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## **5 Things Employers And Employees Need To Know About Cancer In The Workplace**

### **1. Cases Involving Employees With Cancer Who Are Fired Are Inherently High Risk, And Can Lead To Large Verdicts**

Almost every juror has experienced the loss of a loved one from cancer. Thus, hearing about an employee with cancer who was fired is likely to immediately emotionally resonate with them. Given that reality, unless the employer has a very compelling – and objectively provable – reason for firing the employee, the employer could face a large adverse verdict.

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. Allegedly fearing she would lose her job, Jorud returned to work much sooner than the three months she was entitled to under the FMLA. She allegedly forfeited paid time off and cut her pre-approved vacation time. Notwithstanding, Sands allegedly continued to harass her, questioning her need for more time off. When Jorud told Sands she needed a Friday off for more chemotherapy treatment, he allegedly told her she needed to be back to work on the following Monday. Finally, in frustration, Jorud sent an email to human resources: "I am losing faith in the company that says, 'Michaels Cares!' It is disillusioning to me to think that a company that caters largely to women, with a large quantity of women employees, is trying so hard to get rid of a female manager because she was unfortunate to get a women's disease!" Michaels allegedly did nothing. Ultimately, Jorud was fired a day before her next scheduled chemotherapy session.

One of Michaels' initial allegations was that Jorud had stolen merchandise from the store. This backfired, however, when Jorud produced her sales receipt. Thereafter, Michaels claimed it fired Jorud for violating a company policy which prohibits employees from purchasing older and discontinued merchandise about to be thrown away. This too backfired, however, when Plaintiff produced several

employees who testified that violating these policies were not fire-worthy, as they had done the same thing and were not terminated.

This case demonstrates that jurors are highly sympathetic to discrimination and retaliation claims by cancer-stricken employees. While managers and HR staff should be trained on employee rights under the FMLA and ADA, just knowing the rules is not enough when it comes to dealing with employees with cancer. In such cases, the rules must be implemented in a sensible, sensitive, morally upstanding, and respectful manner.

## **2. The EEOC Is Focused On The ADA Rights Of Employees With Cancer, Especially Reasonable Accommodation Issues**

The Equal Employment Opportunity Commission ("EEOC") is the federal government agency that investigates alleged violations of the ADA, issues guidance and regulations on the ADA, and has the authority to sue employers that it believes have violated the ADA. Since the the Americans with Disabilities Act Amendments Act ("ADAAA") took effect in 2009, the EEOC has become very focused on cancer rights under the ADA, and particularly on employer's obligations to make reasonable accommodations for the known disability-related workplace limitations of cancer victims.

For example, 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.

Last year, 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> (attached as Ex. 1). In the guidance, the EEOC explains that, "[a]n employer must provide a reasonable accommodation that is needed because of the limitations caused by the cancer itself, the side effects of medication or treatment for the cancer, or both. For example, an employer may have to accommodate an employee who is unable to work while she is undergoing chemotherapy or who has depression as a result of cancer, the treatment for it, or both." The EEOC's guidance is helpful to both employers and employees confronting cancer in the workplace.

### **3. The FMLA Provides Some Job Protection For Cancer Victims, But Is Very Technical**

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).

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). 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.

The FMLA is a highly technical law. Employees and employers should generally not try to navigate it without guidance from experienced labor and employment lawyers, such as Mark Oberti and Ed Sullivan – both of whom are Board Certified in Labor and Employment Law by the Texas Board of Legal Specialization.

### **4. Victims Of Disability Discrimination Have Short Time Limits To Act**

Under the ADA, an employee has only 300 days to file an EEOC Charge of Discrimination from the date they learn the employer is going to, or has taken an action against them in violation of the law. Under a Texas state law version of the ADA, that deadline is only 180 days to file a Charge of Discrimination with the Texas Workforce Commission – Civil Rights Division. Furthermore, the 300-day or 180-day limits can be triggered by events far short of actual termination. Therefore, if you believe that your employer or former employer has discriminated against you based on a disability, perceived disability, or record of disability – such as cancer – it is imperative to comply with these deadlines.

