



# JALBCA

JUDGES AND LAWYERS BREAST CANCER ALERT

Vol. 14 No. 2

Editor: Martha L. Golar, Esq.

April 2010

## *APRIL PROGRAM*

**DATE:** Tuesday, April 6, 2010

**TIME:** 6:30 – 7:30 P.M.

**PLACE:** **Skadden Arps Slate Meagher & Flom**  
Four Times Square (between 6th Avenue & Broadway)

**TOPIC:** **WHO SHOULD HAVE GENETIC TESTING FOR BREAST CANCER?**

Speaker: Petra Rietschel, MD, PhD  
Assistant Professor Albert Einstein College of Medicine  
Director Melanoma/Sarcoma Medical Oncology  
Member Breast Medical Oncology Division Montefiore Medical Center-  
Weiler Division Department of Oncology

## **SAVE THE DATE**

### **JALBCA'S ANNUAL DINNER**

**Monday, May 10, 2010**

**The Water's Edge**  
**Long Island City, NY**

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## MARCH JALBCA PROGRAM – Breast Cancer: Legal Issues in the Workplace for Survivors



Katharine Parker

On March 2, 2010, Katharine Parker, a partner at Proskauer Rose LLP and an expert in Labor & Employment Law, presented a lecture to the members of JALBCA concerning the legal rights of cancer survivors in the workplace. In the presentation, Ms. Parker identified three key federal statutes that protect the rights of individuals who are currently battling cancer or are survivors: The Americans with Disabilities Act (ADA); the Genetic Information Nondiscrimination Act of 2008 (GINA); and the Family Medical Leave Act (FMLA). These Federal enactments prohibit discriminatory practices by employers and provide employment protection and accommodation for victims of cancer.

The ADA was signed into law in 1990. The ADA specifically prohibits discrimination based on an “impairment that substantially limits one or more major life activities.”<sup>1</sup> The Americans with Disabilities Amendments Act of 2008 (ADAAA),

which amended the ADA, was signed into law on September 25, 2008 and became effective January 1, 2009. The new law overturns several recent U.S. Supreme Court rulings that had limited the ADA, and consequently, it eliminates several employer defenses to ADA claims.<sup>2</sup> Congress found that the Supreme Court had unduly “narrowed the broad scope of protection intended to be afforded by the ADA, and thus eliminating protection for many individuals whom Congress intended to protect.”<sup>3</sup> The decisions of the Supreme Court specifically mentioned in the ADAAA were *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999) and its companion cases, *Murphy v. UPS, Albertsons, Inc. v. Kirkingburg* and *Toyota Motor Manufacturing, Ky., Inc. v. Williams*, 534 U.S. 184 (2002). The ADAAA “rejects the high burden required in these [Supreme Court] cases and reiterates that Congress intends that the scope of the Americans with Disabilities Act be broad and inclusive.”<sup>4</sup>

The objectives of the ADAAA were to construe the definition of disability more broadly; exclude consideration of mitigating measures, like medication, in determining whether a person satisfies the ADA definition of “disability”; and expand the scope of persons who may be deemed regarded as disabled and encompass impairments that substantially limit a major life activity.<sup>5</sup> The new law includes a non-exhaustive list of major life activities and major bodily functions. Major life activities includes, by way of example, caring for oneself and major bodily functions includes, by way of example, normal cell growth and immune systems, neurological, brain, respiratory,

circulatory, endocrinal, and reproductive functions.

The amended Act also provides that “mitigating measures” have no bearing in determining whether a disability qualifies under the law.<sup>6</sup> This overturns a series of Court decisions that had held that the ADA did not protect an employee who was able to manage the symptoms of his/her disability by using medication, prosthetics, or other means of diminishing his/her impairment.<sup>7</sup>

The impairment of a major life activity as defined by the ADAAA need not be continuous but can be episodic. Moreover, it does not have to limit all major life activities, merely one.<sup>8</sup> To evaluate a person who suffers from an episodic impairment or one that is in remission, employers and courts must determine whether the condition would substantially limit a major life activity when the condition is active.<sup>9</sup> Courts, therefore, cannot find there is no protection under the ADA just because the individual may not presently suffer from symptoms of his/her condition.<sup>10</sup> Another change in the 2008 enactment was the expansion of coverage for those who are “regarded as” having an impairment. This amendment protects individuals who can establish that they are regarded as disabled. Such an individual must prove that he was subjected to an adverse action prohibited by the ADA because of an actual or perceived impairment, whether or not that impairment limits or is perceived to limit a major life activity.<sup>11</sup> For cancer survivors, this would be an individual who is now in remission but may not be promoted by his/her employer because he/she once had cancer.<sup>12</sup>

