OEDCA DIGEST

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SUMMARIES OF SELECTED DECISIONS ISSUED BY THE OFFICE OF EMPLOYMENT DISCRIMINATION COMPLAINT ADJUDICATION

FROM THE DIRECTOR

The Office of Employment Discrimination Complaint Adjudication is an independent adjudication unit created by statute. Located in the Office of the Secretary, OEDCA's function is to issue the Department's final agency decision on complaints of employment discrimination filed against the Department. The Director, whose decisions are not subject to appeal by the Department, reports directly to the Secretary of Veterans Affairs.

Each quarter, OEDCA publishes a digest of selected decisions issued by the Director that might be instructive or otherwise of interest to the Department and its employees. Topics covered in this issue include "kitchen-sink" claims, retaliation against spouses, latex-allergies, carpal tunnel syndrome, "speak-English-only" rules, and "outsourcing." Also in this issue is Q & A guidance from the Equal Employment Opportunity Commission regarding cancer in the workplace.

The *OEDCA Digest* now contains a comprehensive cumulative index.

The *OEDCA DIGEST* may be accessed both on the internet at: http://www.va.gov/orm/oedca.asp and on the Department of Veterans Affairs Intranet at http://vaww.va.gov/orm/oedca.htm.

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I

EEOC JUDGE CRITICIZES COMPLAINANT'S "KITCHEN-SINK" APPROACH TO PURSUING HIS CLAIMS

Many employees who file an EEO complaint believe that the more incidents or events that they allege within a single complaint, the better their chance of prevailing on at least some of them. As the following case indicates, the "kitchen-sink approach" can sometimes backfire.

An employee filed a complaint of gender discrimination and reprisal following his nonselection for a GS-15 level management position. In his complaint, in addition to raising the nonselection issue, he threw in additional claims involving a performance appraisal, a performance award, and a harassment claim that contained 25 separate incidents or events alleged to be discriminatory. These incidents or events all involved insignificant matters, the type of things that normally occur in the everyday workplace.

An EEOC judge determined that a hearing was unnecessary and issued a summary judgment decision based on the Department's investigative record. The decision found no evidence to support the complainant's claims of race discrimination and retaliation with regard to any of the matters he raised.

In issuing his decision, the EEOC judge made a point of mentioning that "the complainant appears to have employed the kitchen-sink approach in pursuing his claims, which, in the end, is to his detriment."

Even when they do not mention it specifically, as this judge did, some judges do take this approach into consideration when evaluating a complainant's claims. The kitchen sink approach – complaining about anything and everything no matter how trivial or inconsequential – has a tendency to remove the focus from important issues, and can often detract from a complainant's credibility.

II

RETALIATION AGAINST SPOUSE ACTIONABLE

As the following case shows, adverse action taken against someone other than the person who engaged in EEO protected activity may still constitute unlawful retaliation in certain cases.

A VA employee, who claimed he was forced to take a disability retirement, filed an EEO complaint alleging, among other things, reprisal (retaliation) in connection with his retirement and several other incidents and events, including a refusal by management to extend his wife's temporary appointment at the medical center beyond its expiration date. After reviewing the evidence gathered during the investigation, OEDCA concluded that the complainant had failed to prove his claims by a preponderance of the evidence.

With regard to the termination of the spouse's term appointment, OEDCA found that, while the complainant was unable to sustain his ultimate burden of proving retaliation, he did manage to establish his initial burden of proving a *prima facie* case, notwithstanding that the action complained of involved his spouse rather than himself.

Normally, an employee files a retaliation claim because an adverse action is taken against that employee, allegedly because of the employee's prior EEO protected activity. It's possible, however, to retaliate against an employee by going after someone close to the employee – for example a spouse or other close relative.

The Equal Employment Opportunity Commission has held that retaliation against a close relative or spouse of an employee who has engaged in EEO protected activity can be challenged by both the employee and the close relative or spouse, if both are employees.[1]

III

REASSIGNMENT OF NURSE HELD TO BE REASONABLE ACCOMMODATION

The following case is an excellent example of how management should handle a request for reasonable accommodation.

The complainant, a licensed vocational nurse, was diagnosed with a latex allergy. Her physician recommended she avoid all latex products. She filed an OWCP[2] claim, which the Department of Labor accepted.

