

5-3-2021

Substantially Mutated: Are Genetic Mutations “Disabilities” Under the Americans with Disabilities Act?

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Recommended Citation

Jessica L. Loiacono, Comment, *Substantially Mutated: Are Genetic Mutations “Disabilities” Under the Americans with Disabilities Act?*, 62 B.C. L. REV. E. SUPP. II.-446 (2021), <http://lawdigitalcommons.bc.edu/bclr/vol62/iss9/26/>.

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SUBSTANTIALLY MUTATED: ARE GENETIC MUTATIONS “DISABILITIES” UNDER THE AMERICANS WITH DISABILITIES ACT?

Abstract: The Americans with Disabilities Act (ADA) prohibits discrimination on the basis of disability to ensure that disabled Americans are given equal opportunity to participate in all aspects of life. Title I of the ADA, in particular, prohibits employers from discriminating against employees because of a disability in all employment matters. Courts have struggled to consistently define which impairments constitute a disability under the statute. In June 2020, in *Darby v. Childvine, Inc.*, the U.S. Court of Appeals for the Sixth Circuit seemingly expanded ADA coverage by holding that Sherryl Darby plausibly alleged that she was disabled due to a genetic mutation. This Comment argues that the Sixth Circuit properly allowed Darby’s claim to survive a motion to dismiss, echoing the legislative intent behind the ADA Amendments Act of 2008.

INTRODUCTION

In 1990, the Americans with Disabilities Act (ADA or the Act) became a landmark piece of civil rights legislation making discrimination on the basis of disability illegal.¹ The Act garnered praise as the most extensive expansion of civil rights protections since the Civil Rights Act of 1964.² The passage of the ADA was particularly significant because statutory findings revealed systemic discrimination against disabled individuals who were being deprived of em-

¹ Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101–12213. July 26, 2020 marked the thirtieth anniversary of President George H.W. Bush’s signing of the Americans with Disabilities Act (ADA or the Act) into law. *ADA 30th Anniversary*, U.S. DEP’T OF JUST. CIVIL RIGHTS DIV., https://www.ada.gov/30th_anniversary/index.html [<https://perma.cc/BQ4N-HYQ3>]. As he signed the ADA, President Bush expressed the hopes of lawmakers and civil rights activists that the Act would allow disabled Americans to participate fully in “the rich mosaic of the American mainstream” by guaranteeing equal access in all aspects of life and that it would serve as a necessary expansion of legal and civil rights. George H.W. Bush, Remarks at the Signing of the Americans with Disabilities Act (July 26, 1990), https://www.ada.gov/ghw_bush_ada_remarks.html [<https://perma.cc/4NGC-LN3V>]. The ADA sought to end the discrimination and disenfranchisement of disabled Americans by obligating commercial facilities, employers, and public entities to open their doors in every way possible for such individuals. See 42 U.S.C. § 12101(b) (stating that the purpose of the ADA is to eliminate discrimination against disabled Americans in their everyday lives).

² *A Law for Every American*, N.Y. TIMES, July 27, 1990, at A26 (proclaiming that the ADA not only allows for greater participation in society for disabled Americans but also broadens civil rights for all Americans). The Civil Rights Act of 1964 was a landmark piece of legislation that outlawed discrimination in employment matters, voting rights, and public accommodations on the basis of race, color, religion, sex, or national origin. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241, 255 (1964).

ployment, access, and opportunities because of their impairments or perceived limitations.³ The Act sought to grant equal opportunity to disabled Americans to live a full and independent life, as well as to provide them with an avenue to redress discrimination.⁴ As such, the ADA created an affirmative duty of non-discrimination in three areas: employment, public services, and commercial facilities.⁵ Title I of the ADA, which concerns employment matters, prohibits employers from making decisions with regard to a current or prospective employee’s disability.⁶

Despite the ADA’s groundbreaking reach, the threshold issue for claimants remains whether they are “disabled” under the ADA.⁷ Although Congress called for individualized inquiries in each case to ensure broad coverage, courts in the 1990s and early 2000s increasingly took the disability determination into their own hands, granting employers’ motions to dismiss instead of letting juries decide.⁸

Recently, courts have had even more to consider, as medical advancements, like genetic testing, have allowed physicians to identify more conditions that may qualify as disabilities.⁹ Genetic testing provides valuable infor-

³ 42 U.S.C. § 12101(a)(5)–(6). For example, the Department of Education published a study providing that students whose teachers regarded them as disabled were three times as likely to drop out after the ninth grade than their able-bodied peers. Samuel R. Bagenstos, *Subordination, Stigma, and “Disability,”* 86 VA. L. REV. 397, 420–21 (2000). Those same students were 40% less likely to take the SAT exam than their non-disabled classmates. *Id.* at 421. Additionally, a 1999 Census Bureau study revealed that around 50% of disabled adults in America were employed compared to over 80% of working-age adults without disabilities. *Id.* The employment numbers result in lower incomes for disabled populations and perpetuate a cycle of discrimination. *Id.* As a result, in 1990, disabled Americans were more than twice as likely to live in poverty than the general population. *Id.* at 422.

⁴ Americans with Disabilities Act (ADA) of 1990, Pub. L. No. 101-336, § 2(a)(8), 104 Stat. 327 (1990).

⁵ 42 U.S.C. §§ 12101–12213 (2012). The ADA focuses its efforts in three major areas: employment (Title I), public services such as public transportation (Title II), and public accommodations and services, including privately-run commercial facilities (Title III). Americans with Disabilities Act § 1(b).

⁶ 42 U.S.C. § 12112(a) (prohibiting discrimination by an employer against a disabled employee in job applications, hiring decisions, termination, compensation, and other employment terms).

⁷ 29 C.F.R. § 1630.2(j)(1)(iii) (2020) (identifying the threshold issue of an ADA claim as whether an individual is substantially limited in a major life activity and thus is disabled); *see Darby v. Childvine, Inc.*, 964 F.3d 440, 444 (6th Cir. 2020) (noting that the court’s primary inquiry was whether Darby’s condition is a disability under the statute, the first prong of an ADA claim).

⁸ 29 C.F.R. § 1630.2(j)(1)(iv), (j)(3) (explaining that conducting an individualized assessment will almost always result in a finding that the individual is disabled and therefore covered under the Act); Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99, 115–16 (1999) (arguing that questions concerning whether an individual is disabled under the ADA should be determined through individualized inquiries decided by juries, not judges).

⁹ *See, e.g., Darby*, 964 F.3d at 445 (stating that the question in Darby’s case—whether her BRCA1 genetic mutation and abnormal epithelial cell growth constitutes a disability—was an issue of first impression at the circuit level). Genetic tests are performed using a blood or saliva sample, and they use an individual’s DNA to discover variants or mutations that indicate disease or an increased proclivity to develop a certain disease. *Genetic Testing*, CTRS. DISEASE CONTROL & PREVENTION

mation about an individual's risk of developing genetically linked diseases like Alzheimer's, diabetes, and breast cancer.¹⁰ Despite the benefits of genetic testing, lawmakers were concerned that genetic information could create new opportunities for discrimination.¹¹ In response to these growing concerns, Congress passed the Genetic Information and Nondiscrimination Act (GINA), which prohibits discrimination on the basis of genetic information in health insurance and employment.¹²

In June 2020, in *Darby v. Childvine, Inc.*, the U.S. Court of Appeals for the Sixth Circuit encountered an issue of first impression at the circuit level: whether a genetic mutation could be considered a disability under the ADA.¹³ The court held that, to survive a motion to dismiss, a plaintiff's BRCA1 genetic mutation qualifies as a disability under the ADA.¹⁴ This pronouncement seemingly extended the bounds of the statute's coverage to include genetic mutations.¹⁵

(Mar. 23, 2020), https://www.cdc.gov/genomics/gtesting/genetic_testing.htm [<https://perma.cc/7F7G-WCZ2>].

¹⁰ See Bradley A. Areheart & Jessica L. Roberts, *GINA, Big Data, and the Future of Employee Privacy*, 128 *YALE L.J.* 710, 719 (2019) (stating that genetic testing's primary purpose is to discover whether an individual is at a greater risk of developing a wide range of diseases); Jessica L. Roberts, *Preempting Discrimination: Lessons from the Genetic Information Nondiscrimination Act*, 63 *VAND. L. REV.* 439, 443 n.6 (2010) (explaining that genetic research has shown connections between genetic mutations and thousands of diseases, including Alzheimer's and different cancers).

¹¹ Genetic Information Nondiscrimination Act (GINA), Pub. L. 110-233, § 2(5), 122 Stat. 881 (2008) (codified in scattered section of 29 U.S.C. & 42 U.S.C.) (establishing a federal law to prohibit discrimination on the basis of genetic information after statutory findings that federal law did not sufficiently protect Americans from such discrimination). As genetic testing became cheaper and, thus, more prevalent, employers and insurers became increasingly able to make decisions based on an employee's or a policy holder's genetic makeup. Areheart, *supra* note 10, at 723. The Equal Employment Opportunity Commission (EEOC) offered a hypothetical scenario in which an employee's conditional job offer is rescinded after her genetic testing results showed a heightened risk for cancer. Paul Steven Miller, *Is There a Pink Slip in My Genes? Genetic Discrimination in the Workplace*, 3 *J. HEALTH CARE L. & POL'Y* 225, 239-40 (2000). The employer in that scenario discriminated against the prospective employee on the basis of genetic information demonstrating the mere chance that the employee would develop cancer and become unfit for work. *Id.* In 1995, in anticipation of this issue, the EEOC established policy guidance explaining that the ADA could cover dormant genetic mutations under the "regarded as" prong. *Id.* at 239; see *infra* note 29 (explaining that, under the ADA, individuals can establish that they are disabled if they are "regarded as disabled"). It is worth noting, however, that "[EEOC] guidance does not have the same force of law as a federal statute or regulation," and lawmakers still did not feel there was sufficient protection against genetic discrimination. Miller, *supra*, at 241.

