceived that Austin was absent more than other employees would continue to be because of her cancer, and these were all substantial factors in its decision to terminate her employment. We find that respondent terminated Austin's employment because of her medical condition and thereby discriminated against her in violation of the Act.

41. Hoffman, *supra* note 15, at 32.

42. 42 U.S.C. § 2000 (1982).

43. EEOC Compliance Manual, No. 83, Title VII at 20, 18 (1985).

44. Commentators generally acknowledge that the primary purpose of Title VII was to eliminate racial discrimination in employment. *See, e.g.*, Note, *Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1113-14 (1971); Blumrosen, *Strangers in Paradise:* Griggs v. Duke Power Co. *and the Concept of Employment Discrimination*, 71 MICH. L. REV. 59 (1972).

amended to impose upon employers an obligation to accommodate the religious needs of their employees.[45] The Act was further modified in 1978, again in response to society's changing needs. To combat the problem of exclusion of women from the workforce,[46] the Pregnancy Discrimination Act[47] clarified that the Act's proscription against sex-based employment discrimination included discrimination on the basis of pregnancy.[48]

An expansion of Title VII is again necessary to combat the employment discrimination problem of the 1980's: exclusion of the cancer survivor from the workforce.[49] A basic concept of our legal system is that legal burdens should bear some relationship to individual responsibility.[50] Accordingly, under traditional equal protection analysis, classifications based on sex, race, alienage or national origin are inherently suspect and subject to judicial scrutiny.[51] A legislative classification will be stricken as "patently arbitrary" where it bears no rational relationship to a legitimate governmental interest.[52] As noted by the Supreme Court in *Reed v. Reed*:[53]

> A classification must be reasonable, not arbitrary and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.[54]

The main concern of the Supreme Court in scrutinizing arbitrary classifications has been to root out any action by government which is "tainted by a prejudice against discrete and insular minorities," or "the sort of prejudice which tends . . . to curtail the operation of political processes ordinarily to be relied upon to protect minorities" in our society.[55] In determining whether a group has a discrete or insular character, the Supreme

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45. The Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 2(7), 86 Stat. 103, 102 (codified at 42 U.S.C. § 2000 e(j) (1982)).

46. Note, *Employment Equality Under the Pregnancy Discrimination Act of 1978,* 94 YALE L.J. 929 (1985).

47. Pub. L. No. 95-555, 1, 92 Stat. 2076, 2076 (codified at 42 U.S.C. § 2000 e(k) (1982)) [hereinafter PDA].

48. The PDA amends Title VII's definitional provision, and reads in relevant part:

> The terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes . . . .

42 U.S.C. § 2000e(k) (1982).

49. Like cancer, the AIDS epidemic has also spawned a multitude of job problems. A discussion of employment discrimination as it pertains to AIDS victims, however, is beyond the scope of this Note.

50. Weber v. Aetna Casualty Co., 406 U.S. 164, 175 (1972).

51. Frontiero v. Richardson, 411 U.S. 677, 682 (1973).

52. *Id.* at 683.

53. 404 U.S. 71 (1971).

54. *Id.* at 76.

55. United States v. Carolene Prods. Co., 304 U.S. 144, 152-53 n.4 (1938) (quoting Justice Story).

Court has often stressed the link between a history of prejudice, the existence of an immutable characteristic determined solely by accident of birth, and the presence of suspect employment criteria. These factors are considered so unlikely to relate to any legitimate government purpose that their disadvantageous use by the government probably indicates a desire to disadvantage a politically weak or unpopular group.[56]

The presence of a history of discrimination and the use of suspect criteria in determining a cancer patient's ability to perform in a job indicates that employees with a cancer history have taken on the discrete and insular minority status shared by other victims of employment discrimination. Moreover, the Supreme Court has emphasized that the existence of an immutable characteristic shared by all members of the group is not a necessary prerequisite for heightened judicial scrutiny. For example, alienage discrimination is subject to strict judicial scrutiny even though alienage, unlike race or sex, is not an unalterable trait.[57]

Thus, the differential treatment of cancer survivors indicates that they are entitled to the same specialized treatment and heightened scrutiny afforded to members of other minority groups.[58] Public and private employers continue to discriminate against employees with a cancer history, although corporate and professional studies, as well as thousands of case histories, have shown that people with a cancer history are as productive in the labor force as individuals unburdened by the disease.[59]

Moreover, despite the relative lack of litigation in the area of cancer-based employment discrimination,[60] the discrimination problem confronted by cancer patients is likely to get worse before it gets better.[61] Due to a greater incidence of curable cancers and the discovery of more successful treatments, more cancer patients are surviving today than ever before.[62] As a result, more cancer patients are returning to the workforce. Nearly eighty percent of the people diagnosed with cancer in 1985 were capable of remaining in their jobs or returning to work after therapy.[63] Twenty-six percent of those

56. L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-22, at 1053 (1978).

57. *Id.*

58. *See supra* notes 12-14 and accompanying text.

59. *See* Hoffman, *supra* note 15, at 4.

60. Lawyers believe that the reason why few courts have had to deal with the issue of cancer-based job discrimination is in part because many patients recovering from the disease are reluctant to sue, but also because very few laws clearly protect workers with a cancer history. *See* Tarr, *supra* note 2, at 1.

61. *Id.*

62. The American Cancer Society estimates that five million people in the United States have cancer or a history of cancer. This is a 66% increase over five years ago. Furthermore, of the five million, three million have passed the five year mark which medical authorities consider clinically cured. *See* Hearings, *supra* note 1, at 5 (testimony of Mathew Martinez, representative in Congress from the State of California).

63. Kotulak, *supra* note 15, at 2.

who wanted to return to work, however, were unable to because of employment discrimination.[64] An amendment to Title VII which will include employees with a cancer history as a protected class is the only way cancer survivors can uniformly fight such discriminatory employment practices.

II. THE CANCER PATIENTS EMPLOYMENT RIGHTS ACT

Recognizing that "[l]egislation to outlaw employment-based discrimination is long overdue,"[65] Congressman Mario Biaggi introduced the Cancer Patients Employment Rights Act[66] before the Subcommittee on Employment Opportunities on February 27, 1985, in an effort to eliminate future employment discrimination against cancer survivors. The express objectives of the bill are (1) to discourage discrimination against an individual based on the individual's cancer history, (2) to encourage employers to make reasonable accommodations which assist employment of an individual with a cancer history, (3) to increase the employability of an individual with a cancer history, and (4) to encourage further legislation designed to prohibit discrimination against such individuals in areas other than employment discrimination.[67]

To achieve these ends, the bill proposes to amend Section 701 of the Civil Rights Act of 1964[68] to include persons with a cancer history as a protected class. The statute as amended would read:

> It shall be an unlawful employment practice for an employer (1) to fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment because of such individual's race, color, religion, sex, national origin, or "cancer history."[69]

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64. *Id.*

65. *Hearings, supra* note 1, at 5 (statement of Mario Biaggi, representative in Congress from the State of New York).

