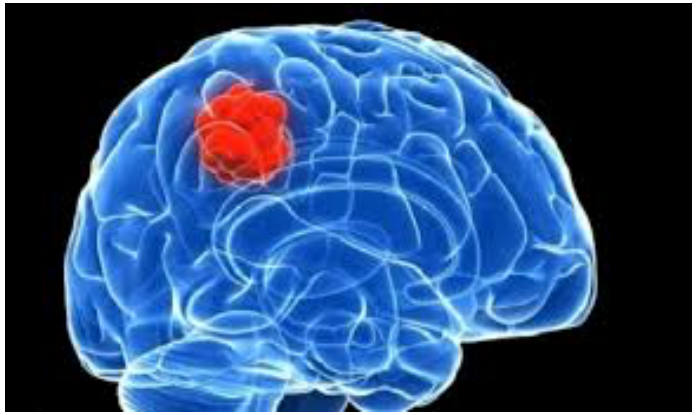
# Managing Cancer In The Workplace



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# Mismanaging Cancer Can Come With A High Price-tag

For example, in 2010 a jury ordered Michaels Stores, Inc. to pay Kara Jorud, a former store manager, $8.1 million for firing her while she was undergoing chemotherapy after having being diagnosed with breast cancer. The jury found that Michaels violated Jorud's rights under the Family Medical Leave Act ("FMLA") and the Americans with Disabilities Act ("ADA").

Just one week after undergoing surgeries, including a double mastectomy, Michaels' district manager, Skip Sands, allegedly began calling Jorud daily, urging her to return to work—even though she was projected to need nine to 10 weeks of recovery time. Although she returned, ultimately Jorud was fired a day before her next scheduled chemotherapy session.

# The EEOC Is Very Focused On Cancer-based Discrimination

Shortly after the ADAAA was passed, the EEOC brought suit in *E.E.O.C. v. Journal Disposition Corp*., NO. 1:10-CV-886, 2011 WL 5118735, (W.D. Mich. Oct. 27, 2011).

There, the EEOC alleged that the employer violated the ADA when it refused to permit the cancer-stricken employee to work four hours a day, five days a week, every other week, for some period of time after his chemotherapy treatments ended. The employer moved to throw the case out without a trial, but the court refused to do so, instead finding that "[w]hether the accommodation proposed by Nelson was objectively reasonable is a question of fact for a jury." *Id*. at *4.

# The EEOC Is Very Focused On Cancer-based Discrimination

More recently, in July 2015, in Maryland, the EEOC sued Dunkin Donuts under the ADA for allegedly failing to accommodate and then firing an employee with breast cancer. *See EEOC v. OHM Concessions Group, LLC d/b/a Dunkin Donuts*, Case No. 1:15-cv-01946 (D. Md. July 2, 2015).

# The EEOC Is Very Focused On Cancer-based Discrimination

In addition, in 2013, the EEOC issued a guidance memorandum entitled "Questions & Answers about Cancer in the Workplace and the Americans with Disabilities Act (ADA)." The guidance is at http://www.eeoc.gov/laws/types/cancer.cfm.

**Bottom Line:** Firing someone with cancer without rock solid grounds for doing so is fraught with peril, and both private plaintiffs' lawyers and the EEOC often see these cases as "low hanging fruit."

So, lawfully managing the ADA, FMLA, and other issues that cancer in the workplace raises is critically important.

# ADA Issues We Will Cover

- When can an employer ask an applicant or employee questions about his cancer and how should it treat voluntary disclosures?
- Confidentiality.
- What types of reasonable accommodations may employees with cancer need?
- How should employers handle safety concerns about applicants and employees with cancer?
- How can employers ensure that no employee is harassed because of cancer?
- What is the ADA's prohibition against "Associational Discrimination" and how does it apply to cancer?
- Common ADA mistakes to avoid.

# When can an employer ask an applicant or employee questions about his cancer and how should it treat voluntary disclosures?

- Cannot initiate questions about cancer with applicant.
- If applicant voluntarily unilaterally discloses cancer, employer cannot probe further about it, unless the employer reasonably believes that he will require an accommodation to perform the job because of his cancer or treatment, in which case the employer may ask whether the applicant will need an accommodation and what type.
- After offer of employment is made, but before employee begins, an employer may ask questions about the applicant's health (including questions about the applicant's disability) and may require a medical examination, as long as all applicants for the same type of job are treated equally (that is, all applicants are asked the same questions and are required to take the same examination).
- An employer may only withdraw the job offer based on the results if doing so is job-related and consistent with business necessity, which generally means that the results demonstrate that the employee: (a) is unable to perform the essential functions of the job with or without a reasonable accommodation; or (b) poses a direct threat to the health and safety of themselves or others that cannot be eliminated or sufficiently reduced through reasonable accommodation.