¹² Genetic Information Nondiscrimination Act § 2(5); 42 U.S.C. § 2000ff-1(a) (prohibiting discrimination on the basis of genetic information in employment); 29 U.S.C. § 1182(a)(1)(F), (b) (prohibiting discrimination on the basis of genetic information in health insurance enrollment eligibility and premium contributions).

¹³ *Darby*, 964 F.3d at 445.

¹⁴ *Id.* at 446; see *infra* note 64 (explaining the medical implications of the BRCA1 mutation).

¹⁵ See *Darby*, 964 F.3d at 446 (declaring it an issue of first impression at the circuit level whether a genetic disorder can be a disability under the ADA); Daniel Pasternak, *Sixth Circuit Reverses Ohio Federal Court: Genetic Mutation Affecting Normal Cell Growth May Qualify as a Disability Under the ADA*

This Comment argues that the Sixth Circuit correctly held that the BRCA1 genetic mutation was a disability under the ADA Amendments Act of 2008 (ADAAA) and that Darby’s claim would not succeed under GINA.¹⁶ Part I of this Comment explains the statutory framework of the ADA, explores GINA as a potential remedy, and sets forth the facts and procedural history of *Darby*.¹⁷ Part II discusses the Sixth Circuit’s ruling and the claim’s interaction with the ADAAA.¹⁸ Finally, Part III argues that the Sixth Circuit correctly allowed Darby’s claim to survive a motion to dismiss.¹⁹ It also considers what Darby’s challenges would have looked like on remand, specifically the unlikelihood that Darby would succeed on a GINA claim.²⁰

I. MAKING A CASE FOR DISABLED AMERICANS

In 2020, in *Darby v. Childvine, Inc.*, the U.S. Court of Appeals for the Sixth Circuit held, in a case of first impression, that a genetic mutation may qualify as a disability under the ADA.²¹ Section A of this Part explains the framework of the ADA and the requirements for making a claim under the statute.²² Section B explores Title II of GINA as an alternative remedy for discrimination claims.²³ Finally, Section C lays out the facts and procedural posture of *Darby*.²⁴

A. Defining “Disability” Under the ADA

Title I of the ADA prohibits an employer from discriminating against an employee based on his or her disability.²⁵ To make a prima facie case under Title I of the ADA, individuals must prove that (1) they are disabled under 42

(US), SQUIRE PATTON BOGGS: EMP. L. WORLDVIEW (July 14, 2020), <https://www.employmentlawworldview.com/sixth-circuit-reverses-ohio-federal-court-genetic-mutation-affecting-normal-cell-growth-may-qualify-as-a-disability-under-the-ada-us/> [<https://perma.cc/ZJL4-Q4ZN>] (warning employers of increased liability exposure, explaining that the Sixth Circuit’s holding could give employees cognizable discrimination claims on the basis of genetic mutations under the ADA or GINA).

¹⁶ See 42 U.S.C. § 12102(4)(A)–(B) (stating that courts should interpret the word “disability” in the ADA in favor of broad coverage consistent with the goals of the ADA Amendments Act of 2008 (ADAAA)); 42 U.S.C. § 2000ff-1(a)(1) (prohibiting employers from discharging an employee because of the employee’s genetic information); *Darby*, 964 F.3d at 443 (noting that Darby’s employer was unaware of her BRCA1 mutation until pre-trial discovery).

¹⁷ See *infra* notes 21–72 and accompanying text.

¹⁸ See *infra* notes 73–115 and accompanying text.

¹⁹ See *infra* notes 116–127 and accompanying text.

²⁰ See *infra* notes 128–135 and accompanying text.

²¹ *Darby v. Childvine, Inc.*, 964 F.3d 440, 444 (6th Cir. 2020).

²² See *infra* notes 25–43 and accompanying text.

²³ See *infra* notes 44–52 and accompanying text.

²⁴ See *infra* notes 53–72 and accompanying text.

²⁵ Americans with Disabilities Act, 42 U.S.C. § 12112(a). The ADA’s stated purpose is “to provide a clear and comprehensive national mandate” that prohibits discrimination against disabled Americans. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, § 2(b)(1), 104 Stat. 327 (1990).

U.S.C. § 12102, (2) they were otherwise qualified to perform the job, and (3) they would not have been fired or adversely impacted but for their disability.²⁶ A disability need not be the sole cause of the employment decision to constitute discrimination, but claimants must show that it was at least an animating factor.²⁷

Thus, for any ADA claim, the threshold issue is whether an individual is disabled within the meaning of the statute.²⁸ To be “disabled” under the ADA, individuals must establish that they fall within one of the three § 12102(1) categories: (1) they have an impairment which substantially limits at least one major life activity, (2) they have a record of their disability, or (3) they are regarded as disabled.²⁹

Specifically, the first § 12102 category requires claimants to show that they are impaired and that the impairment “substantially limits one or more major life activities.”³⁰ The Act does not define impairments that substantially limit at least one major life activity, but federal regulations provide a non-exhaustive, illustrative list of physical and mental impairments that can rise to the level of disability under the statute.³¹

To define “major life activities” in particular, the ADA provides another non-exhaustive list and suggests that an activity’s significance to the claimant is paramount to determining whether an impairment qualifies as a disability.³²

²⁶ 42 U.S.C. § 12112(a); *Darby*, 964 F.3d at 444.

²⁷ *Lewis v. Humboldt Acquisition Corp.*, 681 F.3d 312, 321 (6th Cir. 2012) (establishing that the statute prohibits discrimination on the basis of one’s disability that is a “but for” cause of an adverse employment decision (citing *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 176 (2009))). Previously, courts relied on a more stringent standard requiring plaintiffs to show that their disability was the only factor in an employer’s adverse decision. *Donald v. Sybra, Inc.*, 667 F.3d 757, 763 (6th Cir. 2012) (stating that a plaintiff must establish that her employer “discharged her *solely* because of the handicap,” which espouses the former standard) (emphasis added).

²⁸ *See Darby*, 964 F.3d at 444 (stating that to move forward on discrimination claims under the ADA, claimants must plausibly show they are actually disabled).

²⁹ 42 U.S.C. § 12102(1). The statute states that “[t]he term ‘disability’ means, with respect to an individual: (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such impairment; or (C) being regarded as having such impairment” *Id.* This Comment focuses on the first prong of the definition of disability: whether a condition substantially limits at least one major life activity. *See Darby*, 964 F.3d at 445 (analyzing whether *Darby*’s genetic mutation and epithelial cell growth substantially limited her major life activity of normal cell growth and was so severe as to warrant a double mastectomy).

³⁰ 42 U.S.C. § 12102(1)(A).

³¹ 29 C.F.R. § 1630.2(h) (2020); *see* 42 U.S.C. § 12102(1)(A) (omitting examples of physical or mental impairments that would constitute a disability under the statute). The federal regulations’ list of impairments include: “(1) [a]ny physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more body systems, such as neurological, . . . respiratory . . . , cardiovascular, reproductive, digestive, genitourinary, immune, circulatory . . . ; or [a]ny mental or psychological disorder” 29 C.F.R. § 1630.2(h).

³² *See* 42 U.S.C. § 12102(2)(A)–(B) (“[M]ajor life activities include, but are not limited to, caring for oneself, performing manual tasks, . . . and working . . . [and] also include[] the operation of a major bodily function, including but not limited to . . . normal cell growth, . . . [among others].”).

The Supreme Court affirmed this understanding when, in 1998, in *Bragdon v. Abbott*, it held that the plain meaning of “major” in “major life activity” suggested that determining whether a condition is a disability depends on the significance of the activity impaired.³³ Section 12102, however, includes a wide range of life activities, such as taking care of oneself, walking, working, and bodily functions like normal cell growth, digestion, and reproductive functions.³⁴

To satisfy the “substantially limiting” requirement, claimants cannot simply show that a condition is capable of limiting a major life activity but instead must establish that it in fact does so.³⁵ In other words, if a condition does not presently and substantially limit a major life activity, it will not qualify as a disability under the ADA.³⁶ Additionally, a condition that only results in a mere inconvenience will not be considered “substantially limiting” and thus will not rise to the level of a disability.³⁷

Additionally, the federal regulations provide rules of construction for evaluating a substantial limitation, explaining that conditions that substantially limit an individual’s ability to perform a major life activity, when compared to others in the general population’s ability to perform that same activity, satisfy § 12102(1)(A).³⁸ The regulations also explain that courts do not need to rely on scientific or medical evidence when comparing individuals to the general population.³⁹ Moreover, the degree of limitation is not meant to be an exacting

³³ *Bragdon v. Abbott*, 524 U.S. 624, 638 (1998); see also 29 C.F.R. § 1630.2(i)(2) (stating that courts must not determine whether an activity is a “major life activity” under the ADA by evaluating whether it is “of central importance to daily life”). In 1998, in *Bragdon v. Abbott*, the U.S. Supreme Court held that because the claimant’s human immunodeficiency virus (HIV) substantially limited reproduction, a major life activity, HIV was a disability as defined by the ADA. 524 U.S. at 641. The Court questioned the significance of reproduction to the claimant individually, however, noting that she neither wanted to have children nor believed that the HIV diagnosis would substantially limit *her* life. *Id.* at 659 (Rehnquist, C.J., concurring in part and dissenting in part). In response to subsequent holdings that narrowed ADA coverage, Congress passed the ADAAA, which reinstated Congress’s intent for broad coverage by reiterating that courts should focus their inquiries on whether employers discriminated against an employee and not whether the employee is disabled. ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (2009).