**5. The ADA Also Prohibits Discrimination Based On An Employee's Relationship Or Association With An Individual With Cancer**

In a little known part of the ADA, the law provides that it is unlawful for an employer to discriminate against an individual because of his relationship or association with an individual with a disability. 42 U.S.C. § 12112(a), (b)(4). More informally, this provision 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.

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.

**6. Oberti Sullivan LLP Can Help Cancer Victims Whose Workplace Rights Have Been Violated**

Since launching Oberti Sullivan LLP ([www.osattorneys.com](http://www.osattorneys.com)) in June 2010, Mark Oberti and Ed Sullivan have successfully represented cancer victims, and obtained substantial jury verdicts and settlements on behalf of their clients. Mark and Ed are both Board Certified in Labor and Employment Law by the Texas Board of Legal Specialization, and have both been repeatedly recognized as "Super Lawyers" by Thompson Reuters as published in *Texas Monthly* magazine.

# EXHIBIT 1



## U.S. Equal Employment Opportunity Commission

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# Questions & Answers about Cancer in the Workplace and the Americans with Disabilities Act (ADA)

## INTRODUCTION

The Americans with Disabilities Act (ADA), which was amended by the ADA Amendments Act of 2008 ("Amendments Act" or "ADAAA"), is a federal law that prohibits discrimination against qualified individuals with disabilities. Individuals with disabilities include those who have impairments that substantially limit a major life activity, have a record (or history) of a substantially limiting impairment, or are regarded as having a disability.<sup>1</sup>

Title I of the ADA covers employment by private employers with 15 or more employees as well as state and local government employers. Section 501 of the Rehabilitation Act provides similar protections related to federal employment. In addition, most states have their own laws prohibiting employment discrimination on the basis of disability. Some of these state laws may apply to smaller employers and may provide protections in addition to those available under the ADA.<sup>2</sup>

The U.S. Equal Employment Opportunity Commission (EEOC) enforces the employment provisions of the ADA. This document, which is one of a series of question-and-answer documents addressing particular disabilities in the workplace,<sup>3</sup> explains how the ADA applies to job applicants and employees who have or had cancer. In particular, this document explains:

- when an employer may ask an applicant or employee questions about his cancer and how it should treat voluntary disclosures;
- what types of reasonable accommodations employees with cancer may need;
- how an employer should handle safety concerns about applicants and employees with cancer; and
- how an employer can ensure that no employee is harassed because of cancer or any other disability.

## GENERAL INFORMATION ABOUT CANCER

Cancer is a group of related diseases characterized by the out-of-control growth of abnormal cells caused by both external and internal factors, such as chemicals, radiation, immune conditions, and inherited mutations.<sup>4</sup> In 2008, the last year for which incidence data is available, more than 12 million Americans were living with cancer.<sup>5</sup> Some of these individuals had cancers that were not "active," or in remission, while others still had evidence of cancer and may have been undergoing treatment.<sup>6</sup>

Cancer's effect on an individual depends on many factors, including the primary site of the cancer, stage of the disease, age and health of the individual, and type of treatment(s). The most common symptoms and side effects of cancer and/or treatment are pain, fatigue, problems related to nutrition and weight management, nausea, vomiting, hair loss, low blood counts, memory and concentration loss, depression, and respiratory problems.<sup>7</sup>

Despite significant gains in cancer survival rates, people with cancer still experience barriers to equal job opportunities. Often, employees with cancer face discrimination because of their supervisors' and co-workers' misperceptions about their ability to work during and after cancer treatment. Even when the prognosis is excellent, some employers expect that a person diagnosed with cancer will take long absences from work or be unable to focus on job duties.

