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612-752-6000 thl@hcba.org

An Unwelcome Intruder: Cancer in the Workplace

"To the dumb question, why me? The cosmos barely bothers to return the reply: 'Why not.'"

- Christopher Hitchens

Introduction

In the United States, an astonishing 12.5 million people alive today have been diagnosed with cancer at some point in their lives.[1] A male reader of this article has slightly less than a one in two chance of being diagnosed with cancer in his lifetime; a female reader can relax a bit with odds of just over one in three. Last year, an estimated 1.6 million new cases of cancer (excluding non-melanoma skin cancers) were diagnosed in the United States. An estimated 577,190 Americans died of cancer last year, one out of every four deaths, making cancer second only to heart disease as the most common cause of death in this country. As bad as that sounds, these are the good old days: The number of cancer survivors is expected to climb 30 percent, to 18.1 million, over the course of this decade.[2] "Due to population growth and aging, the number of new cancer patients is expected to double to 2.6 million people by 2050." It is hard to dispute an epidemiologist's observation that "Cancer has become the price of modern life."[3]

Gregory Simpson
Contributing Author

Mr. Simpson is a partner at Meagher & Geer, practicing in the employment, insurance, and construction groups. He is a THL Committee member, issue editor, and contributer.

Cancer's cost in human emotions is beyond measure, but its cost in dollars is not. Medical costs associated with cancer, including all health expenditures, totaled $103.8 billion in 2007.[4] Indirect costs of cancer, measured by lost earnings due to premature death, were estimated to be $123 billion in 2007. But there is a bright spot in the oncologist's gloomy waiting room. As a result of improvements in diagnostics and treatment, the survival rate for all cancers diagnosed between 2001 and 2007 was 67 percent; up from 49 percent in 1975 to 1977. Thus, while more people are being diagnosed with cancer, and at younger ages, those people are recovering from it more often and living longer lives.

That more and more working-aged people are *living* with cancer, instead of the even less pleasant alternative, means that the effects of cancer are not limited to hospitals and homes; they are with us in the workplace. And this, in turn, suggests a need for some scholarly attention to the intersection of cancer and employment law. Although cancer is its focus, most of the issues discussed in this article are equally applicable to those coping with serious illnesses other than cancer.

Legal Side Effects of Cancer

A diagnosis of cancer can portend bad things to come in addition to the illness itself. At a time when the energy to cope is at a low ebb, cancer patients often find themselves confronting a host of bewildering legal issues, such as:

- Insurance issues involving Medicare, Medicaid, or private providers;
- Social Security Disability and other public benefits;
- Long and Short Term Disability insurance claims;
- Housing problems (foreclosure, eviction);
- Estate planning (wills, guardianships, Powers of Attorney, living wills);
- Consumer issues (debtor/creditor, bankruptcy);

- Family law (custody, support);
- Special education; and
- Employment.[5]

One survey of cancer patients identified 30 medically related legal needs that were not being met.[6]

In recent years, a handful of nonprofits have emerged across the country to help cancer patients with these and other nonmedical side effects of cancer. In Minnesota, the Cancer Legal Line provides "critical legal help to Minnesotans dealing with cancer and the many legal issues that may arise as a result."[7] Founded by Executive Director Lindy Yokanovich in 2005, the group offers pro bono legal services regarding such things as appealing insurance coverage denials, obtaining and maintaining public health benefits; protecting against job, housing, and insurance discrimination; obtaining Social Security income benefits; assisting with debt relief; advice regarding the Family Medical Leave Act; and preparing wills, powers of attorney, and health care directives. Its website also serves as a clearing house of information about legal issues faced by cancer survivors. National organizations with similar missions include the National Coalition for Cancer Survivorship, which advocates "for quality cancer care for all people touched by cancer and provides tools that empower people to advocate for themselves,"[8] Breakaway from Cancer, a "national initiative to increase awareness of important resources available to people affected by cancer—from prevention through survivorship,"[9] and the LIVESTRONG Foundation.[10]

After the cancer itself, "the number one fear facing people diagnosed with cancer," says Yokanovich of Cancer Legal Line, "is that they will lose their job."[11] "Even with insurance," she notes, the economic toll of cancer can be severe: "It is a greased and buttered slope to financial ruin." Remaining employed while coping with cancer provides not only income and medical insurance, but also the stability and normalcy needed when dealing with cancer.[12]