66. *Id.* at 2.

67. *Id.*

68. 42 U.S.C. § 2000 (1982). The Civil Rights Act of 1964 makes it a proscribed practice for an employer

> (1) to fail or refuse to hire or discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment . . . or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a) (1982). The Act also proscribes discriminatory employment practices by employment agencies (42 U.S.C. § 2000e-2(b)) and labor organizations (42 U.S.C. § 2000e-2(c)).

69. *See Hearings, supra* note 1, at 3. The bill provides that "[s]ections 703(a)(1), 703(a)(2), 703(b), 703(c)(1), 703(c)(2), 703(d), and 703(e)(1) of Title VII of the Civil Rights Act of 1964 are each amended by striking out "or national origin" each place it appears and inserting in lieu thereof "national origin, or cancer history."

Under the proposed bill, victims of cancer-based discrimination would have the same private right of action currently available to victims of race and sex discrimination under Title VII. All present administrative proceedings of the Equal Opportunities Commission would apply to cases of cancer discrimination, along with all established remedies under Title VII, which include back pay, reinstatement and attorney's fees.[70]

A. Protected Class

The term "cancer history" is defined in the bill as the status of any individual who either has or had cancer or is diagnosed as having cancer.[71] The bill thus covers three classes of claimants: (1) those who have cancer, (2) those who once had cancer, but at the time of their claim are free of uncontrolled growth or the spread of abnormal cells, and (3) those who do not have cancer but are erroneously perceived to have or have had cancer.[72]

The protection afforded under the bill, however, is subject to the following limitations. First, employees are not protected if they are "unable to perform the job requirements in a manner which would not endanger the safety" of others whether or not the employer can alleviate any safety problems through

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70. Hoffman, *supra* note 15, at 21-22.

71. *See Hearings, supra* note 1, at 2. Section 3(a)(1) of the bill provides: "[t]he term 'cancer history' means the status of any individual who has, or has had cancer, or 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.' "

72. *See Hoffman, supra* note 15, at 22. It should be noted, however, that a literal reading of the bill's language indicates that the bill extends its protection only to those employees who have cancer or a history of cancer. Thus, one commentator disagrees with Hoffman's conclusion by contending that the bill's language does not extend to those employees erroneously perceived to have or have had cancer. *See Hearings, supra* note 1, at 23. (Prepared Statement of the Legal Aid Society of San Francisco). Consequently, an employee who is discharged because his employer erroneously believes rumors that he has cancer would not fall within the scope of the bill's protection. *Id.* Moreover, it is unlikely that the bill would protect employees with precancerous conditions from employment discrimination since they presumably do not have, had, or ever have been diagnosed as having cancer. Thus, a woman with a family history of cancer who needs close monitoring of her condition because she is at risk of developing cancer would not be protected under the bill. *Id.*

A simple reconstruction of the provision as drafted could avoid these adverse results. Under the California Fair Employment and Housing Act, CAL. GOV. CODE § 12920 (West 1981), employees are protected from discrimination "related to or associated . . . with cancer." The statute's language, which enlarges the scope of the Act's protection, has enabled California law to protect individuals who have precancerous conditions or "active cells" as well as those who are perceived by their employer as having a history of cancer.

Consequently, by using the California Statute as a model, the present definition of cancer history can be statutorily reconstructed to more effectively carry out the overall purposes of the bill, as follows:

> The term "cancer history" means the status of any individual who (1) has or had cancer; (2) is diagnosed as having cancer; (3) or is regarded as having a disease related to or associated with cancer.

reasonable accommodations.[73] Second, individuals who do not present any safety problems, but who cannot be accommodated without causing the employer undue hardship, fall outside the bill's protection.[74] Finally, employers covered by the proposed Act are the same as those presently covered by Title VII: public and private employers, employment agencies and labor organizations.[75]

B. Definition of Discrimination

The bill aims to shield this class of claimants from employment discrimination in two ways: (1) by prohibiting the use of medical standards unrelated to job performance as a criteria of employment and (2) by placing the employer under an obligation to reasonably accommodate the needs of the cancer victim.

First, the bill holds that it shall be an unlawful employment practice for an employer, employment agency, or labor organization "to 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."[76] Consequently, an employer may not demand that a current or prospective employee meet medical standards that surpass, or are unrelated to, the physical demands of the job. An employee will be compelled to reveal a medical history only if the employer can demonstrate that such information is essential to job performance. Thus, the proposed Act would prevent employers from requiring all job applicants to fill out comprehensive and detailed medical histories unless such information directly relates to the employee's ability to properly and safely perform the job.[77]

Second, the proposal places the employer under an obligation to reasonably accommodate the needs of the cancer victim. The bill states that 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

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73. *See* Hoffman, *supra* note 15, at 22; *Hearings, supra* note 1, at 23 (prepared statement of the Legal Aid Society of San Francisco).

74. *Id.*

75. *Id.*

76. *Id.* at 3. Section 3(c)(1) of the bill states: "It shall be 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.

77. *See* Hoffman, *supra* note 15, at 32.

for an employee or prospective employee with a cancer history which would enable the employee or prospective employee to fulfill the job requirements . . . ."[78] Factors relevant to the determination of reasonableness include consideration of administrative costs, costs of the physical accommodations, cost of disruption of existing work practices, the size of the employer's business and the safety of existing and potential employees.[79] The obligation to accommodate, however, is not without limitation. As the bill provides, an employer may refuse to hire, discharge or classify employees on the basis of their cancer history if he is able to demonstrate that he is "unable to reasonably accommodate an employee or prospective employee" to enable that person "to fulfill the job requirements without undue hardship to the employer."[80]

C. *Limitations of the Bill's Coverage*

The Cancer Patients Employment Rights Act, as presently drafted, *appears* to provide the cancer victim with an effective means of combatting discrimination. It protects those employees who have, had or are perceived as having cancer and holds that it shall be an unlawful employment practice for an employer to require as a condition of employment that an employee meet medical standards unrelated to job performance. The effectiveness of the bill in fact, however, depends largely upon judicial interpretation of its statutory language. As this Note will illustrate, the bill's current definition of employment discrimination frustrates the overall purposes of the Act. The bill provides the cancer survivor with a cause of action on both disparate treatment and disparate impact grounds.[81] It neglects, however, to set forth an effective reasonable accommodation obligation. Unless an employer is under an affirmative duty to accommodate the special needs of an employee with cancer who requires further treatment after re-entering the labor force, otherwise neutral employment practices will have a disparate impact on this group of cancer survivors.

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78. *See Hearings, supra* note 1, at 3. Section 3(c)(3) of the bill states:
> It shall be an unlawful employment practice for an employer to fail to make a good faith effort to explore whether reasonable accomodations may be made for an employee . . . with a cancer history which would enable the employee or prospective employee to fulfill the job requirements. Whether an accomodation 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 accomodations, the cost of disruption of existing work practices, the size of the employer's business, and the safety of existing and potential employees.