³⁴ 42 U.S.C. § 12102(2).

³⁵ See *Darby v. Childvine, Inc.*, 964 F.3d 440, 446 (6th Cir. 2020) (stating that an impairment that is capable of substantially limiting a major life activity, but does not presently do so, cannot be considered a disability under the ADA); *Bragdon*, 524 U.S. at 631, 637 (concluding that HIV is a disability protected under the ADA because the disease affects cell growth and other major bodily functions, not because it will eventually develop into AIDS); *Shell v. Burlington N. Santa Fe Ry. Co.*, 941 F.3d 331, 335–36 (7th Cir. 2019) (holding that obesity is not covered under the ADA as a disability despite the medical conditions that might develop as a result).

³⁶ See *Darby*, 964 F.3d at 446 (explaining that a condition only identified as one that may lead to a more serious condition later is not covered by the ADA).

³⁷ See 29 C.F.R. § 1630.2(j)(1)(ii) (explaining that an impairment need not completely prevent individuals from performing a major life activity to be considered substantially limiting, but every impairment will not be considered a disability).

³⁸ *Id.*

³⁹ *Id.* § 1630.2(j)(1)(v).

standard that precludes individuals from coverage.⁴⁰ The Act instructs courts to focus on whether employers have complied with their affirmative duty of non-discrimination instead of on the claimant's level of impairment.⁴¹

As a whole, the Act calls for a broad interpretation to protect as many individuals as possible and employs imprecise, non-medical terminology to distinguish between disabilities that are covered and other, non-covered illnesses or impairments.⁴² Because the ADA lacks a comprehensive list of impairments, major activities, or limitations, each claim brought under the ADA requires an individualized inquiry.⁴³

B. Redressing Discrimination Claims Under GINA

In 2008, Congress passed GINA to alleviate growing fears that genetic testing would reveal individuals' heightened risk for disease, making insurance companies less willing to cover the individuals and employers less likely to hire them.⁴⁴ GINA prohibits discrimination on the basis of genetic information

⁴⁰ *Id.* § 1630.2(j)(1)(i); see 42 U.S.C. § 12102(4)(A)–(B); ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2(b)(2)–(4), 122 Stat. 3553 (2009) (rejecting several Supreme Court decisions that incorrectly interpreted “substantially limits” to “require a greater degree of limitation than was intended by Congress” and created “too high a standard,” thereby eliminating protection for many otherwise qualified individuals).

⁴¹ ADA Amendments Act of 2008 § 2(b)(5). The ADA governs the standard the EEOC uses in applicable employment actions. See 29 C.F.R. § 1630.1(a) (stating that the regulation's purpose is to implement Title I of the ADA). Both the ADA and subsequent amendments make clear that coverage under the ADA is broad and the inquiry should focus on whether discrimination has occurred by determining whether the employer has complied with its statutory obligations. See 42 U.S.C. § 12102(4)(A) (stating that courts should interpret “disability” in favor of broad coverage under the statute and consistent with the ADAAA); 29 C.F.R. § 1630.1(a) (stating that the ADA and ADAAA provide “clear, strong, consistent” standards to prohibit discrimination against disabled individuals).

⁴² See 42 U.S.C. § 12102(4)(A) (stating that courts should interpret the definition of disability in favor of broad coverage); Isaac S. Greaney, *The Practical Impossibility of Considering the Effect of Mitigating Measures Under the Americans With Disabilities Act of 1990*, 26 FORDHAM URB. L. J. 1267, 1272 (1999) (explaining that every claim under the ADA requires an individualized inquiry because key terms like “substantially limits” and “major life activity” are not fully defined in the statute). When Congress passed the ADA in 1990, an estimated forty-three million Americans were physically or mentally disabled without a federal remedy for discrimination claims. Americans with Disabilities Act § 2(a)(1). The ADA defines a disability with three elements: (1) a “physical or mental impairment” that (2) “substantially limits” (3) “one or more major life activities.” 42 U.S.C. § 12102(1); *Darby v. Childvine, Inc.*, 964 F.3d 440, 445 (6th Cir. 2020) (highlighting the three major components of the ADA's definition of a disability). In providing examples of what may be considered a substantial limitation or a major life activity, the ADA uses phrases like “such as” and “but not limited to,” making clear that these lists are not exhaustive. See *Bragdon v. Abbott*, 524 U.S. 624, 639 (1998) (pointing out that the listed examples of life activities and limitations in the statute are illustrative and not exhaustive). Furthermore, the rules of construction provide that the definition of disability should be “construed in favor of broad coverage of individuals under this chapter, to the maximum extent permitted by the terms of this chapter.” 42 U.S.C. § 12102(4)(A) (emphasis added).

⁴³ 29 C.F.R. § 1630.2(j)(1)(iv); Greaney, *supra* note 42, at 1272.

⁴⁴ Genetic Information Nondiscrimination Act of 2008, Pub. L. No. 110-233, § 2(1)–(5), 122 Stat. 881 (2008) (codified in scattered section of 29 U.S.C. & 42 U.S.C.) (establishing the need to protect

in two areas: health insurance (Title I) and employment (Title II).⁴⁵ Title II bars employers from requesting or purchasing genetic information.⁴⁶

Proponents of the legislation claimed that civil rights laws, before the ADA, were insufficient to protect individuals from discrimination on the basis of genetic information.⁴⁷ GINA, however, is not without critics.⁴⁸ These critics suggest, for example, that GINA is ineffective because Americans are unaware of the statute, presumably given the short amount of time that genetic testing has been available, and that it addresses a non-existent problem.⁴⁹ Plaintiffs have also criticized GINA for the difficulty they face succeeding on

individuals from genetic discrimination and to encourage people to avail themselves of genetic testing); Areheart, *supra* note 10, at 722 (suggesting that Congress passed GINA in large part as a response to the lagging genetic testing industry); Rick Swedloff, *The New Regulatory Imperative for Insurance*, 61 B.C. L. REV. 2031, 2061–62 (2020) (positing that individuals may be disincentivized from undergoing genetic testing if insurers could use test results in risk assessments). Although genetic testing became cheaper and more available, the market did not grow, causing life-science investors to panic. Areheart, *supra* note 10, at 722–23. Some scholars have suggested that GINA was a solution to boost the struggling genetic testing industry and increase demand for testing by assuring individuals that they would not lose their health insurance or be fired based on their genetic test results. *Id.* at 723.

⁴⁵ 29 U.S.C. § 1182(a)(1)(F), (b)(3) (prohibiting health insurance issuers from establishing adverse rules based on an individual’s genetic information); 42 U.S.C. § 2000ff-1(a) (2012) (prohibiting discrimination on the basis of genetic information in employment).

⁴⁶ 42 U.S.C. § 2000ff-1(a); AMANDA K. SARATA, CONG. RSCH. SERV., RL34584, THE GENETIC INFORMATION AND NONDISCRIMINATION ACT OF 2008 (GINA) 1, 7–8, 13 (2015), <http://crsreports.congress.gov/product/pdf/RL/RL34584/16> [<https://perma.cc/JP9C-QRMB>] (describing the scope of GINA’s employment coverage). GINA only created a cognizable claim for disabled individuals in health insurance and employment, which is narrower in scope than some civil rights legislation. *See* Genetic Information Nondiscrimination Act §§ 101, 201 (prohibiting discrimination on the basis of genetic information in health insurance policies and employment decisions); Areheart, *supra* note 10, at 724–25 (comparing GINA’s limited scope, which applies to health insurance and employment, against other civil rights laws, which frequently cover employment, public facilities, and government services).

⁴⁷ *See* Roberts, *supra* note 10, at 444–45 (explaining that lawmakers were concerned that genetic information would not be covered under Title I of the ADA as a result of the Supreme Court’s heightened standards in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams* and *Sutton v. United Airlines, Inc.*, giving credence to critics’ arguments that current antidiscrimination laws did not protect genetic information).

⁴⁸ *See* Areheart, *supra* note 10, at 745 (pointing out that GINA has almost exclusively received negative feedback from legal scholars and that it suffers from a general lack of awareness).

⁴⁹ *See* Roberts, *supra* note 10, at 469 (explaining that there is little evidence of genetic-based discrimination documented or investigated in the health insurance industry and within the scientific community); Amanda L. Laedtke et al., *Family Physicians’ Awareness and Knowledge of the Genetic Information Non-Discrimination Act (GINA)*, 21 J. GENETIC COUNSELING 345, 348 (2012) (reporting that most American physicians who responded to the survey had no awareness or limited knowledge of GINA). Researchers at Northwestern University conducted a survey of 1,500 family physicians between 2009 and 2010 to gauge physicians’ concerns over genetic discrimination and their knowledge of GINA, which Congress had recently passed. Laedtke, *supra*, at 347. The results showed that 54.5% of responding physicians had no awareness of GINA, and that, among all respondents, 28.8% said they were only “slightly concerned” about the prospect of genetic discrimination by employers. *Id.* at 348.