Fortunately, according to a 2006 national survey of cancer survivors, most employers are sensitive and accommodating to the needs of employees who have cancer or are

caregivers for cancer survivors.[13] Three out of five survivors report receiving support from co-workers, and reports of negative reactions from employers and co-workers are very infrequent. The most common negative reaction, reported by 20 percent of survivors, is that the employer gave a survivor less work. However, six percent report being fired or laid off, seven percent report being denied a promotion, and four percent report being denied health insurance benefits. Discrimination perceived by these employees is borne out by U.S. Equal Employment Opportunity Commission (EEOC) charging statistics. Cancer-related EEOC charges in 1997 totaled 448, representing 2.5 percent of total charges filed. Those figures are on the rise. In 2011, 951 cancer patients nationwide filed complaints of employment discrimination, representing 3.7 percent of all charges, according to EEOC filing statistics.[14] Although EEOC charges obviously do not equate to wrongful employer conduct, there is always another side to the story: these statistics are a measure of workplace strife resulting from cancer.

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Employment Issues Arising from Cancer in the Workplace

In Minnesota, the most common cancer-related employment disputes arise under the Americans with Disabilities Act of 1990 (ADA),[15] the Minnesota Human Rights Act, and the Family and Medical Leave Act. Employees and employers should therefore be familiar with the requirements of those laws.

The ADA, for non-practitioners, is a federal law that, among other things, prohibits employment-related discrimination against any individual who has a "disability," defined as (a) "a physical or mental impairment that substantially limits one or more major life activities of such individual;" (b) "a record of such an impairment;" or (c) "being regarded as having such an impairment…."[16] The ADA applies to private employers with 15 or more employees, and also applies to state and local government employers. Before the ADA Amendments Act, which took effect January 1, 2009, it was not always clear whether cancer was a disability under the ADA because cancer doesn't necessarily pose a "substantial limitation" on a major life activity, particularly when it is in remission. The 2009 amendments, however, removed most of the ambiguity on the subject by defining "major life activities" to include "the operation of a major bodily function, including but not limited to … normal cell growth …."[17] Cancer being the *opposite* of normal cell growth, it now seems clear that cancer qualifies as a disability under the ADA, so long as the cancer is of a sort that "substantially limits" normal cell growth.

The 2009 amendments to the ADA also addressed uncertainty about whether cancer that is in remission is nevertheless a disability under the ADA. Previously, courts struggled with this issue. The ADA amendments provide that "An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active."[18] They further clarified that "The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures such as …medication …."[19] With these changes, it appears clear that cancer that is in remission or kept in check by medication is nevertheless a disability, so long as it would substantially limit normal cell growth when active or if left untreated.

The Accommodation Requirement

When an employee is diagnosed with cancer, he or she is faced with a dilemma: "Do I tell my boss?" It is a sad reality that not all employment relationships are characterized by mutual respect and trust. Employees, with cause or without, sometimes decide not to tell their employers that they are being treated for cancer for fear that the employer will treat the employee differently, or even terminate the employee. Employees who adopt this attitude use sick leave, PTO, or vacation days to attend medical appointments and to recover from grueling chemo and radiation therapies. In short, they try to appear normal while their lives are anything but. The employer, meanwhile, unaware that the employee is ill and suddenly perceiving irregular attendance and a decline in performance, may take disciplinary action, as the saying goes, "up to and including termination."

These are the ingredients of an ADA charge or lawsuit. But it is a charge or lawsuit that the employer would likely win, on these facts, because the employee did not tell the employer about the cancer. An employer who does not know that the employee is suffering from a disability can hardly be found to have violated the ADA's directive not to discriminate against a qualified individual "on the basis of a disability."[20] In this scenario, by not telling the employer about the cancer, the employee probably forfeited protection under the ADA.

An employee who tells the employer about the cancer diagnosis triggers the rights afforded by the ADA. These include, first and foremost, the right to reasonable accommodation. The general rule is that the employee who wants an ADA accommodation must ask for one. However, the ADA does not necessarily allow the employer to sit back and wait for an accommodation request. The employer should initiate the reasonable accommodation interactive process without being asked if the employer (1) knows that the employee has a disability; (2) knows or has reason to know that the employee is experiencing workplace problems because of the disability; and (3) knows or has reason to know that the disability prevents the employee from requesting an accommodation.[21] If the employee insists that he or she does not need an accommodation, the employer has fulfilled its accommodation duty under the ADA.