Upon learning that the condition was severe, and possibly even life threatening, the OWCP Program Manager arranged to remove her from her LVN position in the Urgi-Care center (emergency room) because of the significant risk of latex contact. The complainant objected, but the manager testified that it was simply not possible to make the center latex free. Having her work in a separate room in the center was likewise not an option, as it was not possible to prevent ambulance crews, doctors, and others entering the area from introducing latex powder or residue into the general areas and leaving it on the patients she would have to treat.

The complainant was then assigned to the Business Center, where she enrolled new patients and assigned them to primary care providers. She objected, calling the work "clerical." The duties did, in fact, involve a good deal of paperwork, but the complainant retained her LVN job title and pay, and she was able, at least to some extent, to use her nursing knowledge in her new job.

These facts notwithstanding, the complainant requested, as accommodation for her disability, that she be returned

[1] *Tinsley-Meyers v. Sec'y of Agriculture*, EEOC Appeal No. 01983304 (1999).

[2] Office of Workers Compensation Program, U.S. Department of Labor.

to a latex-free clinical setting. In response to her request, the OWCP manager requested medical documentation to support the request. Her physician submitted a letter explaining the condition in detail, advising that she not wear latex gloves or come into contact with latex particles or dust present in powdered latex gloves. He confirmed that she could not work in the emergency room or in any clinical setting where there might be airborne latex material due to the use of latex gloves by medical personnel.

Management tried to place her in several different clinical settings thought to be latex free. She continued, however, to have severe adverse reactions, in one case requiring her absence from work for several weeks. Pursuant to her physician's request that she be removed from clinical duties, management returned her to enrollment duties in the New Patient Clinic. The complainant objected.

Later, management approached her about another possible job, Mental Health Support Clerk. The complainant refused it, stating that she would be unable to deal with mental health patients, given her own fragile psychological condition at the time.

Accordingly, she was reassigned to the Occupational Health Unit in the Outpatient Clinic to manage medical records and schedule appointments. In response, she requested reassignment to a clinical position at another facility because her current commute had become dangerous due to a medication she was taking that caused drowsiness. Management granted her request. However, the job there was not to her liking, so she was offered an LVN position at another facility that was about a 45-minute drive from her home. The position was described as career enhancing. In addition, she was told she could remain in her current location and would only have to travel to the new location periodically to coordinate clinical activities. The complainant refused, saying it did not meet her medical restrictions, even though this particular facility was latex-free.

In response to this refusal, management offered to return her to the Occupational Health Unit to perform the same records management duties she had previously performed there. The complainant accepted the position, agreeing that it was a reasonable accommodation, but then filed a disability complaint alleging that management had violated *The Rehabilitation Act*. Specifically, she claimed that it took management too long to accommodate her, and that it failed to utilize the Reasonable Accommodation Committee to do so.

Following a two-day hearing, an EEOC judge ruled against the complainant, finding that management had fully satisfied its obligations under the Act to accommodate the complainant's condition. It was undisputed that the complainant was disabled. Moreover, although accommodation of her medical condition was not possible in a clinical setting -- *i.e.*,

she was no longer able to perform the essential functions of an LVN in a clinical setting -- management was still under an obligation to consider reassignment to other non-clinical positions for which she might be qualified. Because such positions existed, complainant was a "qualified individual with a disability", as that term is defined by EEO laws and regulations, despite not being able to function as an LVN in a clinical setting. Hence, she was entitled to a reasonable accommodation.

The judge found that management provided the complainant with a reasonable accommodation and that any delay was due entirely to the complainant's objections to the accommodations offered to her, and not to any delay by management. Management made repeated, good-faith efforts to accommodate her, but the complainant kept rejecting the offers until she finally agreed to accept an accommodation she previously rejected a year earlier.

As for the lack of involvement by the Reasonable Accommodation Committee, the judge correctly found that there was no evidence the Committee would have been more successful at finding an accommodation than was the OWCP Program Manager.

This case highlights the importance of looking at the possibility of reassignment as an accommodation when an employee is no longer able to perform the essential functions of his or her current position.

IV

DIAGNOSIS OF "MILD" BILATERAL CARPAL TUNNEL SYNDROME FOUND NOT TO BE A DISABILITY REQUIRING ACCOMMODATION

The following case illustrates that the mere fact that an individual has been diagnosed with a medical condition – in this case carpal tunnel syndrome – does not necessarily mean that the individual has a disability under civil rights laws. In addition, it highlights the requirement that an individual with a disability must submit proof that the accommodation requested is medically necessary.