GINA discrimination claims, with many failing to show that their employers in fact knew their genetic information.⁵⁰

Compared to other areas of civil rights law, there is a noticeable lack of case law around genetic information, making it difficult for courts to establish the elements of a prima facie case.⁵¹ Some courts, however, have held that, in an employment discrimination claim under GINA, plaintiffs must establish that (1) they were qualified for the position, (2) they were adversely impacted by the employment decision, and (3) that the employment decision was based on genetic information obtained from testing.⁵²

C. Facts and Procedural Posture of Darby

In 2020, in *Darby*, the Sixth Circuit held that a gene mutation that inhibited normal cell growth may qualify as a disability under the ADA.⁵³ Plaintiff-appellant Sherryl Darby sued her former employer alleging that it violated the ADA when it fired her after she took medical leave to undergo a double mastectomy.⁵⁴

Shortly after starting work at Kids ‘R’ Kids Learning Academy, Darby informed her supervisor that she had breast cancer and would undergo surgery later that month.⁵⁵ Darby’s supervisor scoffed at the idea and insisted that she push back her surgery until after her probationary period expired, suggesting that Kids ‘R’ Kids would likely fire her if she took time off for surgery during that time.⁵⁶ In fear of losing her job, Darby pushed the date of her surgery

⁵⁰ See Areheart, *supra* note 10, at 743 (noting that employees are often unable to show that their employers know of or possessed their genetic information).

⁵¹ See *Jackson v. Regal Beloit Am., Inc.*, No. 16-134-CJS, 2018 WL 3078760, at *15 (E.D. Ky. June 21, 2018) (stating that the elements for establishing a prima facie case under GINA remain unclear).

⁵² *Id.*

⁵³ *Darby v. Childvine, Inc.*, 964 F.3d 440, 444 (6th Cir. 2020); see § 12102(1) (defining “disability”).

⁵⁴ *Darby*, 964 F.3d at 442. The plaintiff initially requested time off to undergo a double mastectomy and told her employer she had been diagnosed with breast cancer. *Id.* at 442. Childvine, Inc. only later found out through discovery that Darby did not have cancer. *Id.* at 443. Instead, Darby had undergone surgery because she tested positive for the BRCA1 mutation and doctors had found epithelial cell growth. *Id.*

⁵⁵ *Id.* at 442. Childvine, Inc. is a franchise incorporated in Ohio doing business as Kids ‘R’ Kids. SEC’Y OF STATE OF OHIO, ARTICLES OF INCORPORATION NO. 20010091142 (2001); see *The Kids ‘R’ Kids Story*, KIDS R KIDS, <http://kidsrkids.com/the-kids-r-kids-story/> [<https://perma.cc/6Y3J-6XPG>] (summarizing the creation and expansion of Kids ‘R’ Kids schools across the country). Kids ‘R’ Kids Learning Academy is an international education corporation that provides daycare, preschool, and kindergarten programs. KIDS ‘R’ KIDS, *supra*.

⁵⁶ *Darby*, 964 F.3d at 442. Darby initially requested time off and notified her supervisor, Tyler Mayhugh, of her alleged breast cancer diagnosis within the ninety-day probationary period for new employees. *Id.* A probationary period is a “trial period” that typically begins after an employee is hired, and it generally lasts between three and six months. WOLTERS KLUWER, HR COMPLIANCE

back, but her two supervisors continued to harass her about the length of time she had requested for leave.⁵⁷ Darby’s supervisor eventually approved her request, but when she contacted Kids ‘R’ Kids to discuss returning to work after her surgery, a supervisor told her to bring a medical release.⁵⁸ When Darby returned to work with her medical release as instructed, her supervisor stated that her employment had already been terminated.⁵⁹ Days later, Darby received a termination letter dated October 24th—the last day of her ninety-day probationary period.⁶⁰

Darby sued her former employer in the U.S. District Court for the Southern District of Ohio, claiming that it had violated her rights under Title I of the ADA and that the reasons cited for her termination were pretextual.⁶¹ In her complaint, Darby asserted that she had breast cancer.⁶² This, however, was false; Darby did not have cancer.⁶³ Rather, Darby had tested positive for the BRCA1 genetic mutation and had been diagnosed with abnormal cell growth.⁶⁴ Darby requested to submit an amended complaint wherein she would allege that because the BRCA1 gene limits normal cell growth and contributes to the growth of abnormal cells, she was disabled.⁶⁵ In other words, she wished to

LIBRARY ¶ 46, 110 (2020). During this trial period, employers can evaluate a new employee’s performance and may terminate their employment at will. *Id.*

⁵⁷ *Darby*, 964 F.3d at 442–43. Darby’s complaint named both her supervisor Tyler Mayhugh and the franchise co-owner Samantha Doczy. *Id.* Although Samantha Doczy later went by Samantha Blizzard, the court continued to refer to her as “Doczy” for consistency. *Darby v. Childvine, Inc.*, No. 18-cv-00669, 2019 WL 6170743, at *1 n.2 (S.D. Ohio Nov. 20, 2019), *rev’d* 964 F.3d 440 (6th Cir. 2020).

⁵⁸ *Darby*, 964 F.3d at 442–43. Doczy approved Darby’s request for time off but only after Darby agreed to use her vacation and sick days for recovery time. *Id.* at 443. A medical release form grants a physician the right to share medical information with third parties on behalf of a patient. *Employers & Health Information in the Workplace*, U.S. DEP’T HEALTH & HUM. SERVS. (Nov. 20, 2020), <https://www.hhs.gov/hipaa/for-individuals/employers-health-information-workplace/index.html> [<https://perma.cc/P2F3-7C5E>]. Employers may use these forms to certify that an employee is able to return to work or obtain other information from an employee’s physician. *Id.*

⁵⁹ *Darby*, 964 F.3d at 443.

⁶⁰ *Id.* Darby received a termination letter by mail days after her initial return to work. *Id.*

⁶¹ *Id.* Childvine, Inc. cited Darby’s “‘unpleasant’ attitude, dress code violations, and ‘being unable to work’” as reasons for her termination. *Id.*

⁶² *Id.*; Amended Complaint & Jury Demand at 3, *Darby v. Childvine, Inc.*, No. 18-cv-00669 (S.D. Ohio Nov. 16, 2018).

⁶³ *Darby*, 964 F.3d at 443.

⁶⁴ *Id.* Childvine, Inc. only found out that Darby did not have cancer after initial discovery. *Id.* Medical records showed that Darby had only tested positive for the BRCA1 genetic mutation and that she had a family history of cancer. *Id.* The “breast cancer 1” gene, commonly known as BRCA1, can prevent humans from developing certain cancers when functioning properly. *The BRCA1 and BRCA2 Genes*, CTNS. DISEASE CONTROL & PREVENTION, https://www.cdc.gov/genomics/disease/breast_ovarian_cancer/genes_hboc.htm [<https://perma.cc/S6EM-HXXP>]. Conversely, individuals with a mutation in the BRCA1 gene have a 70% lifetime risk of developing breast cancer, as compared to approximately 12% in non-carriers. Lukas Semmler et al., *BRCA1 and Breast Cancer: A Review of the Underlying Mechanisms Resulting in the Tissue-Specific Tumorigenesis in Mutation Carriers*, 22 J. BREAST CANCER 1, 2 (2019).

⁶⁵ *Darby*, 964 F.3d at 443.

allege that her disability was covered under the ADA because the genetic mutation and epithelial cell growth substantially limited the major life activity of normal cell growth.⁶⁶ Rather than allowing Darby to submit the amended complaint, the district court had Darby make a number of admissions, including that she tested positive for the BRCA1 genetic mutation, which the court ultimately treated as part of her complaint.⁶⁷

Childvine filed a motion to dismiss, claiming that Darby failed to plausibly allege she was disabled under the ADA.⁶⁸ The district court found that Darby's diagnosis with the BRCA1 gene was equivalent to "the absence of cancer" and granted Childvine's motion.⁶⁹ In doing so, the district court held that conditions which may lead to a disease in the future are not "physical impairments" within the meaning of § 12102(1).⁷⁰ Darby appealed the district court's decision to the Sixth Circuit.⁷¹ In a case of first impression at the circuit level, the Sixth Circuit held that Darby plausibly alleged that the genetic mutation may be a disability covered by the ADA, reversing the district court's ruling and remanding the case for further proceedings.⁷²

⁶⁶ *Id.*; see Amended Complaint & Jury Demand, *supra* note 62, at 3 (arguing how Darby was able to succeed on her ADA claim).

⁶⁷ *Darby*, 964 F.3d at 445. During the course of discovery, and after the defendant uncovered that Darby had never been diagnosed with breast cancer, Darby requested to amend her complaint to reflect eight admissions. *Id.* at 443. Among these admissions, Darby revealed that (1) her gynecologist discovered abnormal cell growth and recommended genetic testing, (2) she had tested positive for the BRCA1 genetic mutation, (3) the BRCA1 gene substantially limits normal cell growth, and (4) her doctors recommended she undergo surgery because of the BRCA1 gene. *Id.* Darby challenged the district court's decision to treat the admissions as part of her complaint, alleging that the court erred in not treating the motion to amend her complaint as one for summary judgment pursuant to Federal Rule of Civil Procedure 12(d) and that she was unable to address fully her proposed amendment to the district court. *Id.* at 444; see FED. R. CIV. P. 12(d).