When the right to an accommodation is triggered, either by a request or otherwise, the employer must engage the employee in an informal "interactive process"—legal speak for "a meeting of some sort"—to determine (1) if the employee has a disability; and if so, (2) what if anything can be done to reasonably accommodate it. The ADA requires employers to provide reasonable accommodations to qualified individuals who are employees or applicants for employment, unless doing so would cause "undue hardship."[22] "Reasonable accommodation" means to make modifications or adjustments to the job application process, the work environment or otherwise, that enable a "qualified" individual who has a disability to apply for the job, perform the essential functions of the job, or otherwise "enjoy equal benefits and privileges of employment as are enjoyed by [the employer's] other similarly situated employees without disabilities."[23] A "qualified" individual with a disability is one who has the qualifications for the job at issue.[24] "Undue hardship" is defined imprecisely to mean an accommodation that would result in "significant difficulty or expense" to the employer in light of such factors as (1) cost of the accommodation; (2) financial resources of the employer, both at the facility in question and overall; and (3) the impact the accommodation would have on the employer's operations.[25]

Applying these somewhat abstract concepts to concrete situations is not always easy. The EEOC has issued a helpful guide on the subject, "Questions and Answers About Cancer in the Workplace and the Americans with Disabilities Act,"[26] and a more detailed enforcement guide that covers the subject of accommodation more broadly.[27] Although not updated since the ADA amendments took effect in 2009, these guides have not been withdrawn and their discussion of the employer's obligation to accommodate employees with disabilities, including cancer, still likely reflects the EEOC's views on the subject. As the enforcement agency for the ADA, the EEOC's views are usually, but not always, an accurate barometer of how the courts view the ADA, and the prudent employer should pay them heed.

The EEOC guide lists examples of accommodations that employees with cancer might need:

- leave for doctor's appointments and/or to seek or recuperate from treatment;
- periodic breaks or a private area to rest or to take medication;
- adjustments to a work schedule;
- permission to work at home;
- reallocation or redistribution or marginal tasks to another employee; and
- reassignment to another job.

The EEOC guide does not indicate that these requests are necessarily reasonable ones that must be granted by the employer. The employer need only grant accommodation that will not result in "undue hardship," which is a separate issue.

Much litigation arising under the ADA involves whether a requested accommodation must be granted. Employers often would prefer not to grant accommodations because of real or perceived inconvenience that the EEOC and the courts would conclude is not "undue hardship." It is easier to catalogue accommodations that the employer need *not* grant. An often overlooked caveat to the requirement of accommodation is that an employer is not required to grant the precise accommodation that the employee requests. If there is more than one way of reasonably accommodating the disability, the employer can choose from among them. In addition, an employer need not grant an accommodation that removes one or more of the job's essential functions. For example, a doctor who is unable to perform surgery due to fatigue caused by cancer treatments need not be granted an accommodation that relieves the doctor of the duty to perform surgery, if that is essential to the job. However, if the employer is able to shift work schedules to make the accommodation without "undue hardship," the duty to accommodate may require the employer to temporarily remove the doctor from surgery duties, while allowing the doctor to perform other duties.

Summary of ADA Issues

In summary, the ADA imposes the following obligations onto the employment relationship.

- An employer may not discriminate against an employee simply because the employee has, had, or is regarded as having, cancer.
- If an employee wants an accommodation because of his or her illness, the employee (or a proxy, such as a family member, friend, health care professional or other representative) must request one. The request need not be formal; there are no "magic words" that must be used; the ADA need not be mentioned; and the request need not be in writing.
- Upon receiving a request for an accommodation (or learning from other sources that the employee has a disability that may require an accommodation), the employer should engage the employee in an informal process to clarify what the employee needs and to identify the appropriate accommodation. The employer may ask the employee questions relevant to making an informed decision. The employer may ask for reasonable documentation where a disability or the need for reasonable accommodation is not obvious. Note that the employer is not entitled to more private information than is strictly necessary to establish the existence of a disability and the need for accommodation. The employer must hold all medical information in confidence and comply with all laws regarding medical and other private data.
- The employer must grant the employee a reasonable accommodation that does not result in "undue hardship," i.e., it does not result in excessive expense or disruption to the employer's operations. The accommodation need not be the one requested by the employee, if another accommodation will work. An employer may be required to provide more than one accommodation to the same employee. The employer is never required to grant an accommodation that permanently removes one or more of the essential job functions from the employee's duties.