# When can an employer ask an applicant or employee questions about his cancer and how should it treat voluntary disclosures?

- What about current employees? Generally, an employer may ask disability-related questions or require an employee to have a medical examination when: (1) it knows about a particular employee's medical condition; (2) has observed performance problems; and (3) reasonably believes that the problems are related to a medical condition.

- At other times, an employer may ask for medical information when it has observed symptoms, such as extreme fatigue or irritability, or has received reliable information from someone else (for example, a family member or co-worker) indicating that the employee may have a medical condition that is causing performance problems.

# When can an employer ask an applicant or employee questions about his cancer and how should it treat voluntary disclosures?

May an employer require an employee on leave because of cancer to provide documentation or have a medical exam before allowing her to return to work?

Yes. If the employer has a reasonable belief that the employee may be unable to perform her job or may pose a direct threat to herself or others, the employer may ask for medical information. However, the employer may obtain only the information needed to make an assessment of the employee's present ability to perform her job and to do so safely.

# When can an employer ask an applicant or employee questions about his cancer and how should it treat voluntary disclosures?

Are there any other instances when an employer may ask an employee with cancer about her condition?

Yes. An employer also may ask an employee about cancer when it has a reasonable belief that the employee will be unable to safely perform the essential functions of her job because of cancer. In addition, an employer may ask an employee about her cancer to the extent the information is necessary:

- to support the employee's request for a reasonable accommodation needed because of her cancer;

- to verify the employee's use of sick leave related to her cancer if the employer requires all employees to submit a doctor's note to justify their use of sick leave; or

- to enable the employee to participate in a voluntary wellness program.

# Confidentiality

With limited exceptions, an employer must keep confidential any medical information it learns about an applicant or employee. Under the following circumstances, however, an employer may disclose that an employee has cancer:

- to supervisors and managers, if necessary to provide a reasonable accommodation or meet an employee's work restrictions;
- to first aid and safety personnel if an employee may need emergency treatment or require some other assistance at work;
- to individuals investigating compliance with the ADA and similar state and local laws; and
- where needed for workers' compensation or insurance purposes (for example, to process a claim).

# Confidentiality

The EEOC takes the position than an employer may not tell employees who ask why their co-worker is allowed to do something that generally is not permitted (such as work at home or take periodic rest breaks) that she is receiving a reasonable accommodation.

An employer also may not explain to other employees why an employee with cancer has been absent from work if the absence is related to his cancer or another disability.

# Accommodating Employees With Cancer

Some employees may need one or more of the following accommodations:

- leave for doctors' appointments and/or to seek or recuperate from treatment (even it  that requires an exception to a general policy);
- periodic breaks or a private area to rest or to take medication modified work schedule or shift change;
- permission to work at home;
- modification of office temperature;
- permission to use work telephone to call doctors where the employer's usual practice is to prohibit personal calls;
- reallocation or redistribution of marginal tasks to another employee; and
- reassignment to a vacant position when the employer is no longer able to perform her current job.

# Accommodating Employees With Cancer

Recommend the Job Accommodation Network, https://askjan.org, a service of the Office of Disability Employment Policy of the United States Department of Labor. A great resource on all ADA accommodations, including cancer: http://askjan.org/media/Cancer.html.

Using it will probably win over judges (and juries too). Indeed, several court decisions encourage employers to use the JAN. *See Taylor v. Phoenixville Sch. Dist.*, 184 F.3d 296, 317 n.8 (3d Cir. 1999)("Employers may find it useful to take advantage of the Job Accommodation Network although we do not in any way suggest that employers are obliged to make use of this service.").

# Accommodating Employees With Cancer

**How does an employee with cancer request a reasonable accommodation?**

There are no "magic words" that a person has to use when requesting a reasonable accommodation. A person simply has to tell the employer that she needs an adjustment or change at work because of her cancer. A request for reasonable accommodation also can come from a family member, friend, health professional, or other representative on behalf of a person with cancer.

Example: A web designer tells her supervisor that she is having trouble working 12 hours a day because of medical treatments she is undergoing for breast cancer. This is a request for reasonable accommodation.

