

## **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>. 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.