The complainant in this case, a former registered Nurse III, testified that she was diagnosed with carpal tunnel syndrome following a workplace trauma injury to her hand. The condition was permanent, but the complainant was able to control the symptoms with physical therapy, over-the-counter medications, muscle relaxants, and wristbands. She also described numerous compensating behaviors, such as avoiding certain movements and using both hands more often, which enabled her to control the symptoms. Her physician's diagnosis described her condition as **mild** bilateral carpal tunnel syndrome. (emphasis added).

In view of her diagnosis, the complainant requested an "ergonomically correct private office or work station with her own computer." She provided

no documentation from her physician indicating the need for such an accommodation. The record showed that the complainant had been asking for a private office or workstation for over two years because she did not want to share an office or computer equipment with other nursing personnel. Nevertheless, as soon as one became available, her request for a private office with her own equipment was granted. The record also indicated that the complainant continued to serve as a nurse in the military reserves following her hand injury and diagnosis.

Following a hearing, an EEOC administrative judge ruled that the VA did not violate *The Rehabilitation Act* when it failed to respond to her request for an "ergonomically correct private office." First, the judge correctly noted that the complainant failed to prove that she was an "individual with a disability", as that term is defined in the above Act and EEOC's implementing regulations. That is because she failed to show that her diagnosed condition, which she undisputedly had, amounted to a substantial limitation on any of her major life activities.

The judge noted that her physician had described her condition as "mild", thus suggesting no substantial limitations. Furthermore, although not mentioned by the judge, the complainant's own testimony indicated that she was able to reduce or eliminate the symptoms of her condition with medications and various compensating behaviors. Therefore, because she was not an "individual with a disability", she was not entitled to a reasonable accommodation, even though in this case management did eventually meet some of her requests.

Moreover, even if the complainant had demonstrated that she was disabled, by her own admission she failed to produce any medical documentation indicating a need for an "ergonomically correct private office" or a workstation with her own private computer. Accommodations requested must bear some relation to the employee's disability, and it was not clear in this case why a private office or workstation, as opposed to a shared office or workstation with shared equipment, was medically necessary. A disabled employee must present proof that the accommodation requested is medically necessary, which the complainant admittedly failed to do in this case.

V

"SPEAK-ENGLISH-ONLY" RULE HELD TO BE LAWFUL UNDER THE CIRCUMSTANCES

An absolute prohibition against speaking any language other than English at all times is presumed to violate Title VII.[3] However, as the following case illustrates, "speak-English-only" rules applied only at certain times may be lawful where the employer can show that employees are notified of

[3] EEOC's *Guidelines on Discrimination Because of National Origin,* 29 C.F.R. § 1606.7

the rule and it is justified by business necessity.

Complainant alleged that he was treated differently than other employees who speak languages other than English in the workplace, when a supervisor chastised him for speaking Spanish to his union representative. According to the complainant, he has at times observed other employees conversing in another language in the presence of patients who speak English without objection.

The supervisor responded by explaining that while standing at the communication center, she overheard a discussion in Spanish at the communication desk. She stated that she noticed an OR transport person and a patient on a stretcher, and walked toward the voices and requested that Spanish not be spoken in front of the patient. She originally did not know who was speaking when she made her request. The complainant was approximately four to five feet away on the side of the hall speaking to his union representative when he responded to her request by stating that the supervisor could not stop him from speaking Spanish.

The supervisor informed the complainant in a polite, professional manner that he was in the hall, not on break, that he was in the presence of a non-Spanish speaking patient, and that patients are uncomfortable when another language is spoken in front of them, as they do not know if something is being said about them. Despite her explanation, the complainant insisted that he had a right to speak Spanish.

The supervisor further testified that the complainant was loud enough that she heard him at the communication desk without knowing who he was at the time. She added that while other employees do speak other languages, she has not heard it done in front of a patient in a public area; and if she heard any employee speaking a language other than English in front of an English-speaking patient, she would intervene. She noted that she did not discipline the complainant over the incident.

According to the record, there was no formal written policy on the matter, but the issue had been covered in "caring and courtesy" classes at the facility. As a result of this incident, an HR specialist testified that the facility was drafting a formal policy.