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Under the definitions of the ADA, cancer is a disability. Therefore, where individuals are battling cancer and undergoing treatment, employers are required to accommodate them so long as the employer suffers no undue hardship. Undue hardship is defined as unduly costly, extensive, and fundamentally alters the nature or operation of the business.<sup>13</sup> Accommodations that have been deemed reasonable by the courts are: working from home; granting unpaid leave; creating a part-time or modified work schedule; or a transfer to a vacant position.<sup>14</sup> Overall, the burden of proof is placed on the employer to demonstrate a reasonable accommodation is unavailable and/or would cause an undue hardship.<sup>15</sup> Ms. Parker noted the burden of proving undue hardship is very high and rarely found. In addition, the ADA prohibits employers from making certain medical inquiries about the existence or severity of a disability prior to making an offer of employment.<sup>16</sup>

GINA was enacted May 21, 2008 and extends protection against discrimination in health coverage and employment, based on genetic information.<sup>17</sup> GINA has three titles, two of which are relevant to this discussion. Title I prohibits discrimination based on genetic information in health coverage and modifies several health statutes.<sup>18</sup> Title II prohibits discrimination based on genetic information in employment.

GINA defines “genetic information” as information about the following: an individual’s genetic tests; genetic tests of an individual’s family members; genetic tests of any fetus of an individual or family member who is a pregnant woman; and genetic tests of any embryo legally held by an individual or family member utilizing

assisted reproductive technology; the manifestation of a disease or disorder in an individual’s family members; or any request for, or receipt of, genetic services or participation in clinical research that includes genetic services by an individual or an individual’s family members.<sup>19</sup> Genetic information does not include information about the sex or age of an individual.<sup>20</sup>

GINA restricts employers from asking about genetic traits and medical history and mandates confidentiality for genetic information that employers lawfully collect.<sup>21</sup> It further prohibits employers from retaliating against employees who complain about genetic discrimination.<sup>22</sup> Employers with 15 or more employees are prohibited from using genetic information for hiring, firing, or promotion decisions, and for any decisions regarding terms of employment, regardless of when the information was obtained or collected.<sup>23</sup> For cancer patients, this means that an employer is prohibited from discriminating against an individual who has a family history of cancer or has a genetic marker that puts her at a higher risk of contracting cancer (*i.e.*, the BRCA gene). Since this legislation has just recently passed, further information on how it will affect employment law remains to be seen. Clearly, however, GINA creates a cause of action for employer discrimination on the basis of an employee’s genetic information. Alcohol tests are not genetic tests under GINA.

The final federal statute discussed was FMLA. Passed in 1993, and amended January 28, 2008, FMLA allows eligible employees, who work for covered employers, the right to job-protected, unpaid leave for absences due to, among other things, the need to care for a son,

daughter, spouse or parent with a serious health condition or because of an employee’s own serious health condition that makes the employee unable to perform the functions of his/her job. Such eligible employee is entitled to 12 work- weeks of unpaid leave per year and job protection upon the return from leave.<sup>24</sup>

The FMLA applies to all public and private employers with 50 or more employees - the 50-employee requirement includes both full-time and part-time employees.<sup>25</sup> To be eligible for this leave, an employee must be employed by his/her employer for at least 12 months and have worked for 1,250 hours during the previous 12-month period (the 12 months of employment do not need to be consecutive, or for a single employing office). The FMLA will cover time off for cancer patients, survivors, their spouses, children and parents. For instance, if an individual is afflicted with cancer, she is entitled to 12 weeks of leave. If she is married, her spouse is entitled to time off to take her for treatment and follow-up visits. It is not commonly realized that the 12 weeks of permitted time need not be taken in one block, but can be intermittent – *e.g.*, all at once, in separate blocks of time, or on a reduced leave schedule. Once the time is granted, it can be taken whenever medically necessary without the employer’s approval. One caveat is that the employee must make a reasonable attempt to schedule her time away in the least disruptive way possible for the employer.<sup>26</sup> General notice of “foreseeable” leave requires the employee to give at least 30 days’ notice. However, due to the nature of the illness, if the time off is not foreseeable, notice should be given to the employer as soon as possible.<sup>27</sup> An employing office must maintain an