79. *Id.*

80. *Id. See also* Hoffman, *supra* note 15, at 23.

81. *See infra* note 86 and accompanying text.

Using Title VII case law as a source of illustration, the following analysis will show the weaknesses in the bill's statutory language. This Note will attempt to overcome these deficiencies through statutory reconstruction of the Amendment's language. To assist in this endeavor, alternative provisions outlined in the Rehabilitation Act of 1973,[82] principally the H.E.W. Regulations which govern its implementation,[83] will be used.

III. A CRITIQUE OF THE CANCER PATIENTS EMPLOYMENT RIGHTS ACT

The overall purpose of the Cancer Patients Employment Rights Act is to insure that employees with a cancer history have an equal opportunity to participate in the productive labor force. The method by which this equality can or should be achieved, however, is a subject of disagreement when viewed in the context of previous Title VII litigation.[84]

Discrimination against an employee with a cancer history as defined in the bill has three possible definitions: (1) intentional discrimination (disparate treatment), which refers to willful discrimination by an employer, such as a refusal to hire someone because of their cancer history; (2) discrimination by effect (disparate impact), which broadens the violation to include the impact of an "otherwise neutral" employment practice if it adversely affects the cancer victim; and (3) the accommodation rule, which further broadens the violation of discrimination by effect by requiring the employer to reasonably accommodate the special needs of the cancer victim short of experiencing undue hardship.[85]

Unless the bill is modified to require a mandatory reasonable accommodation standard of employment discrimination, many cancer survivors will be unable to successfully participate in the productive labor force. An antidiscrimination model which provides for mere equal employment opportunities, as provided by a cause of action on disparate treatment and disparate

82. 29 U.S.C. § 701-79 (1982).

83. 25 C.F.R. 84-12.

84. *See generally* Kay, *supra* note 9; Note, *Employment Discrimination Against the Handicapped and Section 504 of the Rehabilitation Act: An Essay on Legal Evasiveness,* 97 HARV. L. REV. 997 (1984); Note, *Sexual Equality Under the Pregnancy Discrimination Act,* 83 COLUM. L. REV. 690 (1983).

85. *See* Ingram & Domph, *An Employer's Duty to Accomodate the Religious Beliefs and Practices of an Employee,* 87 DICK. L. REV. 21, 32-33 (1982) (religious discrimination under Title VII similarly has three possible definitions).

impact grounds,[86] is an inadequate remedy for many cancer survivors. Employers must be under an obligation to not only treat cancer survivors equally but to make efforts to remove barriers which stand in the way of otherwise qualified applicants and employees.[87] Providing accommodations such as rearranging work schedules for radiation treatments or allowing time off for doctor and hospital visits is a crucial aspect of integrating the cancer patient into the working world. Thus, effective legislation must contain mandatory accommodation.

A. Ambiguity of Statutory Language

As drafted, the Cancer Patients Employment Rights Act provides different methods for determining how discrimination should be defined under the bill. The relevant provisions state:

> 3(c)(1) It shall be an unlawful employment practice for an employer, employment agency, or labor organization to:
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> (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.[88]
>
> . . . .
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> 3(c)(3) 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 cancer history which would enable the employee or prospective employee to fulfill job requirements.[89]

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86. The Supreme Court distinguished the two causes of action in International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977). The Court observed that claims of disparate treatment may be alleged where:

> The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment . . . .
>
> Claims of disparate treatment may be distinguished from claims that stress "disparate impact." The latter involve employment practices that are facially neutral in their treatment of different groups but in fact fall more harshly on one group than another and cannot be justified by business necessity. Proof of discriminatory motive, we have held, is not required under a disparate impact theory.

87. *See Hearings, supra* note 1, at 23 (Statement of the Legal Aid Society of San Francisco).

88. *Id.* at 3.

89. *Id.*

The first proposal, section 3(c)(1), when taken together with Title VII, mandates an equal opportunity model of employment discrimination.[90] It provides the cancer survivor with a cause of action on disparate treatment[91] and disparate impact[92] grounds. Under this model, cancer patients will not be singled out because of their disability, but rather treated the same as other employees based on their ability to work.[93] An employment practice or policy which intentionally excludes employees with a cancer history would therefore be presumptively discriminatory.[94] Similarly, an otherwise neutral employment practice, such as the use of medical examinations before hiring, would violate the bill if it was unrelated to job performance and had a disparate effect on the number of employees with a cancer history actually hired.[95]

Under the second proposal, section 3(c)(3), an employer is under an obligation to make a "good faith effort" to accommodate the needs of the

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90. This viewpoint complies with traditional disparate treatment and disparate impact analysis, where the courts have adopted a system of inferences that mere denial of equal opportunity constitutes actionable discrimination where alternative explanations, such as lack of qualifications, are not established. *See* Wegner, *The Anti-Discrimination Model Reconsidered: Ensuring Equal Opportunity Without Respect to Handicap under Section 504 of the Rehabilitation Act of 1973,* 69 CORNELL L. REV. 401, 438 (1984).

91. The Supreme Court has divided the process of proving a disparate treatment case under Title VII into three steps. A prima facie case of disparate treatment discrimination can be established by a plaintiff who shows: (1) that he belongs to a category of persons protected by Title VII, (2) that he applied and was qualified for a job for which the employer was seeking applicants, (3) that despite his qualifications he was rejected, and (4) that after his rejection the position remained open and the employer continued to seek applicants from persons with plaintiff's qualifications. McDonnell-Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

92. Although the plaintiff need not establish intent in disparate impact cases, the Court has established a somewhat similar three-part framework of analysis:

> To establish a prima facie case of [disparate impact] discrimination, a plaintiff must show that the facially neutral employment practice had a significantly discriminatory impact. If that showing is made, the employer must then demonstrate that "any given requirement [has] a manifest relationship to the employment in question," in order to avoid a finding of discrimination. Even in such a case, however, the plaintiff may prevail, if he shows that the employer was using the practice as a mere pretext for discrimination.

Connecticut v. Teal, 457 U.S. 440, 446-47 (1982) (quoting Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971) (footnote and citation omitted)).

93. *See* Note, *Sexual Equality Under the Pregnancy Discrimination Act,* 83 COLUM. L. REV. 690, 699-702 (1983) (where the author contrasts two similar models of equality between the sexes: assimilationism, which stresses the likeness of the sexes, and pluralism, which places greater weight on the distinctiveness between men and women).

94. For example, the United States Military (Army, Navy, Air Force, Coast Guard, Reserves and service academies) automatically rejects people with a cancer history for active duty positions. Chapter two, sections 2-40 and 2-41 of Army Regulation 40-501 states, "Causes for rejection for appointment, enlistment, and induction in the United States Military include benign and malignant tumors." Such an exclusionary employment policy would be presumptively discriminatory under the present bill on disparate treatment grounds. *See Hearings, supra* note 1, at 6.