⁶⁸ Defendant Childvine's Motion to Dismiss at 1, *Darby v. Childvine, Inc.*, No. 18-cv-00669 (S.D. Ohio Jan. 15, 2019).

⁶⁹ *Darby*, 964 F.3d at 443–44; see also *Darby v. Childvine, Inc.*, No. 18-cv-00669, 2019 WL 6170743, at *4 (S.D. Ohio Nov. 20, 2019), *rev'd* 964 F.3d 440 (6th Cir. 2020). ("[T]his is not a circumstance akin to remission of cancer. Rather, it is presently, the *absence* of cancer."). The district court also emphasized the potential danger in allowing Darby's claim to proceed. *Darby*, 2019 WL 6170743, at *4. The court reasoned that expanding the definition of disability to include any condition that may lead to disability in the future could ostensibly bring all employees under the ADAAA. *Id.* The district court's finding that the BRCA1 mutation was not a present disability is analogous to the Supreme Court's decision in *Bragdon v. Abbott*, where it held that HIV was a qualified disability because of its "constant and detrimental effect on the infected person's hemic and lymphatic systems from the moment of infection." See 524 U.S. 624, 637 (1998) (holding that HIV is a "disability" because of its present physical impairment, not because it could eventually develop into AIDS); *Darby*, 2019 WL 6170743, at *4 (holding that Darby's genetic mutation did not constitute a present physical impairment, like HIV did, and dismissing Darby's complaint).

⁷⁰ *Darby*, 2019 WL 6170743, at *4.

⁷¹ *Darby*, 964 F.3d at 445.

⁷² *Id.* at 445, 447. The Sixth Circuit also determined that Darby sufficiently pleaded all elements of her discrimination claim. *Id.* at 447. The Sixth Circuit determined that because the district court evaluated Darby's admissions as if they were part of her complaint, they did not consider matters

II. RESTORING THE BREADTH OF ADA COVERAGE

Congress enacted the ADA in 1990 to provide clear guidelines that would protect disabled Americans from discrimination in all aspects of life.⁷³ After the ADA’s passage but before the ADAAA, the U.S. Supreme Court narrowed the ADA’s scope by implementing stricter standards for individuals to prove they are “disabled.”⁷⁴ Section A of this Part describes the U.S. Court of Appeals for the Sixth Circuit’s rationale in *Darby v. Childvine, Inc.*⁷⁵ Section B explains the impact of the ADAAA on the Sixth Circuit’s decision.⁷⁶

A. Why Did the Sixth Circuit Allow *Darby*’s Claim to Proceed?

In 2020, in *Darby*, the Sixth Circuit held that *Darby* plausibly alleged that the BRCA1 genetic mutation qualifies as a disability under the ADA for the purpose of surviving a motion to dismiss.⁷⁷ The court, however, did not determine whether the BRCA1 genetic mutation, or any genetic mutation, is in fact a disability.⁷⁸

To establish a case under Title I of the ADA, claimants must first establish they are disabled.⁷⁹ Thus, *Darby* was required to show, at the pleading stage, that it is at least plausible that the BRCA1 mutation and epithelial cell growth substantially limited her normal cell growth, as compared to the general population.⁸⁰ To do so, *Darby* alleged that doctors discovered an abnormal cell growth, that genetic testing revealed the BRCA1 genetic mutation, which impairs normal cell growth, and that her doctors recommended a double mastectomy as a result.⁸¹

outside of the pleadings to trigger Rule 12(d). FED. R. CIV. P. 12(d); *Darby*, 964 F.3d at 444; see FED. R. CIV. P. 15(a) (allowing plaintiffs to amend pleadings before trial). Furthermore, *Darby* alleged she was unable to present formally her amendment to the district court. *Darby*, 964 F.3d at 444. The Sixth Circuit, however, did not take issue with the district court’s management of the admissions because she did not make any other claims outside of the amendment. *Id.*

⁷³ Americans with Disabilities Act (ADA) of 1990, Pub. L. No. 101-336, § 2, 104 Stat. 327 (1990).

⁷⁴ ADA Amendments Act (ADAAA) of 2008, Pub. L. No. 110-325, § 2(a)–(b), 122 Stat. 3553 (2009) (noting that the Supreme Court’s holdings resulted in eliminating protection for many individuals who were intended to be afforded protection under the ADA).

⁷⁵ See *infra* notes 77–93 and accompanying text.

⁷⁶ See *infra* notes 94–115 and accompanying text.

⁷⁷ *Darby v. Childvine, Inc.*, 964 F.3d 440, 442 (6th Cir. 2020).

⁷⁸ *Id.* at 447.

⁷⁹ *Id.* at 444.

⁸⁰ *Darby*, 964 F.3d at 445; see 29 C.F.R. § 1630.2(j)(1)(ii), (v) (2020) (stating that an impairment will rise to the level of disability under the ADA where it substantially limits an individual’s ability to perform a major life activity compared to the general population and explaining that a scientific inquiry or finding is not required to make these comparisons).

⁸¹ *Darby*, 964 F.3d at 443.

After establishing their disability, claimants must also show (1) they are qualified to perform the job, (2) with reasonable accommodation, and (3) that they suffered an adverse employment action because of their disability.⁸² Darby satisfied the first and second elements because she alleged that with the reasonable accommodation of a medical leave of absence, she could perform the essential functions required of an administrative assistant.⁸³ Finally, Darby pleaded several facts that satisfied the third element, including her supervisor's doubt as to whether she would remain employed if Darby did not delay the surgery, both supervisors' continued harassment over the length of her requested leave, and the fact that her termination letter was dated for the last day of her probationary period.⁸⁴

At the motion to dismiss stage, the Sixth Circuit only reviewed whether Darby's discrimination claim, taken as true, was redressable under the ADA.⁸⁵ The court held that, because Darby sufficiently alleged that she is disabled, she satisfied the first prong of an ADA claim.⁸⁶ To reach this conclusion, the Sixth Circuit conducted an individualized inquiry with respect to each of the three major requirements of a § 12102(1) disability and concluded that the BRCA1 mutation could constitute a physical impairment that substantially limited the major life activity of normal cell growth.⁸⁷ Citing the ADA's rules of construction in defining "disability," the Sixth Circuit interpreted disability in favor of maximum coverage.⁸⁸ Because Darby did not have to prove that her BRCA1 gene in fact caused her abnormal cell growth nor that the gene substantially limited normal cell growth at the time of her lawsuit, the court reasoned it is *plausible* that the BRCA1 mutation rises to the level of disability

⁸² *Id.* at 444 (laying out the elements of an ADA Title I claim); *Michael v. City of Troy Police Dep't*, 808 F.3d 304, 307 (6th Cir. 2015) (same); *Frengler v. Gen. Motors*, 482 F. App'x 975, 976 (6th Cir. 2012) (same); *see* 42 U.S.C. § 12112(b) (explaining the rules of construction for identifying discrimination in employment settings). The ADA broadly defines reasonable accommodations and provides a list of examples, such as making existing structures accessible to disabled individuals, providing training or implementing new policies, or modifying an employee's work schedule. 42 U.S.C. § 12111(9).

⁸³ Amended Complaint & Jury Demand, *supra* note 62, at 3, 5; *Darby*, 964 F.3d at 447.

⁸⁴ Amended Complaint & Jury Demand, *supra* note 62, at 3–4; *Darby*, 964 F.3d at 442–43, 447 (explaining that Darby's termination alone could not establish causation, but that Darby pleaded other facts that plausibly established discrimination).

⁸⁵ *Darby*, 964 F.3d at 444; *see Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009) (holding that plaintiffs must state a plausible claim for relief, not one that merely alleges the possibility of the defendant's liability, to survive a motion to dismiss); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007) (holding that plaintiffs must allege facts that state a plausible claim for relief to survive a motion to dismiss).

⁸⁶ *Darby*, 964 F.3d at 445–46.

⁸⁷ *Id.* at 447 ("While reference to additional sources might yield a second opinion on these medical questions, Darby's factual allegations are sufficient to survive a motion to dismiss.").

⁸⁸ *Id.* at 445; *see* 42 U.S.C. § 12102(4) (providing guidance for courts that encourages "broad coverage" when determining whether a plaintiff's impairment qualifies as a "disability").

based on Darby’s complaint.⁸⁹ After plausibly alleging that her BRCA1 genetic mutation plausibly rendered her disabled, Darby sufficiently pleaded the remaining elements to establish a prima facie case under Title I.⁹⁰

By its own admission, the Sixth Circuit’s holding is quite narrow, as it merely kept open the possibility that a genetic mutation is a disability as defined by the ADA.⁹¹ Relying on *Bragdon v. Abbott*, a 1998 case wherein the Supreme Court held that the human immunodeficiency virus (HIV) is a disability under the ADA even during the asymptomatic phase, the Sixth Circuit concluded that Darby had only plausibly alleged a present substantial limitation on normal cell growth.⁹² Therefore, had the case not settled, the principal issue on remand would likely have been whether the BRCA1 mutation presently and substantially affects normal cell growth in a manner similar to HIV.⁹³

B. A Pivotal Moment: The ADA Amendments Act of 2008

It remains unclear whether discovery on remand would have produced medical evidence supporting Darby’s claim.⁹⁴ What is clear, however, is that

⁸⁹ *Darby*, 964 F.3d at 445. Citing corresponding federal regulations to the ADA, the Sixth Circuit explained that cancer is among several specifically listed impairments that, “at a minimum,” substantially limit major life activities. *Darby*, 964 F.3d at 446; see 29 C.F.R. § 1630.2(j)(3)(iii) (2020) (stating that cancer substantially limits the major life activity of normal cell growth). The court interpreted this language as Congress setting “a floor, not a ceiling,” therefore supporting the conclusion that Darby plausibly alleged that her genetic mutation and epithelial cell growth rendered her disabled. *Darby*, 964 F.3d at 446.