As a result of changes made by the ADAAA, people who currently have cancer, or have cancer that is in remission, should easily be found to have a disability within the meaning of the first part of the ADA's definition of disability because they are substantially limited in the major life activity of normal cell growth or would be so limited if cancer currently in remission was to recur.<sup>8</sup> Similarly, individuals with a history of cancer will be covered under the second part of the definition of disability because they will have a record of an impairment that substantially limited a major life activity in the past.<sup>9</sup> Finally, an individual is covered under the third ("regarded as") prong of the definition of disability if an employer takes a prohibited action (for example, refuses to hire or terminates the individual) because of cancer or because the employer believes the individual has cancer.<sup>10</sup>

## OBTAINING, USING, AND DISCLOSING MEDICAL INFORMATION

Title I of the ADA limits an employer's ability to ask questions related to cancer and other disabilities and to conduct medical examinations at three stages: pre-offer, post-offer, and during employment.

### Job Applicants

#### *Before an Offer of Employment Is Made*

#### **1. May an employer ask a job applicant whether he has or had cancer or about his treatment related to cancer prior to making a job offer?**

No. An employer may not ask questions about an applicant's medical condition<sup>11</sup> or require an applicant to have a medical examination before it makes a conditional job offer. This means that an employer *cannot* legally ask an applicant questions such as:

- whether she has or ever had cancer;
- whether she is undergoing chemotherapy or radiation or taking medication used to treat or control cancer (for example, Tamoxifen) or ever has done so in the past; or
- whether she ever has taken leave for surgery or medical treatment, or how much sick leave she has taken in the past year.

Of course, an employer may ask questions pertaining to the qualifications for, or performance of, the job, such as:

- whether the applicant can lift up to 50 pounds;
- whether he can travel out of town; or
- whether he can work rotating shifts.

#### **2. Does the ADA require an applicant to disclose that she has or had cancer or some other disability before accepting a job offer?**

No. The ADA does not require applicants to voluntarily disclose that they have or had cancer or another disability unless they will need a reasonable accommodation for the application process (for example, additional time to take a pre-employment test due to fatigue caused by radiation treatments). Some individuals with cancer, however, choose to disclose their condition to dispel any rumors or speculation about their appearance, such as emaciation or hair loss.

Sometimes, the decision to disclose depends on whether an individual will need a reasonable accommodation to perform the job (for example, flexible working hours to receive or recover from treatment). A person with cancer, however, may request an accommodation after becoming an employee even if she did not do so when applying for the job or after receiving the job offer.

#### **3. May an employer ask any follow-up questions if an applicant voluntarily reveals that he has or had cancer?**

No. An employer generally may not ask an applicant who has voluntarily disclosed that he has cancer any questions about the cancer, its treatment, or its prognosis. However, if an applicant voluntarily discloses that he has cancer **and the employer reasonably believes that he will require an accommodation to perform the job because of his cancer or treatment**, the employer may ask whether the applicant will need an accommodation and what type. The employer must keep any information an applicant discloses about his medical condition confidential. (See "Keeping Medical Information Confidential.")

**Example 1:** An individual applies for a retail clerk position at a 24-hour convenience store. The job posting indicated that the store was seeking to hire a clerk to work from 2:00 p.m. to 10:00 p.m. During the interview, the applicant mentions that the hours are ideal for him because he will not have to make any adjustments to his scheduled radiation treatments for prostate cancer, which occur in the early morning and are expected to continue for the next five weeks. He also mentions that he has not had any side effects during his first three weeks of treatment. Because the applicant is not requesting a reasonable accommodation, and there is no reason to believe he will require one, the interviewer cannot ask him any questions about the need for reasonable accommodation.

**Example 2:** When an applicant is interviewed to be a driver for a package delivery service, the interviewer explains that although heavy lifting typically is done by at least two employees, sometimes drivers have to lift and carry packages alone. The applicant responds that ever since her surgery for breast cancer, she has had difficulty lifting heavy objects. If lifting is an essential function of a driver's job, the interviewer may ask the applicant whether she will need a reasonable accommodation and what type.