95. *See infra* notes 101-13 and accompanying text.

cancer victim.[96] This provision contemplates a reasonable accommodation model of employment discrimination. Instead of merely providing equal employment opportunities, the employer must attempt to recognize and compensate for differences between an employee with a cancer history and those unburdened by the disease.[97] It requires that the singular disabilities and needs of the cancer patient be recognized and compensated for so that persons with a cancer history can participate on terms equal with the rest of society.[98]

B. Inadequacy of the Equal Opportunity Model

For the cancer patient who is expectantly cured after surgery and no longer requires treatment, section 3(c)(1) provides adequate protection against discrimination.[99] Application of the equal opportunity model, however, is insufficient to protect the rights of the employee who is not clinically cured. The employee with cancer who is still under treatment or susceptible to a relapse in the future requires a more expansive anti-discrimination standard, one which will place the employer under a legal obligation to not only treat the cancer patient equally, but to affirmatively accommodate his special needs as well.[100]

The inadequacy of an equal opportunity approach can be illustrated by applying disparate impact analysis to the context of cancer-based employment discrimination.[101] Disparate impact analysis, which was developed largely in

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96. *See supra* note 78.

97. *See* Note, *supra* note 93, at 707.

98. *See* Note, *Employment Discrimination Against the Handicapped and Section 504 of the Rehabilitation Act: An Essay on Legal Evasiveness, supra* note 84, at 1003-07 (1984) (contrasting two models of equality as applied to the physically handicapped: an equal treatment paradigm, which requires all persons be evaluated by neutral rules related to job performance and an equal impact paradigm, which requires benign differential treatment of the handicapped).

99. The bill in its present form, for example, would provide adequate protection against discrimination for employees with a cancer history who no longer require treatment and are thus able to meet job requirements in spite of their cancer history. The plaintiffs in the *Lyons* and *Kubik* cases, discussed in Part I of this Note, would fall into this class of cancer survivors. *See supra* notes 25-33.

100. The act as drafted does not adequately protect those cancer survivors who are unable to meet job requirements because of their cancer history. *See, e.g., supra* notes 36-40 and accompanying text.

101. Although section 3(c)(1) contemplates both a disparate treatment and disparate impact cause of action, disparate impact analysis is used here. The language used in the proposal indicates that it is the discriminatory *effect* of medical standards unrelated to job performance on the employee with a cancer history, as opposed to the state of mind of the employer, that is of concern.

Furthermore, commentators acknowledge that disparate treatment analysis "contains both mechanical and theoretical difficulties . . . . In order to prove discrimination—that similarly situated people are treated differently—a plaintiff has to prove that the employer intended to discriminate against the plaintiff or the plaintiff's minority group. Since it is illegal to discrim-

the context of race discrimination,[102] aims to promote the distribution of jobs on the basis of merit and to eradicate "artificial, arbitrary and unnecessary barriers to employment."[103] Disparate impact analysis was initially applied in *Griggs v. Duke Power Co.*,[104] where the United States Supreme Court held that a Title VII plaintiff could make a prima facie case of discrimination by showing that a racially-neutral employment policy or practice adversely affected a protected group.[105] A showing of impermissible motivation by the employer is not required.[106] A policy's differential effect is seen to fall within the statutory definition of discrimination.[107]

Once a plaintiff establishes a prima facie case,[108] the burden of proof shifts to the defendant.[109] The defendant may rebut the plaintiff's case by

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inate, and costly if one is caught, in only the most blatant of circumstances will the plaintiff be able to garner the requisite evidence. Even when there is evidence to gather, it is time consuming and costly because of the extensive discovery usually needed to feret out proof of subjective intent. Equally important, discrimination is not always intentional at a conscious level. Under such circumstances it is unfair and counterproductive to require proof of a motive that is unnecessary for the action and the harm. The development of disparate impact [analysis] as an alternative theory has relieved some of the inequities resulting from the above difficulties by extending the definition of discrimination" to disparate effect. *See* Note, *Disparate Impact Analysis and the Age Discrimination in Employment Act,* 68 MINN. L. REV. 1039, 1041 n.15 (1984).

102. *See* Kay, *supra* note 9, at 57.

103. Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).

104. *Id.*

105. "[Title VII] proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited." *Id.* at 431.

106. As stated by the Court:

> [G]ood intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as "built-in headwinds" for minority groups and are unrelated to measuring job capability . . . Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation . . . .

Griggs, 401 U.S. at 432.

107. *See* McDonnell-Douglas Corp. v. Green, 411 U.S. 792, 801-02 (1973).

108. Disparate impact cases clearly provide that statistical disparity rather than intent can establish a prima facie case of discrimination. Thus, in *Griggs* black plaintiffs challenged their employer's use of a diploma requirement and aptitude tests for screening prospective employees for transfer to higher paying positions where these methods disqualified a disproportionate number of blacks and were not shown to be related to job performance. *Griggs,* 401 U.S. at 431.

Dothard v. Rawlinson, 433 U.S. 321 (1977) applied the disparate impact analysis used in *Griggs* to the context of sex discrimination. In *Dothard,* the plaintiff charged that physical requirements (minimum of 5'2", 120 pounds) for a job in the Alabama prison system constituted illegal sex discrimination because over 41% of all the women were excluded while less than 1% of all men were excluded. The Court agreed that the facially neutral height and weight requirements did adversely affect women. It then held that because they were unnecessary for the job there was illegal discrimination. *Id.* at 329-32.

109. "Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question." *Griggs,* 401 U.S. at 432; *see also* Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975).

showing that the selection criteria are "job related" or justified by "business necessity."[110] The Court defined this exemption more precisely in *Albemarle Paper Co. v. Moody,*[111] finding that a prima facie case of illegal discrimination can be rebutted by proving that the practice in question is job related and that it directly measures a skill needed for the job.[112] Even if the defendant satisfies his burden, however, the plaintiff will still prevail if he is able to show an alternative employment practice which would achieve the same result without the illegal differential impact.[113]

In accordance with disparate impact analysis, section 3(c)(1) prohibits the use of medical information in employee selection, an otherwise neutral job requirement which could have a disparate impact on the employee with a cancer history, *unless* such information is necessary to reveal qualifications essential to job performance.[114] The effect of this language is to require employers to treat cancer survivors and other job applicants and employees equally, notwithstanding their medical history. This model of equal opportunity, as set out in *Griggs,*[115] works effectively in the context of race discrimination, where society regards race as a salient characteristic unrelated to job performance.[116] This standard, however, is less effective in the area of cancer-based employment discrimination. Unlike race, an employee's cancer history may directly affect his ability to perform in a job. An adequate model of equality for the employee with a cancer history, therefore, must recognize and take into account the physiological differences and needs between applicants or employees with a cancer history and all other participants. Disparate impact analysis undermines the cancer patient's ability to participate equally in the workforce on two grounds: (1) inability to meet initial job requirements, and (2) exclusion from the workforce on grounds of business necessity.