The Minnesota Human Rights Act (MHRA)

The Minnesota Human Rights Act (MHRA) prohibits employment-related discrimination on grounds of disability, except when based on a "bona fide occupational qualification."[28] Like the ADA, the MHRA requires employers to make "reasonable accommodation to the known disability of a qualified disabled person or job applicant unless the employer ... can demonstrate that the accommodation would impose undue hardship ...."[29] Although the MHRA generally applies to employers of any size, the requirement of reasonable accommodation only applies to employers who have 15 or more part-time or full-time employee. Since the ADA also applies to employers with 15 or more employees, there is little daylight between the ADA's and the MHRA's prohibitions on disability discrimination. There are distinctions between the rights and procedures afforded under the MHRA as compared to the ADA, but with respect to employees with cancer, an employer's obligation under either law is substantially the same.

The Family and Medical Leave Act (FMLA)

In contrast to the ADA, with its messy fact patterns and reliance on fuzzy phrases like "undue hardship," the Family and Medical Leave Act (FMLA) of 1993, is a breath of fresh air.[30] Generally, the FMLA requires private employers of 50 or more employees and certain public employers to give up to 12 weeks of unpaid, job-protected leave to eligible employees for specified reasons, including serious illness of the employee. The FMLA imposes basically two requirements on the employer: (1) Maintain the employee's health benefits; and (2) Restore the employee to his or her job (or an equivalent position) when the leave is over.

Determining an employer's obligations, and an employee's rights, under the FMLA boils down to a handful of fairly straightforward questions: (1) Is the employer covered by the FMLA?; (2) Is the employee eligible for FMLA leave?; (3) Is the employee seeking leave for an FMLA-covered reason?; and (4) Did the employee give the right kind of notice? If these questions are all answered "yes," the employee is entitled to FMLA leave and the employer must hold the employee's job and maintain the employee's health benefits in the meantime.

1. FMLA Coverage

The FMLA generally applies to employers who employ 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year.[31] If this threshold requirement is not met, the FMLA analysis can stop because the employee is not entitled to FMLA leave.

2. Employee Eligibility

An employee of a covered employer is generally eligible for FMLA leave if (1) he or she has been employed for at least 12 months, not necessarily consecutive, by the employer from whom leave is requested; (2) the employee has worked at least 1,250 hours for the employer in the previous 12 months; and (3) the employee is employed at a worksite where 50 or more employees are employed by the employer within 75 miles of the worksite.[32] Of course, if the employee has already taken 12 weeks of leave, the employee has exhausted his or her rights to FMLA leave and is not entitled to take more.[33] The FMLA has special rules for federal employees, airline flight crews, and some other categories of employees, of which employers should be aware.

3. Reason for Leave

The FMLA grants leave only for limited reasons, including birth of a child, adoption placement, care of a close relative, certain reasons related to service in the armed forces, and—of relevance to this article—because of "a serious health condition that makes the employee unable to perform the functions of the position of such employee."[34] "Serious

health condition" means "an illness, impairment, or physical or mental condition that involves ... inpatient care in a hospital, hospice, or residential medical care facility ... or continuing treatment by a health care provider."[35] Most forms of cancer will likely satisfy this requirement for FMLA benefit eligibility. The employer is entitled to require that the request for leave be supported by certification from the health care provider, and is entitled to obtain a second opinion at its own expense if it doubts the validity of the certification.[36]

4. FMLA Notice

The final requirement for FMLA leave is proper notice to the employer. If the need for leave is foreseeable based on planned medical treatment, the employee must give at least 30 days of advance notice before the FMLA leave is to begin.[37] Where this much notice is not feasible, for example because of a medical emergency, notice of the need for leave must be "as soon as practicable." For intermittent FMLA leave, discussed below, notice need only be given once. There are no formal requirements for the notice, which may be verbal. Notice will be sufficient to trigger FMLA obligations if it sufficiently alerts the employer "that the employee needs FMLA-qualifying leave, and the anticipated timing and duration of the leave." With respect to planned treatment, employees must consult with employers and make "a reasonable effort to schedule the treatment so as to not to disrupt unduly the employer's operations ...."

5. Intermittent/Reduced Schedule FMLA Leave

The FMLA contemplates that employees may not need a continuous 12-week leave, and authorizes intermittent leave (leave taken in separate blocks of time) or a reduced leave schedule (reduced working hours) where medically necessary, up to an aggregate amount of 12 weeks of leave.[38] On request, the employee must tell the employer the reasons why intermittent/reduced schedule leave is necessary and supply the treatment schedule. The employee and employer are required to negotiate an agreed schedule that meets the employee's treatment needs while minimizing disruption to the employer's operations. The FMLA gives the employer the option of temporarily transferring or reassigning an employee who wants intermittent or reduced schedule leave to a different job, so long as the employee is qualified for the job and the pay and benefits are equivalent.[39]

Conclusion

Cancer rates in the work force are expected to rise in the coming decades due to the aging work force, the rise in some cancer rates for working-age people and the fact that improvements in medicine increasingly allow cancer survivors to live long and productive lives. With more cancer survivors in the workforce, the need for competent legal advice to employers and employees coping with cancer is correspondingly greater. Accurate and timely advice will minimize strife between cancer survivors and their employers, when the unwelcome intruder visits the workplace.