#### *After an Offer of Employment Is Made*

After making a job offer, 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). After an

employer has obtained basic medical information from all individuals who have received job offers, it may ask specific individuals for more medical information if it is medically related to the previously obtained medical information. For example, if an employer asks all applicants post-offer about their general physical and mental health, it can ask individuals who disclose a particular illness, disease, or impairment for more medical information or require them to have a medical examination related to the condition disclosed.

#### **4. What may an employer do when it learns that an applicant has or had cancer after she has been offered a job but before she starts working?**

When an applicant discloses after receiving a conditional job offer that she has or had cancer, an employer may ask the applicant additional questions, such as whether she is undergoing treatment or experiencing any side effects that could interfere with the ability to do the job or that might require a reasonable accommodation. The employer also may send the applicant for a follow-up medical examination or ask her to submit documentation from her doctor answering questions specifically designed to assess the applicant's ability to perform the job's functions safely. Permissible follow-up questions at this stage differ from those at the pre-offer stage when an employer only may ask an applicant who voluntarily discloses a disability whether she needs an accommodation to perform the job and what type.

An employer may not withdraw an offer from an applicant with cancer or a history of cancer if the applicant is able to perform the essential functions of a job, with or without reasonable accommodation, without posing a direct threat (that is, a significant risk of substantial harm) to the health or safety of himself or others that cannot be eliminated or reduced through reasonable accommodation. ("Reasonable accommodation" is discussed in Questions 10 through 15. "Direct threat" is discussed in Questions 6 and 16.)

**Example 3:** An applicant is asked to complete a medical history questionnaire and undergo a medical examination after receiving an offer of a security guard position. In the section of the questionnaire asking about various current and/or past medical conditions, the applicant indicates that she was diagnosed with very early-stage colon cancer six years ago. When the doctor conducting the medical examination asks medically related follow-up questions about the possibility of recurrence, the applicant explains that she did not require any further treatment after the malignant polyp was removed and that her annual colonoscopies for the past five years have shown no evidence of disease. Because the applicant is able to perform the duties of a security officer without posing a direct threat, the employer may not withdraw the job offer.

## **Employees**

The ADA strictly limits the circumstances under which an employer may ask questions about an employee's medical condition or require the employee to have a medical examination. Once an employee is on the job, his actual performance is the best measure of ability to do the job.

#### **5. When may an employer ask an employee if cancer, or some other medical condition, may be causing her performance problems?**

Generally, an employer may ask disability-related questions or require an employee to have a medical examination when it knows about a particular employee's medical condition, has observed performance problems, and 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. Often, however, poor job performance is unrelated to a medical condition and generally should be handled in accordance with an employer's existing policies concerning performance.<sup>12</sup>

**Example 4:** An attorney complains to a law firm partner that, several times a day for the past month, the receptionist has missed numerous phone calls and has not been at her desk to greet clients. The attorney explains that she has been reluctant to say anything because she knows that around the same time the performance problems began, the receptionist started undergoing radiation treatment for some type of cancer. The partner may ask the receptionist questions about whether her cancer treatments are causing her performance problems and, if so, how long the treatments are expected to continue and whether she needs a reasonable accommodation.

**Example 5:** A normally reliable computer programmer, who had surgery several years ago to treat early-stage thyroid cancer, lately has been calling in sick on Monday mornings. This pattern started shortly after the programmer began working weekends as a bartender. The supervisor can talk to the programmer about his attendance problems but may not ask him questions about his medical condition (including whether his cancer has returned) unless there is objective evidence that his absences stem from a medical condition.

#### **6. 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.

**Example 6:** A newspaper reporter, who has been on leave for eight months receiving experimental treatment for non-aggressive lung cancer, notifies her employer that she will be able to return to work in two weeks but will need to continue her treatment for four more months. Because the reporter's job frequently requires her to travel nationally and internationally on short notice, the employer may ask her to provide a doctor's note or other documentation indicating whether she can travel during the next four months and, if so, whether there are any limits on how long she can be away.