1. The Problem of Ability

An individual's ability is commonly used as an appropriate neutral basis for determining his participation in various sorts of programs or activities.[117] Selection criteria are generally used as a means of screening applicants to

110. *See Griggs,* 401 U.S. at 431-32; *see also* Contreras v. City of Los Angeles, 656 F.2d 1267, 1278-79 (9th Cir. 1981), *cert. denied,* 445 U.S. 1021 (1982). ("*Griggs* suggests that the Court perceived 'business necessity' to be the same standard as 'job-related' and viewed both as requiring only that an employer prove that his employment practices are legitimately related to job performance . . .").

111. *Albemarle,* 422 U.S. at 425.

112. *Id.* at 425-36.

113. *Id.* at 425.

114. *See supra* note 76.

115. 401 U.S. at 424.

116. *See* Note, *supra* note 93, at 690.

117. Wegner, *supra* note 90, at 436-37.

determine whether they possess the requisite abilities for the job.[118] Although it has been generally accepted that an individual's ability to meet such criteria is unrelated to race,[119] the same is not true with respect to the employee with a cancer history. In many cases, an individual's cancer history will excuse him or her from participation.

The case of *School Board of Pinellas County v. Rateau*[120] is an example of employee exclusion on grounds of inability to meet initial job requirements. In that case, the plaintiff Rateau applied for a position as a substitute business teacher with the defendant school board. Although the plaintiff was eligible for the position, the board withdrew their offer of employment on job qualification grounds when they discovered that the plaintiff had a back condition due to previous surgery to remove a malignant tumor.[121] Ignoring evidence that the plaintiff's cancer history would not affect his ability to carry out job requirements,[122] and that the school board had never required a substitute teacher to meet physical requirements in the past,[123] the Florida Court of Appeals affirmed the school board's decision. The court concluded that the plaintiff's cancer history prevented him from meeting job requirements necessary to teach an elementary business class. The court failed to even consider whether Rateau's alleged disability could have been reasonably accommodated, thereby making his employment feasible.[124]

2. The Problem of Business Necessity

Additionally, an employer may be justified in excluding or firing an employee with a cancer history on business necessity grounds. To carry his burden, the employer must merely show that an otherwise discriminatory practice is a reasonable measure of job performance.[125] Ordinarily, a cancer

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118. *Id.* at 437.

119. For example, Title VII permits employers to consider such characteristics as religion, sex, and national origin in making employment decisions, provided that those characteristics are "bona fide occupational qualification[s] reasonably necessary to [the] normal operation of the particular business or enterprise." *See* 42 U.S.C. § 2000e-2(e) (1981); *see also* Dothard v. Rawlinson, 433 U.S. 321 (1977).

120. 449 So. 2d 839 (Fla. Dist. Ct. App. 1984).

121. The Employment Coordinator for the county school system testified that the lifting of typewriters, computer components and other office equipment was among the job duties required of a business teacher. *Id.* at 841.

122. Rateau testified that he had performed similar kinds of activity for a ten-week period as a substitute teacher in another school district, which involved the lifting of business machines and "quite a bit of bending," with no adverse effects. 449 So. 2d at 842.

123. 449 So. 2d at 841.

124. The court sustained the plaintiff's dismissal without considering whether Rateau's alleged disability could have been reasonably accommodated. Assistance from students and faculty in performing the manual aspects of the job, for example, would have made Rateau's employment possible.

125. *See Griggs,* 401 U.S. at 424.

patient, following treatment, has the necessary qualifications for employment. The difficult issue surrounding the cancer patient's job status, however, arises in the context of the future ramifications of his condition. His prior illness poses certain future risks. Even if an employee can show that he is able to meet initial job requirements, the employer may attempt to show that future risks involved in hiring a cancer patient would impose too great a burden on the employer. In short, the employer may successfully demonstrate that it is a business necessity to avoid hiring or promoting someone who has a cancer history.[126]

Employers have used this defense often in the context of handicap discrimination claims, pursuant to section 504 of the Rehabilitation Act of 1973[127] and in the area of Title VII pregnancy discrimination suits. The risk of future injury, for example, may justify an employer's refusal to hire or maintain an employee under the Rehabilitation Act.[128] Thus, in *E.E. Black, Ltd. v. Marshall,*[129] the court reasoned that screening "individuals on the basis of possible future injury could be consistent with both business necessity and safe performance on the job."[130] In *Black,* the plaintiff's congenital back condition caused him to lose his job as an apprentice carpenter. The employer contended that the plaintiff's condition would cause back pain and future injury.[131] Recognizing that the risk of future injury threatened to increase the employer's insurance and workman's compensation costs, the court held that the employer was justified in his refusal to hire the plaintiff.[132]

Employers have also used this defense in the context of Title VII pregnancy discrimination claims[133] to justify employment termination or exclusion of pregnant women requesting extended disability leaves. One court[134] thus upheld an employer's decision to deny a woman a promotion because of her pregnancy where the employer claimed as a defense that anyone who missed as much work as a result of a disability would be treated in a similar manner.[135]

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126. Note, *Legal Recourse for the Cancer Patient Returnee: The Rehabilitation Act of 1973,* 10 AM. J.L. & MED. 309, 317-18 (1984).

127. 29 U.S.C. § 794 (1982).

128. *See* Note, *supra* note 126, at 318.

129. 497 F. Supp. 1088 (D. Haw. 1980).

130. *See* Note, *supra* note 126, at 318.

131. *Id.*

132. 497 F. Supp. 1104. In reaching its conclusion, the *Black* court identified three factors which determine when an employer's assertion of future risk will justify employment criteria that exclude otherwise qualified handicapped individuals. These factors are the likelihood, imminence, and seriousness of the possible injury. *Id.* Due to lack of medical evidence, the court, however, did not apply these standards in this case.

133. *See supra* note 48.

134. Group Hospitalization, Inc. v. District of Columbia Comm'n on Human Rights, 16 Fair Empl. Prac. Cas. (BNA) 561 (D.D.C. 1977). The employer said it followed the same procedure on a promotion offered to any employee who was leaving for an extended period of time.

135. *Id.* at 564-65.