⁹⁰ *Darby*, 964 F.3d at 447; see 42 U.S.C. § 12112(a)–(b) (prohibiting workplace discrimination on the basis of disability).

⁹¹ *Darby*, 964 F.3d at 446.

⁹² *Id.* at 447. In *Bragdon v. Abbott*, the Supreme Court held that HIV is a physical impairment that substantially limits at least one major life activity at every stage of the disease, including its asymptomatic phase. 524 U.S. 624, 631 (1998). In 1994, dentist Randon Bragdon found a cavity during the course of patient Sidney Abbott’s dental exam. *Id.* at 628–29. Doctors diagnosed Abbott with HIV in 1986 and disclosed her disease to Bragdon prior to the exam. *Id.* at 628. At the time of her appointment, Abbott was in the asymptomatic phase of the disease. *Id.* After discovering the cavity, Bragdon informed Abbott that he does not perform cavity fillings on patients with HIV but that he would perform the procedure at a local hospital. *Id.* at 629. Abbott refused his offer and sued under Title III of the ADA claiming Bragdon discriminated against her on the basis of disability. *Id.*

⁹³ *Darby*, 964 F.3d at 446. The Sixth Circuit explained that, in *Bragdon*, HIV qualified as a disability because of its present and constant effect on an individual’s cell growth and function, not because the disease will progress into AIDS. *Id.*; see *Bragdon*, 524 U.S. at 637 (explaining that HIV is a disability because of its effect on an individual’s cell function from initial infection through every stage of the disease). Determining whether the BRCA1 genetic mutation substantially limits cell growth, as well as whether it caused Darby’s abnormal cell growth, requires medical expertise and testimony. *Darby*, 964 F.3d at 447. Ultimately, the parties settled out of court, and the district court dismissed the case on November 18, 2020, without reviewing any such medical evidence. *Darby v. Childvine, Inc.*, No. 18-cv-00669 (S.D. Ohio dismissed Nov. 18, 2020).

⁹⁴ See *Darby*, 964 F.3d at 446 (noting that the district court should follow the Supreme Court’s decision in *Bragdon* by allowing the plaintiff’s claim to move forward so the court could consider medical evidence in later discovery).

without Congress's passage of the ADAAA in 2008, the claim would have been dismissed.⁹⁵ Prior to the ADAAA, the ADA did not define "major life activities," provide any examples of actions or bodily functions that could be considered "major life activities," nor define "substantially limits."⁹⁶

With only regulatory agency interpretations to guide it, the Supreme Court narrowly interpreted the ADA's scope of protection and effectively denied coverage to the individuals Congress designed the statute to protect.⁹⁷ For example, in 2002, in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, the Court held that to substantially limit major life activities, and thus be considered a disability, an impairment must "severely restrict[]" individuals from performing an activity "of central importance to most people's daily lives."⁹⁸ In

⁹⁵ 42 U.S.C. §§ 12101–12213 (2012); ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2(b), 122 Stat. 3553 (2009) (explaining that the amendment serves to reject and correct several Supreme Court holdings that resulted in eliminating protection for many individuals who Congress intended to protect under the ADA).

⁹⁶ Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (1990). Because the original legislation remained silent on what constituted a major life activity, courts relied heavily on regulations from the Department of Health and Human Services that interpreted the Rehabilitation Act of 1973. See 45 C.F.R. § 84.3(j)(2)(ii) (2020) (defining major life activities as "caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working"). Unlike the current definitions, the Department of Health and Human Services regulations did not, and still do not, suggest that the list is merely illustrative and not exhaustive. Compare 42 U.S.C. § 12102(2) (explaining major life activities "include, but are not limited to" those specifically named in the statute), with Americans with Disabilities Act of 1990 § 3(2) (failing to provide any examples of major life activities), and 45 C.F.R. § 84.3(j)(2)(ii) (suggesting the list of major life activities is exhaustive by omitting phrases like "but not limited to"). Like the Department of Health and Human Services, the EEOC created its own regulations interpreting the definition of "substantially limits." *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 195 (2002), *superseded by statute*, ADA Amendments Act of 2008 § 2(b)(4). The EEOC regulations determined whether an impairment substantially limited an individual's activities such that it rose to the level of disability by comparing that individual's ability to that of "the average person in the general population." *Id.* Following the ADAAA, the EEOC updated the federal regulations to include rules of construction for interpreting "substantially limits" in favor of broad coverage, making clear that an impairment need not completely prevent individuals from performing a major life activity. 29 C.F.R. § 1630.2(j)(1) (2020).

⁹⁷ See *Toyota*, 534 U.S. at 197 (stating that the statute requires strict interpretation to create a demanding standard for qualifying as disabled); *Sutton v. United Airlines, Inc.*, 527 U.S. 471, 482 (1999) (holding that corrective or ameliorative measures must be taken into consideration when determining whether an individual's physical or mental impairment substantially limits a major life activity and is thus disabled), *superseded by statute*, ADA Amendments Act of 2008 § 2(b)(3).

⁹⁸ *Toyota*, 534 U.S. at 198 (emphasis added). In *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, the plaintiff, Ella Williams, began to experience neck and shoulder pain as a result of her work at Toyota's manufacturing plant in Kentucky, and doctors diagnosed her with bilateral carpal tunnel syndrome and bilateral tendinitis, among other maladies. *Id.* at 187, 189. In 1993, plant supervisors placed Williams on a quality control team where she was only required to visually inspect painted cars for flaws during assembly and to wipe painted cars with a glove. *Id.* at 188–89. Approximately three years later, in 1996, Williams's role changed to include several manual tasks, requiring her to keep her arms raised for hours at a time. *Id.* at 189. According to Williams's complaint, her conditions worsened, and she requested to return to her original tasks, but doctors placed her under a "no-work-of-any-kind restriction." *Id.* at 190. Williams's last day of work at the plant was in December 1996, and, on January 27, 1997, Toyota informed Williams that it had terminated her employment

Toyota, the Court found that the plaintiff was not disabled under the ADA because her carpal tunnel syndrome and related physical impairments only limited her ability to perform specific work-related manual tasks but did not limit daily tasks of central importance to most people’s lives.⁹⁹ Thus, the Court’s holding narrowed the scope of protection under the ADA by heightening the “substantial limitation” standard.¹⁰⁰

Similarly, in *Sutton v. United Airlines, Inc.*, the Court held that individuals claiming a disability under the ADA must be evaluated with respect to the ameliorative effects of corrective or mitigating measures.¹⁰¹ In *Sutton*, twin sisters who both suffered from severe nearsightedness sued United, alleging discrimination under the ADA after the airline did not offer the women jobs as commercial pilots for failing to meet the minimum vision requirement.¹⁰² Both

due to poor attendance. *Id.* at 190–91. Williams sued her former employer in the U.S. District Court for the Eastern District of Kentucky alleging discrimination and failure to accommodate her disability. *Id.* at 190.

⁹⁹ *Id.* at 201–02 (explaining that although the plaintiff’s carpal tunnel syndrome prevented her from keeping her arms raised for extended periods of times at work, she was able to bathe, brush her teeth, and perform other household chores); see 42 U.S.C. § 12102(2) (citing a long list of “major life activities,” including walking, sleeping, eating, breathing, and caring for oneself). In cases where the plaintiff’s major life activity was “working,” courts would only find that individuals were disabled if their impairments substantially limited their employment generally. See Ruth Colker, *The Mythic 43 Million Americans with Disabilities*, 49 WM. & MARY L. REV. 1, 40 (2007) (criticizing the Supreme Court’s narrow interpretation of the ADA whereby only individuals who were too severely disabled to work would be covered under the statute). In other words, courts would only determine that an individual was disabled if the individual was severely restricted in performing a broad class of jobs as compared to an average person performing the same job. See *Dovenmuehler v. St. Cloud Hosp.*, 509 F.3d 435, 440–41 (8th Cir. 2007) (determining that a former nurse was not disabled due to her cocaine addiction because she was only precluded from performing a job with special patient concerns, not general nursing jobs); *Hall v. Clausen*, 6 F. App’x 655, 670 (10th Cir. 2001) (allowing a former employee’s ADA claim to proceed because his urological condition prevented him from performing a broad range of jobs in law enforcement); *Sherrod v. Am. Airlines, Inc.*, 132 F.2d 1112, 1120 (5th Cir. 1998) (holding that an employee’s back injury did not render her disabled because she was not significantly restricted from performing a broad class of jobs); *Harrington v. Rice Lake Weighing Sys., Inc.*, 122 F.3d 456, 460 (7th Cir. 1997) (holding an employee’s ADA claim failed because his inability to lift objects during the general course of his work did not render him disabled, and, furthermore, the plaintiff was showing signs of recovery at the time of his dismissal); *Branch v. Bridgestone/Firestone, Inc.*, 108 F. Supp. 2d 897, 902 (M.D. Tenn. 2000) (holding that an employee was not disabled because his carpal tunnel syndrome only precluded him from repetitive work with power tools and did not prevent him from performing a substantial set of jobs).