**7. 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;<sup>13</sup> or
- to enable the employee to participate in a voluntary wellness program.<sup>14</sup>

**Keeping Medical Information Confidential**

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).

**8. May an employer 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?**

No. Telling co-workers that an employee is receiving a reasonable accommodation amounts to a disclosure that the employee has a disability. Rather than disclosing that the employee is receiving a reasonable accommodation, the employer should focus on the importance of maintaining the privacy of all employees and emphasize that its policy is to refrain from discussing the work situation of any employee with co-workers. Employers may be able to avoid many of these kinds of questions by training all employees on the requirements of equal employment laws, including the ADA.

Additionally, an employer will benefit from providing information about reasonable accommodations to all of its employees. This can be done in a number of ways, such as through written reasonable accommodation procedures, employee handbooks, staff meetings, and periodic training. This kind of proactive approach may lead to fewer questions from employees who misperceive co-worker accommodations as "special treatment."

**9. If an employee has lost a lot of weight or appears fatigued, may an employer explain to co-workers that the employee has cancer?**

No. Although the employee's co-workers and others in the workplace may be concerned about the employee's health, an employer may not reveal that the employee has cancer. An employee, however, may voluntarily choose to tell her co-workers and others that she has cancer and about her treatment. However, even when an employee voluntarily discloses that she has cancer, the employer must keep this information confidential consistent with the ADA. 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.

**Example 7:** A hair stylist, who has been unable to eat regularly because he is undergoing chemotherapy for melanoma, has lost 30 pounds. His co-workers and other clients are gossiping about whether he has AIDS. The salon owner should act to discourage the rumors and gossip, but may not disclose that the stylist has cancer.

**ACCOMMODATING EMPLOYEES WITH CANCER**

The ADA requires employers to provide adjustments or modifications -- called reasonable accommodations -- to enable applicants and employees with disabilities to enjoy equal employment opportunities unless doing so would be an undue hardship (that is, a significant difficulty or expense). Accommodations vary depending on the needs of the individual with a disability. Not all employees with cancer will need an accommodation or require the same accommodations, and most of the accommodations a person with cancer might need will involve little or no cost. An employer must provide a reasonable

accommodation that is needed because of the limitations caused by the cancer itself, the side effects of medication or treatment for the cancer, or both. For example, an employer may have to accommodate an employee who is unable to work while she is undergoing chemotherapy or who has depression as a result of cancer, the treatment for it, or both. An employer, however, has no obligation to monitor an employee's medical treatment or ensure that he is receiving appropriate treatment.

## 10. What other types of reasonable accommodations may employees with cancer need?

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

- leave for doctors' appointments and/or to seek or recuperate from treatment<sup>15</sup>
- periodic breaks or a private area to rest or to take medication
- modified work schedule or shift change

**Example 8:** An engineer working independently on a long-term project has to undergo radiation for cancer every weekday morning for the next eight weeks. If the employee requests to change his starting time or number of hours he works as a reasonable accommodation, the employer should consider whether it can provide a flexible schedule (for example, allow him to come in later or work part-time) to accommodate his treatment.

**Example 9:** The oncologist who recently successfully treated a nurse for breast cancer recommended that she continue seeing her doctor every three months for next two years to check for a possible recurrence. The nurse requested to continue working a fixed 6:00 a.m. to 2:00 p.m. schedule instead of being required to work a later shift so that she could schedule her appointments during her doctor's office hours. Because allowing the nurse to keep her desired shift to go to monitoring appointments was not an undue hardship, her employer granted her request for an adjustment to the usual requirement that nurses work a rotating schedule.

- permission to work at home<sup>16</sup>
- 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

**Example 10:** A janitor, who had a leg amputated to cure bone cancer, can perform all of his essential job functions without accommodation but has difficulty climbing into the attic to occasionally change the building's air filter. The employer likely can reallocate this marginal function to one of the other janitors.