Resources

- Cancer Legal Line (*www.CancerLegalLine.org*).
- National Cancer Legal Services Network (*www.NCLSN.org*).
- Social Security Administration (*www.ssa.gov/pgm/disability.htm*).
- The Americans with Disabilities Act (ADA) (*www.ada.gov*).
- Cancer Legal Resource Center (CLRC) (*www.disabilityrightslegalcenter.org*)
- The Equal Employment Opportunity Commission (*EEOC*) (*www.eeoc.gov*)
- The Family and Medical Leave Act (FMLA) (*www.dol.gov/dol/topic/benefits-leave/fmla.htm*)

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1 American Cancer Society. Cancer Facts and Figures 2012, p. 1 (Atlanta: American Cancer Society; 2012) (available online at *http://www.cancer.org/research/cancerfactsfigures/cancerfactsfigures/cancer-facts-figures-2012*);

2 National Cancer Institute. Cancer Prevalence and Cost of Care Projections. (*http://costprojections.cancer.gov/*)

3 Steven Shapin, *Cancer World: The Making of a Modern Disease*, The New Yorker, Nov. 2010.

4 American Cancer Society. Economic Impact of Cancer. (Atlanta: American Cancer Society; 2012) (last revised 2/9/2012) (*http://www.cancer.org/cancer/cancerbasics/economic-impact-of-cancer*).

5 Eric T. Rosenthal, "How Legal Services Are Supplementing the Work of the Cancer Care Team for Certain Psychosocial Issues," Oncology Times Apr. 25, 2010, p. 24.

6 B. Victorian, "Study: Cancer Patients' Quality of Life Affected by Unmet Legal Needs," Oncology Times Dec. 10, 2007, pp. 21-23.

7 Cancer Legal Line (*http://www.cancerlegalline.org/about/cancer-legal-line/*) (site last visited 1/15/2013).

8 National Coalition for Cancer Survivorship (*http://www.canceradvocacy.org/about-us/*) (site last visited 1/15/2013).

9 *http://www.breakawayfromcancer.com/aboutus/aboutus.html*

10 *http://www.livestrong.org/Who-We-Are*.

11 Interview with the author, Jan. 15, 2013.

12 Rosenthal, p. 27.

13 *http://www.canceradvocacy.org/resources/employment-rights/*.

14 *http://www.eeoc.gov/eeoc/statistics/enforcement/ada-receipts.cfm*.

15 42 U.S.C. § 12101, *et seq.* (2012).

16 42 U.S.C. §12102(1) (2012).

17 *Id.* § 12102(2)(B).

18 *Id.* § 12102 (4)(D).

19 *Id.* § 12102 (4)(E)(i).

20 *Id.* § 12112(a).

21 U.S. EEOC, "Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act," ¶ 40 (last modified Oct. 17, 2002) (*http://www.eeoc.gov/policy/docs/accommodation.html#N_19_*).

22 *Id.*, § 12112(b)(5).

23 29 C.F.R. 1630(o) (current through 1/14/2013).

24 *Id.*, § 1630(m).

25 *Id.*, § 1630(p).

26 *http://www.eeoc.gov/facts/cancer.html* (last modified Jan. 19, 2011).

27 U.S. EEOC, "Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act," (last modified Oct. 17, 2002) (*http://www.eeoc.gov/policy/docs/accommodation.html#N_19_*).

28 Minn. Stat. § 363A.08, subd. 2 (2012).

29 Minn. Stat. § 363A.08, subd. 6.

30 29 U.S.C. § 2601, et seq. (2012).

31 29 U.S.C. § 2611 (4).

32 29 U.S.C. § 2611 (2); 29 CFR 825.110(a).

33 29 CFR 825.200(a).

34 29 U.S.C. § 2612(a)(1).

35 *Id.* § 2611(11).

36 *Id.* § 2613.

37 29 CFR § 825.302 (2012).

38 *Id.*, 29 CFR 825.302(f).

39 29 CFR 825.204.