

## Cancer in Remission May be a “Disability”

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In 2008 Congress adopted the amendments to the Americans with Disabilities Act (“ADAAA”). These amendments clarified and, in many ways, expanded the reach of the original ADA, including the definition of “disability.” Among other things, the ADAAA provides that “an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.” Thanks to a recent federal court decision out of Indiana, we now have a better understanding of just how broad this expansion of the definition of “disability” is.

In *Hoffman v. Carefirst of Fort Wayne, Inc., d/b/a Advanced Healthcare* (Case No. 1:09-CV-251, 8/31/10) plaintiff Stephen Hoffman was hired in 2006 as a service technician by Advanced Healthcare’s predecessor and continued in this role with Advanced Healthcare. As a technician, he supplied patients with home medical devices such as oxygen and wheelchairs and typically worked 9 to 5 (40 hours per week). His written job description contained such essential functions as the ability “to . . . remain flexible within normal working hours and available after hours and on call,” to have “light day travel” and “to work from varying locations.”

In November 2007 Hoffman was diagnosed with Stage III renal carcinoma and underwent surgery to remove his left kidney. Hoffman informed his employer of his diagnosis and the employer was supportive and accommodating, placing him on short term disability. Hoffman returned to work on January 2, 2008, with no specific restrictions or limitations, and he began working his usual schedule with his cancer in remission. Hoffman also converted his residential garage into an office and was allowed to work out of his home in Angola, Indiana.

After returning from a Hawaiian vacation in January 2009, Hoffman was informed that the company had acquired a contract with a hospital system and that all service technicians, including

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Hoffman, were required to work overtime. Shortly thereafter Hoffman's supervisor told him that he was concerned about Hoffman's health and how the 65 to 70 hours per week of work would affect him physically. Hoffman replied that working that much would put him "in the grave."

On January 29, 2009, Hoffman provided his employer with a doctor's note stating "[p]atient may not work more than 8 hours/day, 5 days/week. Dx: Stage III renal cancer." Over the course of the next 48 hours various discussions occurred between Hoffman and management regarding his ability to work, leading to the company presenting him with two options: immediately resign, or work the overtime like the other service technicians. Hoffman said he was not going to resign and couldn't do the extra work. Discussions continued, and the employer said it would not fire Hoffman, but offered to let him work 40 hours per week, but out of the Fort Wayne office (requiring a 2-3 hour unpaid commute each day) rather than out of his home. Discussions continued (many of which Hoffman tape-recorded), but Hoffman concluded he had been terminated based upon the options presented. Hoffman's physician opined shortly after Hoffman's separation from employment that Hoffman was doing well and did not need to return for another 6 months.

Hoffman sued alleging he was terminated in violation of the ADA. Hoffman claimed that his renal cancer, even if in remission, constituted a disability under the ADAAA, and that Advanced Healthcare unlawfully terminated him when it failed to offer a reasonable accommodation. Advanced Healthcare contended Hoffman was not disabled given that his cancer was in remission, he had returned to work without restriction and had worked an entire year without significant absences or other issues.

The employer moved for summary judgment, and on August 31, 2010, the Indiana federal district court overruled the motion. The court, noting that there is very little case law on the ADAAA since it went into effect on January 1, 2009, concluded that under the ADAAA Hoffman was not required to show a substantial limitation in a major life activity because he had cancer in remission and that cancer would have substantially limited a major life activity when it was active. Thus, Hoffman gets his day before a jury unless the case settles.

**Lesson:** *Hoffman* demonstrates what employment law practitioners have been saying since 2008--the ADAAA represents a significant expansion of potential liability for employers. Employers are strongly encouraged to: (1) educate their supervisors on the employer's obligations under the ADAAA; (2)

to engage in the interactive process with the employee where required; and (3) discuss and make reasonable accommodations for employees who are “qualified individuals with a disability” under the expanded ADAAA.

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