- reassignment to a vacant position when the employer is no longer able to perform her current job

**Example 11:** As a result of lymphedema<sup>17</sup> from her mastectomy, a truck driver for a courier service no longer can lift anything heavier than 10 pounds and, therefore, informs her employer that she is unable to do her current job, which requires her to load and unload packages weighing up to 70 pounds. The employer must consider whether a vacant position exists for which the driver is qualified and to which she can be reassigned as a reasonable accommodation, absent undue hardship. The vacant position must be equivalent in terms of pay and status to the original job, or as close as possible if no equivalent position exists. The position need not be a promotion, although the employee should be able to compete for any promotion for which she is eligible. The employer also does not have to "bump" another employee to create a vacancy.

Although these are some examples of the types of accommodations commonly requested by employees with cancer, other employees may need different changes or adjustments. Employers should ask the particular employee requesting an accommodation what he needs that will help him do his job. There also are extensive public and private resources to help employers identify reasonable accommodations. For example, the website for the Job Accommodation Network (JAN) (<http://askjan.org/media/Cancer.html>) provides information about many types of accommodations for employees with cancer.

## 11. 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 12:** 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.

## 12. 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.<sup>18</sup>

**Example 13:** When an employee asks for leave to receive treatment for colon cancer, his employer asks him to submit a doctor's note. The employee provides a note from his oncologist indicating that treatment of the condition will require surgery to remove a portion of the large intestine, along with chemotherapy and radiation. The note also states that the employee likely will be totally unable to work for the next six months. The doctor's letter is sufficient to demonstrate that the employee has a disability and needs the reasonable accommodation of leave. If, after returning to work, the employee makes a subsequent accommodation request related to his colon cancer (for example, a part-time schedule) and the need for accommodation is not obvious, the employer may ask for documentation explaining why the accommodation is needed but may not ask for documentation concerning his cancer diagnosis.

### **13. 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.

### **14. May an employer be required to provide more than one accommodation for the same employee with cancer?**

Yes. The duty to provide a reasonable accommodation is an ongoing one. Although some employees with cancer may require only one reasonable accommodation, others may need more than one. For example, an employee with cancer may require leave for surgery and subsequent recovery but may be able to return to work on a part-time or modified schedule while receiving chemotherapy. An employer must consider each request for a reasonable accommodation and determine whether it would be effective and whether providing it would pose an undue hardship.

### **15. 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 it comes to safety concerns, an employer should be careful not to act on the basis of myths, fears, or stereotypes about cancer. Instead, the employer should evaluate each individual on her skills, knowledge, experience and how having cancer affects her.

### **16. 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.<sup>19</sup> This determination must be based on objective, factual evidence, including the best recent medical evidence and advances in the treatment of cancer.

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:

1. the duration of the risk;

2. the nature and severity of the potential harm;
3. the likelihood that the potential harm will occur; and
4. the imminence of the potential harm.<sup>20</sup>

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.<sup>21</sup>

**Example 14:** 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

The ADA prohibits harassment, or offensive conduct, based on disability just as other federal laws prohibit harassment based on race, sex, color, national origin, religion, age, and genetic information. Offensive conduct may include, but is not limited to, offensive jokes, slurs, epithets or name calling, physical assaults or threats, intimidation, ridicule or mockery, insults or put-downs, offensive objects or pictures, and interference with work performance. Although the law does not prohibit simple teasing, offhand comments, or isolated incidents that are not very serious, harassment is illegal when it is so frequent or severe that it creates a hostile or offensive work environment or when it results in an adverse employment decision (such as the victim being fired or demoted).

### 17. 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. For more information on the standards governing harassment under all of the EEO laws, see [www.eeoc.gov/policy/docs/harassment.html](http://www.eeoc.gov/policy/docs/harassment.html).

## RETALIATION

The ADA prohibits retaliation by an employer against someone who opposes discriminatory employment practices, files a charge of employment discrimination, or testifies or participates in any way in an investigation, proceeding, or litigation related to a charge of employment discrimination. It is also unlawful for an employer to retaliate against someone for requesting a reasonable accommodation. Persons who believe that they have been retaliated against may file a charge of retaliation as described below.