¹⁰⁰ ADA Amendments Act of 2008 § 2(a)(5); *Sutton*, 527 U.S. at 475.

¹⁰¹ ADA Amendments Act of 2008 § 2(b)(2)–(3); *Sutton*, 527 U.S. at 475. Corrective or mitigating measures are defined in the ADA as medication, prosthetics, or any assistive technology intended to reduce an impairment’s effect. 42 U.S.C. § 12102(4)(E)(i). Eyeglasses and contact lenses do not fall into this category and are fully considered when evaluating whether an impairment rises to the level of disability. *Id.* § 12102(4)(E)(ii).

¹⁰² *Sutton*, 527 U.S. at 475–76. Myopia, or nearsightedness, is a condition where individuals can see objects close to them clearly, but objects farther away are blurry. *Myopia (Nearsightedness)*, AM. OPTOMETRIC ASS’N, <https://www.aoa.org/healthy-eyes/eye-and-vision-conditions/myopia?sso=>

women were qualified for the position and had near perfect vision with corrective lenses, but United based its decision on the plaintiffs' uncorrected vision levels.¹⁰³ The Supreme Court determined that the plaintiffs failed to establish a disability under the ADA because, with corrective measures, they are not in fact disabled.¹⁰⁴ In so holding, the Court concluded that courts must take into account all corrective measures when determining whether an individual is disabled under the ADA.¹⁰⁵

As a result of these holdings, many individuals who were substantially limited in major life activities due to physical and mental impairments could not prove they were in fact disabled.¹⁰⁶ This created a "catch-22" for individuals seeking relief in employment discrimination cases: courts frequently concluded that only plaintiffs who were so severely impaired that they could not work were "disabled" under the ADA.¹⁰⁷ Thus, plaintiffs who were impaired

[<https://perma.cc/6YB3-6LVV>]. Karen Sutton and Kimberly Hinton both had uncorrected vision that fell below United Airline's minimum requirement for pilots. *Sutton*, 526 U.S. at 475–76.

¹⁰³ *Sutton*, 527 U.S. at 475–76. With corrective measures such as glasses or contact lenses, both women had visual acuities of 20/20 or better. *Id.* at 475. Additionally, the plaintiffs both met United Airline's age, education, and experience requirements and had the appropriate Federal Aviation Administration qualifications. *Id.* at 475–76.

¹⁰⁴ *Id.* at 482.

¹⁰⁵ *Id.* The Court reasoned that because Congress specifically called for the protection of 43 million Americans with disabilities, the presumably large number of Americans whose impairments were corrected with medication or other mitigating measures should not be considered disabled under the ADA. *Id.* at 486. The Court in *Sutton* also expressly rejected the EEOC's guidelines at the time, which stated that whether an individual was substantially limited in a major life activity, and thus was disabled, should be determined without regard to corrective measures. *Id.* at 481–82. The Court also held that the plaintiffs' nearsightedness only prevented them from being "global airline pilots," not from performing a broad class of jobs, and, thus, they were not substantially limited. *Id.* at 493. In addition to *Sutton*, the Supreme Court released two accompanying decisions that together are often referred to as "The *Sutton* Trilogy." See *Sutton*, 527 U.S. at 471; *Murphy v. United Parcel Serv., Inc.*, 527 U.S. 516, 519 (1999) (holding that an employee's hypertension did not render him disabled because with proper medication he was not restricted from working and could function normally as compared to other individuals); *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555, 565–66 (1999) (reversing the Ninth Circuit's ruling that the plaintiff was disabled under the ADA and finding that a plaintiff without vision in one eye was not in fact disabled because he had learned to adjust and subconsciously correct his vision). These decisions ultimately precluded individuals from coverage under the ADA because medication and other corrective measures usually treated claimants' impairments, eliminating millions of Americans' ability to redress workplace discrimination claims. Perry Meadows & Richard A. Bales, *Using Mitigating Measures to Determine Disability under The Americans with Disabilities Act*, 45 S.D. L. REV. 33, 35 (2000).

¹⁰⁶ See ADA Amendments Act of 2008 § 2(b)(1)–(5); see also *Toyota*, 534 U.S. at 195, 201 (holding that the claimant was not disabled because her multiple diagnoses did not severely restrict her "from doing activities that are of central importance to most people's daily lives").

¹⁰⁷ See Kerri Stone, *Substantial Limitations: Reflections on the ADAAA*, 14 N.Y.U. J. LEGIS. & PUB. POL'Y 509, 523–24 (2011) (describing that plaintiffs who tried to show they were substantially limited in the major life activity of "working" would only be deemed disabled if they were so limited they were unable to work); Colker, *supra* note 99, at 40 (explaining that the Supreme Court's interpretation was so rigid that only individuals who were too severely disabled to work could be protected under the statute).

and substantially limited in working would not be deemed “disabled” because their impairment did not prevent them from employment generally.¹⁰⁸ The ADA, which sought to allow full participation and economic viability for disabled Americans, became ineffective for plaintiffs.¹⁰⁹ In fact, in 1999, ninety-three percent of plaintiffs’ claims failed in reported employment discrimination cases.¹¹⁰

This was the impetus for Congress’s passage of the ADAAA.¹¹¹ The ADAAA’s purpose was to reject the holdings in *Toyota* and *Sutton* that eliminated protection for some otherwise qualified individuals and that were contrary to Congress’s intent.¹¹² In the ADAAA, Congress included rules of construction for interpreting the definition of disability that demanded broad coverage consistent with the stated purposes of the statute as amended.¹¹³ Congress also added illustrative examples of major life activities ranging from “lifting” and “thinking” to “functions of the immune system” to overrule the “central importance to most people’s daily lives” standard espoused in *Toyota*.¹¹⁴ The ADAAA also stated that courts cannot consider the mitigating effects of medication or corrective measures in determining whether an impairment is a disability, thereby rejecting *Sutton*.¹¹⁵

III. THE SIXTH CIRCUIT PROPERLY ALLOWED DARBY’S CLAIM TO PROCEED

In evaluating Darby’s claim, the Sixth Circuit embraced the ADAAA’s inclusive provisions, which pushed courts to be less stringent in evaluating

¹⁰⁸ Colker, *supra* note 99, at 40 (arguing that the Supreme Court’s “overly rigid standard” resulted in fewer disabled Americans being covered under the ADA).

¹⁰⁹ Colker, *supra* note 8, at 160 (suggesting that courts have been quick to grant summary judgment by setting high standards for evidentiary proof of a disability and that reliance on summary judgment results in favorable decisions for employers by preventing claims from reaching more plaintiff-friendly juries).

¹¹⁰ *Id.* at 100 (stating that defendants in employment discrimination cases succeed 93% of the time and defendants succeed in 84% of reported appealed decisions).

¹¹¹ See ADA Amendments Act of 2008 § 2(b)(5) (stating that the primary focus of an ADA claim must be whether an employer has violated the statute, not whether the claimant is disabled).

¹¹² *Id.* §§ 2(b)(1)–(5); 4(a); see *Toyota Motor Mfg., Inc. v. Williams*, 534 U.S. 184, 198 (2002), *superseded by statute*, ADA Amendments Act of 2008 § 2(b)(4)–(5); *Sutton v. United Airlines, Inc.*, 527 U.S. 471, 482 (1999), *superseded by statute*, ADA Amendments Act of 2008 § 2(b)(3).

¹¹³ 42 U.S.C. § 12102(4) (instructing that individuals should be covered under the ADA “to the maximum extent permitted”); ADA Amendments Act of 2008 § 2(b)(1)–(5) (rejecting both the Court’s higher standard of limitation and narrow scope, neither of which reflected congressional intent).

¹¹⁴ ADA Amendments Act of 2008 § 2(b)(4).

¹¹⁵ 42 U.S.C. § 12102(4)(E) (stating that determinations of whether an individual is disabled should be made irrespective of ameliorative effects, except for the effects of “ordinary eyeglasses or contact lenses”).

whether an impairment constitutes a disability.¹¹⁶ Section A of this Part argues that the U.S. Court of Appeals for the Sixth Circuit was correct to allow Darby's claim to proceed because it follows congressional intent in expanding coverage under the statute.¹¹⁷ Section B argues that Darby could not have brought a claim under the GINA and, as such, her only means of redress would have fallen under the ADA.¹¹⁸

A. Darby Sufficiently Pleaded She Was Disabled to Survive a Motion to Dismiss in Accordance with the ADAAA

In 2020, in *Darby v. Childvine, Inc.*, the Sixth Circuit correctly allowed Darby's claim, including that she was disabled due to her BRCA1 genetic mutation and epithelial cell growth, to move forward given the expanded definition of a disability under the ADAAA.¹¹⁹ The Sixth Circuit's holding embraced the tenets of the ADAAA to reaffirm that courts should interpret the statute in favor of broad coverage and protection, as Congress intended.¹²⁰ The ADAAA's stated purpose was to reverse the Supreme Court's decisions in cases like *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams* and *Sutton v. United Airlines, Inc.*, both of which eliminated coverage for many otherwise qualified individuals by creating standards that made it nearly impossible to demonstrate a disability.¹²¹ Indeed, many cases brought prior to the ADAAA focused on whether the claimant was disabled, instead of whether the employer had discriminated against the employee.¹²² The ADAAA shifted the focus to whether discrimination had occurred, stating that establishing a disability under the statute should not be challenging for plaintiffs.¹²³

The Sixth Circuit suggested that the district court, on remand, consider whether *Bragdon v. Abbott* could serve as a useful comparison in determining

¹¹⁶ *Darby v. Childvine, Inc.*, 964 F.3d 440, 445 (6th Cir. 2020) (stating that Darby plausibly alleged she was disabled when considering the ADA "to the maximum extent permitted by [its] terms" (quoting 42 U.S.C. § 12012(4))).