In *Marafino v. St. Louis County Circuit Court,*[136] the court relied on the same reasoning to find no per se violation of Title VII where a pregnant woman was not hired for a law clerk position. The court acknowledged that even assuming the employer's policy had a disparate impact on women, it was justified by "business necessity."[137] A similar rationale has been used to ratify pregnancy specific exclusions in the airline industry based on customer safety[138] and fetal hazard grounds.[139] In *Harriss v. Pan American World Airways,*[140] for example, the Ninth Circuit upheld a "stop work" policy requiring pregnant employees to put themselves on unpaid maternity leave within 24 hours of learning of the pregnancy. The court accepted the employer's practice on customer safety rationale.[141]

Where mere equal opportunity is required, business necessity could be used as a valid defense in an employer's decision to terminate an employee with a cancer history. Most recovered cancer patients do not have limitation of physical or mental capacity, as do many other disabled persons after treatment.[142] But many will need to take time off for surgery, radiation therapy, regular doctor and hospital visits, and other forms of treatment.[143] The average length of sick leave per year due to cancer is 108.3 days for women and 93.3 days for men.[144] Although job absences are infrequent, they are usually prolonged.[145] Consequently, an employer with a strict disability leave policy would be justified under the business necessity defense to discharge a cancer patient on grounds of excessive absenteeism.[146] Similarly, under the rationale advanced by the *Black* court[147], the potential for increased insurance costs may be a valid reason for either refusing to hire or terminating employment. Since identical treatment of cancer survivors

136. 537 F. Supp. 206 (E.D. Mo. 1982). *But see* Abraham v. Graphic Arts Int'l Union, 660 F.2d 811, 820 (D.C. Cir. 1981) (where the court was more narrow in its view of business necessity even where the position was only for a limited period of time).

137. *Id.* at 214.

138. Levin v. Delta Air Lines, 730 F.2d 994 (5th Cir. 1984); Harriss v. Pan American World Airways, 649 F.2d 670 (9th Cir. 1980).

139. Wright v. Olin Corp., 697 F.2d 1172 (4th Cir. 1982).

140. 649 F.2d 670 (9th Cir. 1980).

141. *Id.* at 673, 676-77.

142. *See Hearings, supra* note 1, at 19 (prepared Statement of Dr. Robert J. McKenna, M.D., President, American Cancer Society).

143. The accepted treatment modalities for the treatment of cancer include surgery, radiotherapy, chemotherapy, and, on an experimental basis for certain forms of cancer, immunotherapy. Because cancer is such a complex and variable disease, each cancer patient is treated as a unique case. Consequently, the length and type of therapeutic regimen will vary with each individual cancer patient. A. FRANK, COURTROOM MEDICINE, § 5.00 (1986).

144. *See* Bond, *Employability of Cancer Patients,* 74 ROCKY MTN. MED. J. 153 (1977).

145. *Id.*

146. *See supra* notes 36-38 and accompanying text, where the defendant in the *Kingsburg Cotton Oil Co.* case attempted to use "excessive absenteeism" as a legitimate grounds for dismissing the complainant.

147. *See supra* note 129.

and those unburdened by the disease will have an adverse impact on the cancer survivor, use of traditional disparate treatment and disparate impact analysis, provided by section 3(c)(1) of the bill, is an inappropriate means of eradicating cancer based on employment discrimination. If equal treatment *in result* is to be achieved, the differences between these two groups must be recognized and taken into account.[148] Reasonable accommodation is required.

3. The Need for Reasonable Accommodation

As drafted, the Cancer Patients Employment Rights Act recognizes a need for employers to remove barriers that stand in the way of otherwise qualified applicants.[149] These efforts, which are called reasonable accommodations, refer to the adoption or modification of a program's design or operation to facilitate participation by the protected group.[150] A reasonable accommodation standard attempts to recognize and compensate for differences between the discriminated group and other groups in society. It requires employers to take whatever steps are necessary to accommodate any disadvantages suffered by the protected group so that this class of persons can compete on a more or less equal basis with other persons.[151]

Although section 3(c)(3)[152] of the bill attempts to define the concept of accommodation, it does not articulate the type of affirmative obligation which is required to meet the needs of an employee with a cancer history for two reasons. First, it fails to set forth a mandatory accommodation requirement. Section 3(c)(3) merely suggests that employers "explore whether reasonable accommodations may be made."[153] Second, it fails to articulate the type of accommodation required. Reasonable accommodation is a term already contained in the Title VII context, pertaining to discrimination on the account of religion. The term as interpreted by the courts in that area, however, has been very narrowly defined. In 1977, the Supreme Court held that any accommodation which imposes more than a de minimis cost in wages and efficiency imposes an impermissible hardship on the employer.[154]

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148. A similar rationale has been applied to the context of discrimination against the handicapped. While the courts have not gone so far as to require equal results in regard to the handicapped and nonhandicapped, they have viewed the provision of merely identical services as being discriminatory against the handicapped. *See* Southeastern Community College v. Davis, 442 U.S. 397, 408-13 (1979) (the provision of equal services may not be sufficient accommodation of the needs of a disabled person not to discriminate); *see also* Garrity v. Gallen, 522 F. Supp. 171, 206-07 (D.N.H. 1981) (to provide only equal services would "harken back to Social Darwinism").

149. *See Hearings, supra* note 1, at 23.

150. *See* Wegner, *supra* note 90, at 442.

151. *See* Note, *supra* note 98, at 1006.

152. *See supra* note 89 and accompanying text.

153. *Id.*

154. *See* TWA v. Hardison, 432 U.S. 63 (1977).

If a similar de minimis standard was read into the language of the Cancer Patients Employment Rights Act, the overall purpose of the bill—integrating the cancer patient into the workforce—would be frustrated.

Alternatively, the regulations governing the application of the Rehabilitation Act of 1973 drafted by the Department of Health, Education and Welfare (HEW)[155] place an expansive accommodation requirement on public employers of handicapped individuals. The Rehabilitation Act, and its accompanying regulations, is designed not only to thwart discrimination in hiring and firing handicapped individuals, but also to "affirmatively assist in their career placement and advancement and ameliorate their work conditions through reasonable accommodations."[156] An application of this latter interpretation of accommodation results in an anti-discrimination standard which both meets the special needs of the cancer survivor and effectively integrates him into the workforce.

a. The Inadequacy of a De Minimis Standard: *Trans World Airlines v. Hardison*

Although the need for accommodation may seem unique to an employee with a cancer history, it has been widely used in the Title VII context of religious discrimination.[157] Accommodation was initially recognized as a constitutional right when individuals affected by certain facially neutral state policies demonstrated that those policies adversely affected their religious freedoms, and that such policies could not be modified without impairing a compelling state interest.[158] Title VII similarly requires that employers reasonably accommodate their employees' religious beliefs to avoid discrimination on the basis of religion.[159]

The reach of the statute's accommodation requirement, however, is limited by the provision that such accommodation cannot impose an undue hardship on the conduct of an employer's business.[160] Although the language contemplates accommodation may result in some hardship to the employer,[161] the

155. 42 U.S.C. § 2000e(j) (1982), which imposes religious accommodation obligations.

156. Butler v. Department of the Navy, 595 F. Supp. 1063, 1067 (D. Md. 1984).

157. *See* 42 U.S.C. § 2000e(j) (1982), which imposes religious accommodation obligations.

158. For example, in Sherbert v. Verner, 374 U.S. 398 (1963), the Supreme Court required South Carolina to modify its employment compensation laws to avoid penalizing persons unwilling to work on Saturdays because of their religious beliefs.