## HOW TO FILE A CHARGE OF EMPLOYMENT DISCRIMINATION

### Against Private Employers and State/Local Governments

Any person who believes that his or her employment rights have been violated on the basis of disability and wants to make a claim against an employer must file a charge of discrimination with the EEOC. A third party may also file a charge on behalf of another person who believes he or she experienced discrimination. For example, a family member, social worker, or other representative can file a charge on behalf of someone who is incapacitated because of cancer. The charge must be filed by mail or in person with the local EEOC office within 180 days from the date of the alleged violation. The 180-day filing deadline is extended to 300 days if a state or local anti-discrimination agency has the authority to grant or seek relief as to the challenged unlawful employment practice.

The EEOC will send the parties a copy of the charge and may ask for responses and supporting information. Before formal investigation, the EEOC may select the charge for EEOC's mediation program. Both parties have to agree to mediation, which may prevent a time consuming investigation of the charge. Participation in mediation is free, voluntary, and confidential.

If mediation is unsuccessful, the EEOC investigates the charge to determine if there is "reasonable cause" to believe discrimination has occurred. If reasonable cause is found, the EEOC will then try to resolve the charge with the employer. In some cases, where the charge cannot be resolved, the EEOC will file a court action. If the EEOC finds no discrimination, or if an attempt to resolve the charge fails and the EEOC decides not to file suit, it will issue a notice of a "right to sue," which gives the charging party 90 days to file a court action. A charging party can also request a notice of a "right to sue" from the EEOC 180 days after the charge was first filed with the Commission, and may then bring suit within 90 days after receiving the notice. For a detailed description of the process, you can visit our website at [www.eeoc.gov/employees/howtofile.cfm](http://www.eeoc.gov/employees/howtofile.cfm).

### Against the Federal Government

If you are a federal employee or job applicant and you believe that a federal agency has discriminated against you, you have a right to file a complaint. Each agency is required to post information about how to contact the agency's EEO Office. You

can contact an EEO Counselor by calling the office responsible for the agency's EEO complaints program. Generally, you must contact the EEO Counselor within 45 days from the day the discrimination occurred. In most cases the EEO Counselor will give you the choice of participating either in EEO counseling or in an alternative dispute resolution (ADR) program, such as a mediation program.

If you do not settle the dispute during counseling or through ADR, you can file a formal discrimination complaint against the agency with the agency's EEO Office. You must file within 15 days from the day you receive notice from your EEO Counselor about how to file.

Once you have filed a formal complaint, the agency will review the complaint and decide whether or not the case should be dismissed for a procedural reason (for example, your claim was filed too late). If the agency doesn't dismiss the complaint, it will conduct an investigation. The agency has 180 days from the day you filed your complaint to finish the investigation. When the investigation is finished, the agency will issue a notice giving you two choices: either request a hearing before an EEOC Administrative Judge or ask the agency to issue a decision as to whether the discrimination occurred. For a detailed description of the process, you can visit our website at [www.eeoc.gov/federal/fed\\_employees/complaint\\_overview.cfm](http://www.eeoc.gov/federal/fed_employees/complaint_overview.cfm).

## Footnotes

<sup>1</sup> See 42 U.S.C. §12102(2); 29 C.F.R. §1630.2(g).

<sup>2</sup> For example, disability laws in California, Pennsylvania, New Jersey, and New York apply to employers with fewer than 15 employees.

<sup>3</sup> See "The Questions and Answers Series" under "Available Resources" on EEOC's website at [www.eeoc.gov/laws/types/disability.cfm](http://www.eeoc.gov/laws/types/disability.cfm)

<sup>4</sup> American Cancer Society (ACS), "Facts & Figures 2012" [www.cancer.org/Research/CancerFactsFigures/index](http://www.cancer.org/Research/CancerFactsFigures/index) (last visited January 10, 2013)

<sup>5</sup> "Cancer Prevalence: How Many People Have Cancer?" [www.cancer.org/Cancer/CancerBasics/cancer-prevalence](http://www.cancer.org/Cancer/CancerBasics/cancer-prevalence) (last visited January 10, 2013).