# Accommodating Employees With Cancer

**May an employer request documentation when an employee who has cancer requests a reasonable accommodation?**

**Yes**. An employer may request reasonable documentation where a disability or the need for reasonable accommodation is not known or obvious. An employer, however, is entitled only to documentation sufficient to establish that the employee has cancer and to explain why an accommodation is needed. A request for an employee's entire medical record, for example, would be inappropriate, as it likely would include information about conditions other than the employee's cancer.

# Accommodating Employees With Cancer

**Does an employer have to grant every request for a reasonable accommodation?**

**No**. An employer does not have to provide an accommodation if doing so will be an undue hardship. Undue hardship means that providing the reasonable accommodation will result in significant difficulty or expense. **An employer also does not have to eliminate an essential function of a job as a reasonable accommodation**, tolerate performance that does not meet its standards, or excuse violations of conduct rules that are job-related and consistent with business necessity and that the employer applies consistently to all employees (such as rules prohibiting violence, threatening behavior, theft, or destruction of property).

If more than one accommodation would be effective, the employee's preference should be given primary consideration, although the employer is not required to provide the employee's first choice of reasonable accommodation. If a requested accommodation is too difficult or expensive, an employer may choose to provide an easier or less costly accommodation as long as it is effective in meeting the employee's needs.

# Accommodating Employees With Cancer

**May an employer automatically deny a request for leave from someone with cancer because the employee cannot specify an exact date of return?**

**No.** Granting leave to an employee who is unable to provide a fixed date of return may be a reasonable accommodation. Although many types of cancer can be successfully treated -- and often cured -- the treatment and severity of side effects often are unpredictable and do not permit exact timetables. An employee requesting leave because of cancer, therefore, may be able to provide only an approximate date of return (for example, "in six to eight weeks," "in about three months"). In such situations, or in situations in which a return date must be postponed because of unforeseen medical developments, employees should stay in regular communication with their employers to inform them of their progress and discuss the need for continued leave beyond what originally was granted. The employer also has the right to require that the employee provide periodic updates on his condition and possible date of return. After receiving these updates, the employer may reevaluate whether continued leave constitutes an undue hardship.

# Concerns About Safety

**When may an employer refuse to hire, terminate, or temporarily restrict the duties of a person who has or had cancer because of safety concerns?**

An employer only may exclude an individual with cancer from a job for safety reasons when the individual poses a direct threat. A "direct threat" is a significant risk of substantial harm to the individual or others that cannot be eliminated or reduced through reasonable accommodation. This determination must be based on objective, factual evidence, including the best recent medical evidence and advances in the treatment of cancer.

# Concerns About Safety

In making a direct threat assessment, the employer must evaluate the individual's present ability to safely perform the job. The employer also must consider:

- the duration of the risk;
- the nature and severity of the potential harm;
- the likelihood that the potential harm will occur; and
- the imminence of the potential harm.
- The harm must be serious and likely to occur, not remote or speculative.
- Finally, the employer must determine whether any reasonable accommodation (for example, temporarily limiting an employee's duties, temporarily reassigning an employee, or placing an employee on leave) would reduce or eliminate the risk.

Example: A school district may not demote a high school principal, who has been successfully treated for non-Hodgkin's lymphoma, because it fears that the stress of the job may trigger a relapse.

# Harassment

**What should employers do to prevent and correct harassment?**

Employers should make clear that they will not tolerate harassment based on disability or on any other basis.

This can be done in a number of ways, such as through a written policy, employee handbooks, staff meetings, and periodic training.

The employer should emphasize that harassment is prohibited and that employees should promptly report such conduct to a manager.

Finally, the employer should immediately conduct a thorough investigation of any report of harassment and take swift and appropriate corrective action.

# Associational Discrimination

This provision of the ADA prohibits three types of discrimination against employees associated with, or related to someone with, a disability:

- Discrimination based on expense: where an employee suffers an adverse employment action because of an association with a disabled individual covered under the employer's health plan, which is costly to the employer.

- Discrimination based on disability by association: where the employer fears that the employee may contract the disability of the person he or she is associated with (e.g., HIV), or the employee is genetically predisposed to develop a disability that his or her relatives have.

- Discrimination based on distraction: where the employee suffers an adverse employment action based on the employer's speculation that they will be inattentive at work because of the disability of someone with whom he or she is associated.