159. *See* 42 U.S.C. § 2000e(j) ("The term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates he is unable to reasonably accommodate an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.")

160. *See id.*

161. *See* Note, *Heaven Can Wait: Judicial Interpretation of Title VII's Religious Accommodation Requirement Since* TransWorld Airlines v. Hardison, 53 FORDHAM L. REV. 839, 841 (1985).

amendment does not make clear the exact nature of the balance.[162] Consequently, a definition of the undue hardship standard has been left largely to interpretation by the courts.[163]

The Supreme Court interpreted the undue hardship requirement in *Trans World Airlines v. Hardison,*[164] where an employer alleged that TWA had unreasonably failed to accommodate his needs to observe a Saturday Sabbath. The airline had refused, in accordance with a collective bargaining agreement, to assign other employees to cover his shift and had declined to encourage voluntary coverage by offering premium overtime pay to substitutes. The Supreme Court held that TWA had made reasonable efforts to accommodate Hardison's religious needs. The Court did not require TWA to make additional accommodations because the collective bargaining agreement served the legitimate purpose of distributing burdens and privileges in a way acceptable to both workers and management,[165] and because the airlines *reasonably* chose not to finance time off for employees on the basis of their religious beliefs.[166] As reasoned by the Court:

> To require TWA to bear more than a *de minimis* cost in order to give Hardison Saturdays off is an undue hardship. Like abandonment of the seniority system, to require TWA to bear additional costs when no such costs are incurred to give other employees the days off that they want would involve unequal treatment of employees on the basis of their religion. . . . While incurring extra costs to secure a replacement for Hardison might remove the necessity of compelling another employee to work involuntarily in Hardison's place, it would not change the fact that the privilege of having Saturdays off would be allocated according to religious beliefs.[167]

The two principals articulated by the *Hardison* Court in its interpretation of the religious accommodation requirement, the priority of seniority rights over the need for accommodation and the definition of undue hardship as no more than de minimis cost, places a minimal obligation on the employer to accommodate.[168] Moreover, the concern with reverse discrimination[169]

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162. *See* Anderson v. General Dynamics Convair Aerospace Div., 589 F.2d 397, 400 (9th Cir. 1978), *cert. denied,* 442 U.S. 921 (1971) ("There is no doubt that what constitutes reasonableness and undue hardship will vary under the circumstances of each case.").

163. *See* TWA v. Hardison, 432 U.S. 63, 75 (1977) ("the reach of [the accommodation] obligation has never been spelled out by Congress").

164. *Id.*

165. *Id.* at 77-78.

166. *Id.* at 84-85.

167. *Id.* at 84-85.

168. *See* A. Larson & L. Larson, *Employment Discrimination* 92.10, at 19-6 to -17 (1984); Hill, *Reasonable Accommodation and Religious Discrimination under Title VII: A Practitioner's Guide,* 34 ARB. J. DEC. 1979, at 19, 25; Comment, *Religious Discrimination in Employment—The Undoing of Title VII's Reasonable Accommodation Standard,* 44 BROOKLYN L. REV. 598, 620 (1978).

169. *See* Note, *Religious Discrimination and Title VII's Reasonable Accommodation Rule:* Trans World Airlines, Inc. v. Hardison, 39 OHIO ST. L.J. 639 (1978).

suggests a view of statutory interpretation that protects and even justifies only the smallest of efforts by the employer to accommodate his employees' religious needs.[170]

Several courts have strictly adhered to the mandate of *Hardison,* finding that any cost, even to a large employer, is likely to impose an undue hardship.[171] One court, for example, found that an employer's unsuccessful one and a half hour effort to reschedule an employee's workshift constituted a reasonable accommodation and more than this would entail undue hardship.[172] Similarly, in *Rohr v. Western Electric Inc.,*[173] the court applied the *Hardison* rationale, without any reference to the size of the employer's business, to find that all the alternatives posed by the plaintiff to accommodate his religious needs constituted undue hardship, especially where the imposition of a nonstandard work week would be a "threat to the morale of other employees."[174]

If a similar de minimis standard is read into the language of section 3(c)(3)[175] of the proposed Cancer Patients Employment Rights Act, any obligation on the employer to reasonably accommodate the needs of an employee with a cancer history will be rendered meaningless. Employers must be under an affirmative duty to provide reasonable accommodation which may, in some circumstances, require more than de minimis cost. The HEW regulations[176] which govern the implementation of section 504 of the Rehabilitation Act of 1973[177] provide this alternative: a more expansive accommodation standard which may require additional expense without constituting "undue hardship."[178]

b. An Effective Alternative: The HEW Regulations

The Rehabilitation Act was initially passed by Congress in 1972 as a means of integrating the handicapped into the workforce. Congress intended the statute to "highlight the parallels between the discrimination suffered by the

170. *See, e.g.,* Howard v. Haverty Furniture Cos., 615 F.2d 203, 206 (5th Cir. 1980) (where lost efficiency was found to produce more than de minimis cost). *But c.f.* Philbrook v. Ansonia Bd. of Educ., 757 F.2d 776 (1985), *cert. granted,* 106 S. Ct. 848 (1986) (where school teacher established prima facie case of religious discrimination under Title VII with regard to school board's policy of allowing only three days of paid leave for religious observance and not allowing three days of paid leave for personal business to be used for religious observance).

171. *See* Note, *supra* note 153, at 855. *See also* TWA v. Hardison, 432 U.S. 63, 84 (1977) (where court made no reference to actual costs).

172. Turpin v. Missouri-Kan-Tex R.R., 736 F.2d 1022, 1026 (5th Cir. 1984).

173. 567 F.2d 829 (8th Cir. 1977).

174. *Id.* at 830.

175. *See supra* note 89 and accompanying text.

176. 45 C.F.R. pt. 84 (1983).

177. 29 U.S.C. § 794 (1976).

178. *See* Note, *supra* note 161, at 841 n.16.

handicapped and other minority groups, manifested particularly through their segregation from the rest of society."[179] Section 504 of the Act attempts to achieve this end by prohibiting discrimination against otherwise qualified handicapped individuals under any program or activity receiving federal financial assistance.[180] Although section 504 does not expressly require recipients of federal funds to spend money to modify programs or facilities so that otherwise qualified handicapped individuals can use them more easily,[181] the implementing regulations issued by the HEW construe section 504 to mandate such accommodation requirements.[182]

Under the HEW regulations, an employer has a duty to make "reasonable accommodations" to the known physical or mental limitations of an otherwise qualified handicapped applicant or employee unless such accommodation would result in undue hardship.[183] To assist in the determination of what constitutes reasonable accommodation, the HEW has devised a list of alternative techniques by which an employee can be accommodated. These alternatives include restructuring job assignments, providing for part-time employment and modifying work schedules.[184]

The regulations further prescribe a detailed set of factors governing the determination of whether forcing an employer to provide accommodations would constitute undue hardship. In arriving at this determination, the decision-maker must balance the cost of the accommodations against the size, purpose, structure and budget of an employer's program or business.[185]

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179. Garrity v. Gallen, 522 F. Supp. 171, 205 n.119 (D.N.H. 1981).