employee's group health coverage for the duration of the leave at the same level and under the same conditions as if the employee had remained continuously employed, provided the employee pays his/her share of the premiums (an employee on unpaid FMLA leave may pay the employee share of the premiums on a current basis or pay upon return to work).<sup>28</sup> Upon return from FMLA leave, an employee may be returned to the same position or to an "equivalent position with equivalent benefits, pay, status, and other terms and conditions of employment."<sup>29</sup> (Exceptions are sometimes permitted if the result would cause serious economic injury to an employer's operations.) Even if FMLA does not apply, employees will want to check if their state has its own laws or requirements for employers, and check rights that may be available under an employment contract, employment policy manual or union benefits program.

Overall, these enactments safeguard the employment of an individual who is afflicted or recovering from cancer and assure that, in most instances, accommodations will be made.

NOTE: *This article was prepared with the assistance of Gamelin-Arnold Telesfort, JALBCA's 2009/10 Susan Solomon Intern, and includes information outside of the actual presentation.*

1. Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213 (2010) (hereinafter ADA). The entire text is posted at the U.S. Department of Justice ADA home page (<http://www.usdoj.gov/crt/ada/adahom1.htm>).

2. Examples of court decisions reflecting the high standard for establishing disability include the following: *Popko v. Pennsylvania State Univ. Milton S. Hershey Med. Ctr.*, 254 F.3d 1078 (3d Cir. 2001) (epilepsy not a disability); *Garrett v. Univ. of Ala. at Birmingham Bd. of Trs.*, 507 F.3d 1306 (11th Cir. 2007) (successful

treatment for cancer not disabling); *McConnell v. Pioneer Hi-Bred Int'l, Inc.*, 260 F.3d 958 (8th Cir. 2001) (bipolar disorder not a disability); *Scheerer v. Potter*, 443 F.3d 916 (7th Cir. 2006) (diabetes not a disability).

3. Joint Statement of Rep. Hoyer and Sensenbrenner on the Origins of the ADA Amendments Act of 2008, H.R. 3195 (154 Cong. Rec. H6067 (daily ed. June 25, 2008)).

4. *Id.*

5. *Id.*

6. *Id.* at § 12102 (4)(E).

7. These overturned cases are referred to as the *Sutton* trilogy, based on the lead case of *Sutton v. United Airlines*, 527 U.S. 471 (1999).

8. *Lytes v. D.C. Water & Sewage Authority*, 572 F.3d 936 (2009).

9. ADA, *supra* note 1, at 42 U.S.C.S § 12102 (4) (D).

10. House Judiciary Report on ADA Amendment Act of 2008, H.R. REP. NO. 110-730, at 9 (2008) (stating that "[i]t is thus expected that individuals with impairments that are episodic or in remission (e.g., epilepsy, multiple sclerosis, cancer) will be able to establish coverage if, when active, the impairment or the manner in which it manifests (e.g., seizures) substantially limits a major life activity").

11. *Id.* at 17.

12. See *Pimentel v. Dartmouth-Hitchcock Clinic*, 236 F. Supp. 2d 177, 182-83 (D. N. H. 2002)(court determined that the "terrible effect the cancer had" upon the plaintiff as being too "short-lived" to constitute a disability even though the plaintiff's cancer required a modified radical mastectomy, radiation treatment, and chemotherapy that resulted in early menopause and impaired her concentration, ability to sleep, and memory); see also *Treiber v. Lindbergh Sch. Dist.*, 199 F. Supp.2d 949 (2002) (demonstrating that prior to 2008 Amendment, cancer patients were not afforded same protection under ADA not considered a disability).

13. ADA, *supra* note 1, at 42 U.S.C. § 12182(b)(2)(A)(iii) (2010).

14. See *Hoffman v. Zurich*, 2007 U.S. Dist Lexis 87860; see also 42 U.S.C 12111(9)(B).

15. See *US Airways, Inc. v. Barnett*, 122 S. Ct. 1516 (2002) (stating that a "plaintiff/employee need only show that an 'accommodation' seems reasonable on its face, once the plaintiff has shown that the accommodation s/he needs is "reasonable,"

the burden shifts to the defendant/employer to provide case-specific evidence proving that reasonable accommodation would cause an undue hardship in the particular circumstances")

16. ADA, *supra* note 1, at 42 U.S.C. §§ 12111(9)(B) (2010).

17. Genetic Information Nondiscrimination Act, Pub. L. 110-233, 122 Stat. 881 (hereinafter GINA).

18. Amends: The Employee Retirement Income Security Act of 1974; Public Health Service Act, Internal Revenue Code of 1986; and Title XVIII Social Security Act. The entire text of the modifications is available at the U.S. Equal Employment Opportunity Commission web page, <http://www.eeoc.gov/laws/statutes/gina.cfm>.