¹¹⁷ See *infra* notes 119–127 and accompanying text.

¹¹⁸ See *infra* notes 128–135 and accompanying text.

¹¹⁹ See ADA Amendments Act (ADAAA) of 2008, Pub. L. No. 110–325, § 4, 122 Stat. 3553 (2008) (redefining the statutory definition of "disability" to expand protection under the ADA).

¹²⁰ See *id.* § 2(b)(1) (stating that the ADAAA seeks to reinstate "clear, strong, consistent, enforceable standards" to protect disabled Americans); *Darby*, 964 F.3d at 445 (holding that, "to the maximum extent permitted" by the ADA, Darby had sufficiently pleaded that she was disabled).

¹²¹ ADA Amendments Act of 2008 § 2(b)(2)–(5) (explaining the purpose of the amendments and rejecting the Court's holdings in *Toyota* and *Sutton*).

¹²² See, e.g., *Bragdon v. Abbott*, 524 U.S. 624, 637 (1998) (focusing the Court's inquiry on whether the plaintiff's HIV rendered her disabled under the ADA); *Darby*, 964 F.3d at 445 (evaluating whether plaintiff Darby's BRCA1 genetic mutation and epithelial cell growth rendered her disabled under the ADA).

¹²³ ADA Amendments Act of 2008 § 2(b)(5).

the BRCA1 gene mutation’s effect on the human body.¹²⁴ Following *Bragdon*, the inquiry for the district court would have been whether the BRCA1 gene mutation has a “constant and detrimental effect” on Darby’s normal cell growth.¹²⁵ In other words, the Sixth Circuit implied that the district court should evaluate whether the BRCA1 genetic mutation operates similarly to HIV in the body.¹²⁶ Although it is unclear whether Darby would have prevailed on remand, allowing similar claims to proceed beyond summary judgment presents tangible benefits to plaintiffs: when plaintiffs survive a defendant’s motion to dismiss, the likelihood of settling, as well as the amount of the potential settlement, increase substantially.¹²⁷

B. Darby’s Claim Would Likely Have Failed Under GINA Because She Did Not Disclose Genetic Information to Her Employer

The Sixth Circuit noted that Darby may have had a cognizable claim under GINA because the BRCA1 mutation is genetic information gleaned from genetic testing.¹²⁸ This, however, is incorrect.¹²⁹ Because Darby never disclosed her BRCA1 mutation to her employer and instead claimed she had breast cancer, a claim under GINA would have been unlikely to succeed.¹³⁰ Therefore, Darby’s ADA claim was likely her only means of redress.¹³¹

¹²⁴ *Darby*, 964 F.3d at 446 (noting that the Supreme Court decided *Bragdon* at summary judgment, which gave the Court an opportunity to evaluate medical evidence concerning HIV’s effect on the body).

¹²⁵ See *Bragdon*, 524 U.S. at 637 (holding that HIV qualifies as a disability under the ADA because it is a physiological disorder that immediately and constantly impairs normal life activities); *Darby v. Childvine, Inc.*, No. 18-cv-00669 (S.D. Ohio dismissed Nov. 18, 2020) (dismissing the case on remand following a settlement between Darby and Childvine).

¹²⁶ *Darby*, 964 F.3d at 446; see *Bragdon*, 524 U.S. at 637 (holding that HIV is a disability because of its constant detrimental effect on the body’s normal functions). The Sixth Circuit referenced *Bragdon* and even suggested that the BRCA1 mutation could be held as a disability under the ADA if Darby can produce medical and factual evidence analogizing the effect of BRCA1 in the body to that of HIV. *Darby*, 964 F.3d at 446; see *Bragdon*, 524 U.S. at 637 (concluding that HIV is a disability because of its immediate and constant detrimental effect on major bodily functions, as required by the statute).

¹²⁷ See *Darby*, 964 F.3d at 446 (explaining that additional medical evidence and further factfinding would have been required to decide whether Darby is disabled); Nicole Buonocore Porter, *The New ADA Backlash*, 82 TENN. L. REV. 1, 67 (2014) (describing the benefits of the ADAAA’s broader protection for plaintiffs). On remand, the district court dismissed the case after the parties settled out of court for an undisclosed amount. *Darby*, No. 18-cv-00669 (S.D. Ohio dismissed Nov. 18, 2020).

¹²⁸ *Darby*, 964 F.3d at 447.

¹²⁹ See 42 U.S.C. § 2000ff-1(a) (outlawing discrimination in employment on the basis of an employee’s known genetic information); *Darby*, 964 F.3d at 443 (stating that the employer only found out about Darby’s BRCA1 genetic mutation through discovery and, therefore, did not know her genetic information when it fired Darby).

¹³⁰ See 42 U.S.C. § 2000ff-1(a) (prohibiting adverse decisions against employees on the basis of the employee’s genetic information); *Darby*, 964 F.3d at 443 (stating that Darby told her former employer that she had breast cancer, not that she tested positive for the BRCA1 genetic mutation). Section 2000ff-1(a) of GINA implicitly imposes a knowledge element on the employer—the employer

To succeed on a GINA claim, plaintiffs must demonstrate that they were qualified for the position, they were adversely impacted, and the employment action was based on genetic information obtained from testing.¹³² As such, GINA imposes a knowledge requirement on the employer.¹³³ If the employer is unaware of or does not possess the employee's genetic information, it cannot take an adverse employment action based on that genetic information.¹³⁴ Childvine was not aware of the BRCA1 gene mutation until after Darby sued for discrimination and, therefore, under GINA, Childvine did not discriminate against Darby.¹³⁵

CONCLUSION

Darby v. Childvine, Inc. offers a glimpse into how the ADA may interact with newly discoverable diseases and impairments as medical advancements continue into the twenty-first century. The ADAAA breathed new life into the statute to be as flexible as possible, creating opportunities for unknown impairments to be brought under the ADA's protection. The Sixth Circuit properly allowed Darby's claim to proceed and fulfilled Congress's intent for greater protection under the ADAAA. The holding, however, left open the possibility of whether a genetic mutation is a disability and ultimately punted the question to future medical research. Moving forward, courts must be steadfast in using the

must know the employee's genetic information and must make an adverse employment decision based on that information. See § 2000ff-1(a) (prohibiting employers from discriminating against employees or potential employees based on known genetic information). Based on Darby's pleading, Childvine, Inc., Mayhugh, and Doczy all lacked the requisite knowledge for Darby to bring a claim under GINA. See *id.* (prohibiting employment discrimination on the basis of genetic information known by the employer); Amended Complaint & Jury Demand, *supra* note 62, at 2 (alleging that Darby had breast cancer).

¹³¹ See 42 U.S.C. § 2000ff-1(a) (prohibiting discrimination in employment against individuals on the basis of genetic information); *id.* § 12112(a) (prohibiting discrimination in employment against individuals on the basis of disability).

¹³² Jackson v. Regal Beloit Am., Inc., No. 16-134-CJS, 2018 WL 3078760, at *15 (E.D. Ky. June 21, 2018) (describing the elements of a genetic discrimination claim under GINA, noting that there is little consensus among courts due to the lack of caselaw regarding the statute).

¹³³ 42 U.S.C. § 2000ff-1(a).

¹³⁴ See Amended Complaint & Jury Demand, *supra* note 62, at 2 (claiming that Darby told her supervisors she had breast cancer, not that she had a BRCA1 mutation); Areheart, *supra* note 10, at 743 (stating that employees' claims brought under GINA often fail because they cannot prove that their employer possessed or was aware of their genetic information).

¹³⁵ See 42 U.S.C. § 2000ff-1(a) (outlawing discrimination in employment on the basis of an employee's genetic information); *Darby*, 964 F.3d at 443 (stating that Darby's employer only found out about her BRCA1 genetic mutation through discovery, after Darby had already filed her claim). Had all the facts remained the same and Darby told her employer that she was diagnosed with epithelial cell growth and a BRCA1 gene mutation as a result of genetic testing, Darby may have been able to seek a remedy under GINA. See 42 U.S.C. § 2000ff-1(a) (prohibiting discrimination against an employee on the basis of known genetic information).

ADAAA’s more inclusive standards to accommodate medical discoveries of the future and provide legal protection to those most vulnerable in our society.

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Preferred citation: Jessica L. Loiacono, Comment, *Substantially Mutated: Are Genetic Mutations “Disabilities” Under the Americans with Disabilities Act?*, 62 B.C. L. REV. E. SUPP. II-446 (2021), <http://lawdigitalcommons.bc.edu/bclr/vol62/iss9/26/>.