180. *See supra* note 18.

181. *See* Note, *Accommodating the Handicapped: The Meaning of Discrimination under Section 504 of the Rehabilitation Act,* 55 N.Y.U. L. REV. 881 (1980).

182. *See* 45 C.F.R. § 84.12.

183. *Id.*

184. *Id.* The provision states in relevant part:

> (a) A recipient shall make reasonable accommodation to the known physical or mental limitations of an otherwise qualified handicapped applicant or employee unless the recipient can demonstrate that the accommodation would impose an undue hardship on the operation of its program.
>
> (b) Reasonable accommodation may include:
>
> (1) making facilities used by employees readily accessible to and usable by handicapped persons, and
>
> (2) job restructuring, part-time or modified work schedules, acquisition or modification of equipment or devices, the provision of readers or interpreters and other similar actions.

185. *Id.* The provision states in relevant part:

> In determining pursuant to paragraph (a) of this section whether an accommodation would impose an undue hardship on the operation of a recipient's program, factors to be considered include:
>
> (1) The overall size of the recipient's program with respect to number of employees, number and type of facilities, and size of budget;
>
> (2) The type of the recipient's operation, including the composition and structure of the recipient's workforce; and
>
> (3) The nature and cost of the accommodation needed.

Although the courts have articulated different views about the level or cost of inconvenience at which an accommodation becomes unduly burdensome,[186] several courts have taken an expansive view, holding that section 504 places a significant obligation on the employer to make reasonable accommodations. Thus, in *Nelson v. Thornburgh,*[187] the court held that the refusal of a state agency to provide readers for blind social workers was discriminatory within the meaning of section 504, despite its substantial expense. Likewise, in *Smith v. Administrator of Veterans Affairs,*[188] the court found that the provision of a supervisor and the administration of frequent blood tests for the employment of an epileptic nursing assistant was a reasonable accommodation under the Act.

Even though the employee with a cancer history may not require such extreme accommodation measures to be successfully integrated into the productive labor force, the HEW regulations provide a flexible standard for determining how reasonable accommodation should be defined in the bill. The HEW regulations avoid the rigidity of a quantitative threshold test, as evidenced by the de minimis standard, by requiring courts to balance the employee's needs against the degree of "undue hardship" which the employer can reasonably absorb. Under this standard, an employer will be under an obligation to accommodate the special needs of an employee with a cancer history for radiation treatment, physical checkups and doctor or hospital visits by modifying job assignments, rearranging work schedules and providing for part-time employment. Moreover, there is no evidence that such minimal accommodations will place an undue financial burden on the employer. To the contrary, one study has actually shown that it is cost effective for an employer to retain or hire a person with a cancer history. Turnover rate, absenteeism and work performance of cancer survivors was found to be comparable to the matched company population. Moreover, the study concluded that retaining cancer survivors enhanced the morale of the or-

186. *See, e.g.,* Southeastern Community College v. Davis, 442 U.S. 397 (1979) (where unanimous Court held section 504 did not require a federally assisted nursing program to admit an applicant with a severe hearing impairment); Bey v. Bolger, 540 F. Supp. 910, 927 (E.D. Pa. 1982) (offering "light duty status" to the handicapped employees who had not met five year minimum service requirement would be an undue hardship to the Postal Service because of losses of efficiency and extraordinary costs); Upshur v. Love, 474 F. Supp. 332, 342 (N.D. Cal. 1979) (section 504 would not require a school district to hire an aide for a blind administrator); *see also* American Pub. Transit Ass'n v. Lewis, 655 F.2d 1272, 1277-78 (D.C. Cir. 1981) (Dep't of Transportation regulations requiring that all transportation be made accessible to handicapped would have imposed unduly burdensome costs).

187. 567 F. Supp. 369, 379-82 (E.D. Pa. 1983).

188. 32 Fair Empl. Prac. Cas. (BNA) 986 (C.D. Cal. 1983). *See also* Crane v. Lewis, 36 Fair Emp. Prac. Cas. (BNA) 31 (D.D.C. 1982) (reasonable accommodation requires Federal Aviation Administration to provide hearing aid to former employee with hearing impairment to make re-employment feasible).

ganization as a whole; the employees knew the employer had a sense of commitment to his workers.[189]

4. Statutory Reconstruction: Defining an Appropriate Reasonable Accommodation Standard

A simple redrafting of section 3(c)(3)[190] can avoid statutory ambiguity in its interpretation and provide satisfactory guidelines for accommodation. If the bill is to effectuate the overall purposes of the Cancer Patients Employment Rights Act it must contain two provisions: first, it must place a mandatory requirement on the employer to reasonably accommodate the needs of a cancer survivor; second, it must make clear through the use of a specific set of proposals that the de minimis standard of reasonable accommodation does not apply to the context of cancer-based employment discrimination. An effective revision of section 3(c)(3) might read as follows:

> 3(c)(3) An employer, employment agency or labor organization shall make reasonable accommodation for the known physical needs of an employee with a cancer history unless the employer can show that the accommodation would impose an undue hardship.
>
> (a) Reasonable Accommodation shall include (1) job restructuring, (2) reassignment, (3) part-time or modified work schedules, and (4) other similar actions.
>
> (b) In determining pursuant to paragraph (a) of this section whether an accommodation would impose an undue hardship on the operation of an employer's business, factors to be considered include:
>
> (1) overall size of the employer's business with respect to number of employees and size of budget;
>
> (2) the type of the employer's operation, including the composition and structure of the recipient's workforce; and
>
> (3) the nature and cost of the accommodation needed.

CONCLUSION

Whether an amendment to Title VII of the Civil Rights Act of 1964 will provide employees with a cancer history with an effective means of combatting employment discrimination depends largely upon how the bill's statutory language will be interpreted by the courts. As presently drafted, the bill provides the cancer survivor with an anti-discrimination model insuring equal employment opportunities, while placing only minimal demands on

189. *See* Wheatly, *Employability of Persons With a History of Treatment of Cancer,* 33 CANCER 441-45 (1975) (regarding Metropolitan Life Insurance study).

190. *See supra* note 88 and accompanying text.

the employer to accommodate the cancer survivor's special needs. This Note demonstrates, however, that an effective anti-discrimination remedy must call for employers to recognize and take into account the differences between cancer survivors and other qualified applicants. If equality in result is to be achieved, legal significance must be given to the physiological differences and needs of the cancer survivor. Consequently, a reformulation of the bill, placing a mandatory accommodation requirement on the employer, is necessary if the cancer survivor is to be effectively integrated into the productive labor force.

KATHERINE J. STREICHER