19. GINA, Definitions, 42 U.S.C.S § 2000ff (4)(A) (2010).

20. *Id.* at 42 U.S.C.S § 2000ff (4)(C).

21. GINA, *supra* note 17.

22. *Id.*

23. Office of Human Research (OHRP) Department of Health and Human Services (HHS), Guidance on the Genetic Information Nondiscrimination Act: Implications for Investigators and Institutional Review Boards (March 29, 2009), <http://www.hhs.gov/ohrp/human-subjects/guidance/gina.html>.

24. Family and Medical Leave Act of 1993. Public Law 103-3, February 5, 1999, 29 U.S.C. 2601-2654 (hereafter FMLA). Final regulations implementing the FMLA also address new military family leave entitlements included in amendments to the FMLA enacted as part of the National Defense Authorization Act for FY 2008. These rules are effective on January 16, 2009. For more details, refer to the FMLA compliance guide, posted on the U.S. Department of Labor Web site (<http://www.dol.gov/esa/regs/compliance/whd/1421.htm>).

25. FMLA, Sub-Part A, Coverage under FMLA, 29 CFR 825.110. § 825.110.

26. FMLA, Subpart C, Employee and Employer Rights and Obligations, 29 CFR 825.302 § 825.302.

27. *Id.* at 29 CFR § 825.302 (e)

28. FMLA, Subpart B-Employee Leave Entitlements Under the Family and Medical Leave Act, 29 CFR 825.209 § 825.209.

29. *Id.*, at 29 CFR 825.216 § 825.216.

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## **JALBCA OFFICERS FOR 2010/2011**

The Board of Directors of JALBCA announced the newly elected officers for the 2010/2011 year:

### **President**

Hon. Ellen Spodek  
Cynthia Rubin, Esq.

### **Vice Presidents**

Hon. Margaret A. Chan  
Edward Kornreich, Esq.  
Burton N. Lipshie, Esq.  
Hon. Jennifer Schecter

### **Secretary**

Emily Morales, Esq.

### **Assistant Secretary**

Hon. Paula J. Omansky

### **Treasurer**

Hon. William C. Thompson

### **Assistant Treasurer**

Marvin Moskowitz, Esq.

The newly elected members of the Board of Directors, and the newly elected members of the Board of Advisors, will be installed together with the officers at JALBCA's annual dinner.

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## CALENDAR/CONTACTS

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### **ADELPHI NY STATEWIDE BREAST CANCER**

*Hotline & Support Program*

Adelphi University School of  
Social Work

Garden City, NY 11530

[www.breastcancerhotline@adelphi.edu](mailto:www.breastcancerhotline@adelphi.edu)

### **CancerCare**

275 Seventh Avenue

New York, NY 10001

[www.cancercares.org](http://www.cancercares.org)

1.800.813.HOPE (4673)

### **ELLEN's RUN**

130 W. 42nd St., 22nd Fl.

New York, NY 10036

[www.ellensrun.org](http://www.ellensrun.org)

212.840.0916

### **MEMORIAL SLOAN KETTERING CANCER CENTER**

#### **Post-Treatment Resource Program**

#### *Educational Forums*

215 E. 68<sup>th</sup> St., Ground Fl.

New York, NY 10021

[www.mskcc.org/mskcc/html/59513.cfm](http://www.mskcc.org/mskcc/html/59513.cfm)

212.717.3527

### **Bendheim Integrative Medicine Center**

1429 First Avenue (at 74th Street)

### **SHARE** (*Self-Help for Women with Breast or Ovarian Cancer*)

1501 Broadway, Ste. 704A

New York, NY 10036

[www.sharecancersupport.org](http://www.sharecancersupport.org)

212.719.0364

Speak to a survivor toll-free:

1.866.891.2392

### **JALBCA**

c/o Jennifer Fiorentino

Executive Director

1324 Lexington Avenue, PMB 324

New York, New York 10128

[www.jalbca.org](http://www.jalbca.org)

**Address Service Requested**