# Associational Discrimination

Relying on this theory, the EEOC sued the employer in *E.E.O.C. v. DynMcdermott Petroleum Operations Co.*, 537 Fed. Appx. 437 (5th Cir. 2013), the EEOC alleged that the employer had refused to hire an otherwise outstanding candidate because his wife had cancer.

The district court threw the EEOC's lawsuit out, but in 2013 the Fifth Circuit Court of Appeals reversed the district court's decision and remanded the case for trial.

# Common ADA Mistakes To Avoid

## Denying A Request For A Reasonable And Definite Leave Of Absence Because It Is Longer Than Company Policy Permits

*Garcia-Ayala v. Lederle Parenterlas, Inc.*, 212 F.3d 638 (1st Cir. 2000): In this case the company had a leave of absence policy that allowed employees to take disability leave for up to one year. If an employee exceeded that time period, they were automatically terminated. Garcia-Ayala had been diagnosed with breast cancer and took a leave of absence to undergo several surgeries, chemotherapy, and ultimately, a bone marrow transplant. At the end of her one-year leave of absence, her doctor authorized her to return to work in seven weeks. However, the company refused her request for an extra seven weeks leave and terminated her pursuant to its one-year leave of absence policy. Garcia-Ayala sued, and the district court granted her former employer's motion for summary judgment. On appeal, however, the First Circuit Court of Appeals reversed the district court's decision.

# Common ADA Mistakes To Avoid

## Failing To Recognize That An Employee Has Initiated The Interactive Process, Or Responding To The Employee With Inaccurate Information

*Gagliardo v. Connaught Laboratories, Inc.*, 311 F.3d 565 (3d Cir. 2002): Gagliardo was a customer service representative. A "special project" she handled was military orders from her company. For many years she was a good employee with no performance problems. After she developed Multiple Sclerosis (MS), however, she began making mistakes at work. Gagliardo told her supervisor and a manager of human resources – who was herself a MS sufferer – that taking away the military orders from her job duties would reduce her MS symptoms and thus improve her performance. The company agreed with this assertion, but never acted on it. Rather, Gagliardo was written up and then fired for poor performance. Gagliardo sued under the ADA. At trial the jury ruled in Gagliardo's favor and awarded her $2,000,000.00 in compensatory damages and $500,000.00 in punitive damages. The Third Circuit affirmed.

# Common ADA Mistakes To Avoid

Train your managers and HR to know when their interactive process duty has been triggered (it is not always obvious), and what their responsibilities are. (*See* Gagliardo; *see also EEOC v. Chevron Phillips Chemical Co., LP*).

# Common ADA Mistakes To Avoid

Denying a Request For A Reasonable Accommodation On The Basis Of Preexisting Performance Problems That Were Caused By The Employee's Disability

*Humphrey v. Memorial Hospital Assoc.*, 239 F.3d 1128 (9th Cir. 2001), *cert. denied*, 122 S. Ct. 1592 (2002)

*Riel v. Electronic Data Systems Corp.*, 99 F.3d 678 (5th Cir. 1996)

# Common ADA Mistakes To Avoid

**Tip:** Never deny a request for a reasonable accommodation without first engaging in the interactive process by: (1) requesting proof of the disability and its resulting workplace limitations; (2) discussing the proposed reasonable accommodation with the employee in light of the employee's job's essential functions; and (3) explaining to the employee why you believe their proposed accommodation is not reasonable and giving them an alternative proposed accommodation, or at least an opportunity to respond or propose a new accommodation.

*See Humphrey v. Memorial Hospital Assoc.*, 239 F.3d 1128 (9th Cir. 2001), *cert. denied*, 122 S. Ct. 1592 (2002)

# Common ADA Mistakes To Avoid

Denying an accommodation request on the grounds it would show favoritism or be inconsistent with Company policy.

Do not deny a request for a reasonable accommodation on the grounds that to do so would "show favoritism," "set a bad precedent," or undermine the company's need to apply policies consistently. (*See Garcia-Ayala*; EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act Q&A No. 24, 915.002 (Oct. 17, 2002). ("It is a reasonable accommodation to modify a workplace policy when necessitated by an individual's disability-related limitations, absent undue hardship."); Ralph Waldo Emerson ("A foolish consistency is the hobgoblin of little minds, adored by little statesmen and philosophers and divines.").

# Common ADA Mistakes To Avoid

Relying on a doctor's opinion when the doctor does not know the job's essential functions.