<sup>6</sup> Id., at ACS, "Facts & Figures 2012" [www.cancer.org/research/cancerfactsfigures/cancerfactsfigures/cancer-facts-figures-2012](http://www.cancer.org/research/cancerfactsfigures/cancerfactsfigures/cancer-facts-figures-2012) (last visited January 10, 2013)

<sup>7</sup> ACS, Cancer Basics, Signs and Symptoms of Cancer, [www.cancer.org/cancer/cancerbasics/signs-and-symptoms-of-cancer](http://www.cancer.org/cancer/cancerbasics/signs-and-symptoms-of-cancer) (last visited January 10, 2013)

<sup>8</sup> See 29 C.F.R. §§1630.2(j)(3)(iii) and 1630.2(j) (1)(vii).

<sup>9</sup> Id. at §1630.2(k).

<sup>10</sup> Id. at §1630.2(l).

<sup>11</sup> Federal contractors are required under 41 C.F.R. § 60-741.42, a regulation issued by the Office of Federal Contract Compliance Programs (OFCCP), to invite applicants to voluntarily self-identify as persons with disabilities for affirmative action purposes. The ADA prohibition on asking applicants about medical conditions at the pre-offer stage does not prevent federal contractors from complying with the OFCCP's regulation. See Letter from Peggy R. Mastroianni, EEOC Legal Counsel, to Patricia A. Shiu, Director of OFCCP, [www.dol.gov/ofccp/regs/compliance/section503.htm#bottom](http://www.dol.gov/ofccp/regs/compliance/section503.htm#bottom).

<sup>12</sup> An employer also may ask an employee about his cancer or send the employee for a medical examination when it reasonably believes the employee may pose a direct threat because of his cancer. See "Concerns About Safety."

<sup>13</sup> An employer also may ask an employee for periodic updates on her condition if the employee has taken leave and has not provided an exact or fairly specific date of return or has requested leave in addition to that already granted. Of course, an employer may call employees on extended leave to check on their progress or to express concern for their health without violating the ADA.

<sup>14</sup> The ADA allows employers to conduct voluntary medical examinations and activities, including obtaining voluntary medical histories, which are part of an employee wellness program (such as a smoking cessation program or cancer detection screening), as long as any medical records (including, for example, the results any diagnostic tests) acquired as part of the program are kept confidential. See Q&A 22 in EEOC Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees Under the ADA, <http://www.eeoc.gov/policy/docs/guidance-inquiries.html>

<sup>15</sup> An employee who needs continuing or intermittent leave, or a part-time or modified schedule, as a reasonable accommodation also may be entitled to leave under the Family and Medical Leave Act (FMLA). For a discussion of how

employers should treat situations in which an employee may be covered both by the FMLA and the ADA, see Questions 21 and 23 in the EEOC Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act (rev. Oct. 17, 2002) at [www.eeoc.gov/policy/docs/accommodation.html](http://www.eeoc.gov/policy/docs/accommodation.html).

<sup>16</sup> See EEOC fact sheet on Telework as a Reasonable Accommodation at [www.eeoc.gov/facts/telework.html](http://www.eeoc.gov/facts/telework.html).

<sup>17</sup> Treatment for cancer may have some permanent effects. In breast cancer, for example, removal of lymph nodes makes women subject to lymphedema, a painful swelling in the arms and hands.

<sup>18</sup> Requests for documentation to support a request for accommodation may violate Title II of the Genetic Information Nondiscrimination Act (GINA) where they are likely to result in the acquisition of genetic information, including family medical history. 29 C.F.R. §1635.8(a). For this reason, employers may want to include a warning in the request for documentation that the employee or the employee's doctor should not provide genetic information. *Id.* at 1635.8(b)(1)(i)(B).

<sup>19</sup> See 29 C.F.R. §1630.2(r).

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*