If you require "fitness for duty" pre-employment medical exams, make sure the doctor knows what the essential qualifications for the job are, and performs an "individualized assessment." You cannot necessarily simply blindly rely on what your doctor says, if he or she did not follow these rules. (*See Rodriguez v. ConAgra Grocery Products Co.*, 436 F.3d 468 (5th Cir. 2006).

# Common ADA Mistakes To Avoid

Firing an employee who has recently requested a reasonable accommodation, when the grounds for termination are tenuous.

When an employee seeks a reasonable accommodation, do not terminate them instead, unless the grounds for termination are rock solid and unrelated to their request or their medical condition (*e.g.*, they were caught on tape stealing). Otherwise, you are taking a big risk. (*See EEOC v. Chevron Phillips Chemical Co., LP*).

# Common ADA Mistakes To Avoid

Insisting that an employee have a "full duty" release to return to work.

Don't fall into the "full duty" trap. (*See Barber v. Nabors Drilling, U.S.A., Inc.*, 130 F.3d 702 (5th Cir. 1997) (affirming jury verdict for the plaintiff in an ADA case because the employer refused to allow an employee to return to work because he could not obtain a "full medical release" even though he could perform all the essential functions of his job); *Wright v. Middle Tenn. Elec. Membership Corp.*, M.D. Tenn., No. 3:05-cv-00969 (Dec. 07, 2006) ("While an employer is not required to create a light duty position where none exists and the ADA permits job requirements that are job-related and consistent with business necessity, a '100 percent healed' or 'fully-healed' policy is a *per se* violation of the ADA.").)

# Common ADA Mistakes To Avoid

Not training HR and managers on the basics of the ADA.

Such failure leads to more claims and greater exposure. On the other hand, giving such training lessens the likelihood of litigation, and reduces the company's exposure even if they do get sued. See *Kolstad v. American Dental Assn.*, 119 S. Ct. 2118, 2129 (1999) (holding that "an employer may not be held vicariously liable for the discriminatory employment decisions of managerial agents where those decisions are contrary to the employer's 'good faith efforts to comply with Title VII.'"); *Hatley v. Hilton Hotels Corp.*, 308 F.3d 473, 477 (5th Cir. 2002) (fact that company gave training on employment law allowed it to successfully invoke the *Kolstad* defense to punitive damages).

# Common ADA Mistakes To Avoid

Waiting until after the employee identified their disability, or asks for accommodations, to begin documenting chronic poor performance.

- A documented disciplinary trail that preexists the employee's disclosure of their disability, or request for accommodation, is golden in these cases.

- On the other hand, the lack of such a trail can be complicating and problematic.

# FMLA Issues

The FMLA provides up to 12 weeks of job-protected leave per year for employees suffering from a serious health condition. An employee is eligible for FMLA leave when he or she has worked for a "covered employer" at least twelve months, and worked "at least 1,250 hours of service with his employer during the previous 12 month period." 29 U.S.C. §§ 2611(2)(A) & 2611(2)(B)(ii). To be a "covered employer" under the FMLA, a business must "employ 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year." 29 U.S.C. § 2611(4)(A)(I).

# FMLA Issues

- The leave may be “intermittent,” rather than consecutive.
- As for “intermittent” leave, the employer has the right to transfer the employee to an alternative position temporarily during the period of time when the intermittent leave or reduced leave is required.
- According to the Fair Labor Standards Act, exempt employees who qualify for and take intermittent leave or a reduced leave schedule can have their salaries reduced without jeopardizing their exemption status.
- However, the position into which the employee transfers must have the same pay and benefits as the previous position, although the duties may be different.
- Once an employee is able to return to full-time work, the employee must be placed in the same or equivalent job as he or she had when the leave started.

# FMLA Issues

Interference with FMLA rights includes "not only refusing to authorize FMLA leave, but discouraging an employee from using such leave." 29 C.F.R. § 825.220(b). Furthermore, "employers cannot use the taking of FMLA leave as a negative factor in employment actions, such as hiring, promotions or disciplinary actions." *Id*. § 825.220(c).

# FMLA Issues

For example, in *Kinney v. Holiday Companies*, 398 Fed. Appx. 282 (9th Cir. 2010), the employee took FMLA leave for cancer treatment, returned to work, and was fired a year later – shortly after her cancer returned. She sued under the FMLA, and presented evidence that the employer's managers involved in the termination decision were aware that her cancer had returned and discussed whether she had taken FMLA leave shortly before she was terminated. The Court of Appeals concluded that "[s]uch evidence creates a triable issue as to whether her potential need for FMLA leave in the future was a negative factor in Holiday's decision to terminate her." *Id*. at 284.

# FMLA Issues

In *DeAngelo v. Yellowbook Inc.*, 2015 WL 1915641 (D. Conn. 2015), the district court denied the employer's MSJ against the cancer-stricken plaintiff's ADA claims and his FMLA interference and retaliation claims.

# FMLA Issues

Pursuant to the FMLA and related regulations, when an employee provides notice of the need for FMLA leave, the employer shall provide the employee with notice detailing the specific expectations and obligations of the employee and explaining any consequences of a failure to meet these obligations. 29 C.F.R. § 825.300(c)(1).

The FMLA regulations permit an employee at least 15 days to provide certification of a serious health condition after a request from an employer. *See Lubke v. City of Arlington*, 455 F.3d 489, 496-97 (5th Cir. 2006) (stating that 29 C.F.R. § 825.305(b) "requires" that the employer allow the employee at least 15 days to respond to the medical certification request).

# FMLA Issues

- An employer may require an employee on FMLA leave to report periodically on the employee's status and intent to return to work. The employer's policy regarding such reports may not be discriminatory and must take into account all of the relevant facts and circumstances related to the individual employee's leave situation. 29 C.F.R. § 825.311(a).

- Courts are generally very deferential to employers with such policies, and often dismiss plaintiffs' FMLA claims where they failed to comply with them. *See, e.g.*, *Bones v. Honeywell Intern., Inc.*, 366 F.3d 869 (10th Cir. 2004).

# General Risk Management Issues

- Compassion – documented – is critical. HR and management must think like human beings, not corporate drones. Meaning:
  - Flowers.
  - Cards.
  - Ensuring all benefits are offered and the employee is aware of them.
  - The “extra” touch, such as a visit to the hospital, or a kind note at the end of the day.
  - If termination is required and consistent with the law, handle it with the utmost care, dignity, and respect.
  - Do not fire over the phone. Do not disrespect. Think of how you would want your mother to be treated in that situation, and act accordingly.

# General Risk Management Issues

If you do terminate, the termination letter must not be a cold form that begs to start a social media firestorm: http://www.shrm.org/hrdisciplines/diversity/articles/pages/cancer-patient-fired-.aspx.

Rather, a termination letter must be a loving missive that invites the employee to return to reapply when they are able. That alone can pay huge dividends. *See, e.g.*, *Oguezuonu v. Genesis Health Ventures, Inc.*, 415 F. Supp. 2d 577, 588 (D. Md. 2005) (granting summary judgment against retaliation claim and relying on the fact that plaintiff's "termination letter invites her to reapply when she is able to return to work"); *Greene v. Dialysis Clinic, Inc.*, 159 F. Supp. 2d 228, 240 (M.D.N.C. 2001) (granting summary judgment for the defendant on a retaliatory discharge claim in part because the defendant invited the plaintiff to reapply for a position when one became available).

# General Risk Management Issues

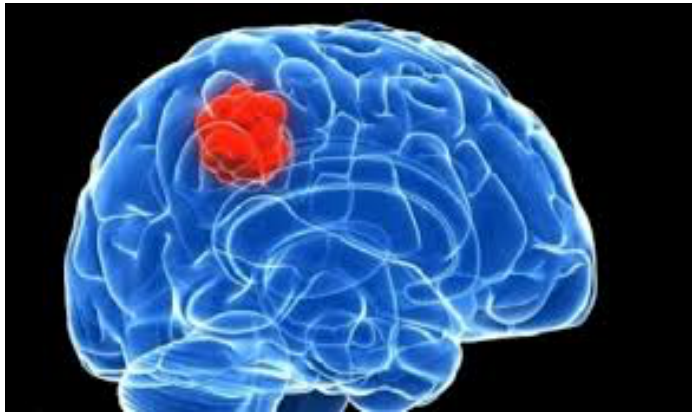
Recent case involving an employee with cancer who was fired where employer (a law firm) handled the situation correctly, and still got sued by the EEOC, but won: *EEOC v. Womble Carlyle Sandridge & Rice, LLP*, No. 14-1958, 2015 WL 3916760 (4th Cir. June 26, 2015). Pointers:

- Law firm worked with the ee's accommodations until they simply prevented her from performing the essential functions of her job.

- Firm kept good records of all its accommodations and of the interactive process it repeatedly followed.

- Firm had strong proof from job description and other workers that what it deemed an essential function really was.

# Managing Cancer In The Workplace



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