"Speak-English-only" rules requiring that English be spoken in the presence of customers have been upheld as justified by business necessity.[4] OEDCA concluded that the limited "speak-English-only'" policy was justified by business necessity. Moreover, the policy was not enforced in a disparate manner -- *i.e.,* there was no evidence that employees were allowed to speak other foreign languages in the presence of patients.

[4] *Alvarez v. Dept. of Veterans Affairs*, EEOC Appeal No. 01A10091 (2003).

VI

OUTSOURCING OF LAUNDRY SERVICES NOT DISCRIMINATORY

"Outsourcing" is undoubtedly a hot button issue for many employees in both the public and private sector. While the motive behind outsourcing is almost always financial, employees occasionally claim that discrimination is the reason. As the following case demonstrates, such claims almost always fail.

An employee had worked in the Laundry Section of a VA medical center for over 15 years. By all accounts he enjoyed his job and performed it well.

Because of the age of the laundry equipment and the condition of the building housing it, the facility director requested the associate director to conduct a study evaluating the laundry operation and to prepare a written report with recommendations, if any, for changes and improvement.

The associate director reported back that the laundry, overall, was in bad shape. It had been built in the 1950s, some of the equipment was over 30 years old, and not in good operating order. The building leaked water, constantly needed repairs, and the basement was always flooding. Conditions that year had become even worse due to a lack of air conditioning and a rise in the frequency of equipment breakdown.

The associate director further reported that it would cost 3.3 million dollars to keep the laundry running "as is" – *i.e.*, without upgrades – and about 5.5 million dollars to upgrade and automate it. He also noted that any new equipment purchased would wear out before the upgrade had paid for itself.

After reviewing the report the facility the director closed the laundry for safety and sanitation reasons and outsourced laundry services. All laundry section employees were reassigned to different positions in the medical center. A few of the employees, including the complainant, lost temporary promotions previously given to them because they had been operating complex machinery. Otherwise, however, all employees retained their original grade and pay level.

The complainant filed a complaint alleging that the decision to outsource laundry services was motivated by his race, color, and age. In support of his claim, he alleged that the decision was "illegal" and that there were more African-American employees in the laundry than White and Hispanic employees.

After reviewing the investigative file, an EEOC judge determined that summary judgment was appropriate, *i.e.*, that a hearing was unnecessary. The judge issued a decision finding that the complainant was not even able to establish a *prima facie* case, as he was unable to show that he was treated less favorably than other laundry service employees, <u>all</u> of whom were reas-

signed, including White employees, Hispanic employees, and an employee under the age of 40. Moreover, he offered no other evidence to suggest that race, color, or age might have factored into the decision to close the laundry.

The judge went on to note that even if a *prima facie* case had been established, management met its burden of articulating legitimate, nondiscriminatory reasons for the closure, and there was no evidence in the record indicating that those reasons were a pretext for discrimination.

VII

Questions and Answers About Cancer in the Workplace and the Americans with Disabilities Act (ADA)

INTRODUCTION

The Americans with Disabilities Act (ADA) is a federal law that prohibits discrimination against individuals with disabilities. Title I of the ADA covers employment by private employers with 15 or more employees as well as state and local government employers. The Rehabilitation Act provides the same 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 apply to smaller employers and may provide protections in addition to those available under the ADA.[1]

The U.S. Equal Employment Opportunity Commission (EEOC) enforces the employment provisions of the ADA.[2] This is the fourth in a series of question-and-answer documents addressing particular disabilities in the workplace.[3] It explains how the ADA might apply to job applicants and employees who have or had cancer. In particular, this guide explains:

- when cancer is a disability under the ADA;
- when an employer may ask an applicant or employee questions about his or her cancer and how it should treat voluntary disclosures;
- what types of reasonable accommodations employees with cancer may need; and,
- how employers can ensure that they do not discriminate against applicants and employees with cancer.

GENERAL INFORMATION ABOUT CANCER

Approximately 40 percent of the more than one million Americans diagnosed with some form of cancer each year are working-age adults, and nearly 10 million Americans have a history of cancer.[4]

Despite significant gains in cancer survival rates and the passage of the ADA, people with cancer still experience barriers to equal job opportunities. One reason individuals with cancer face discrimination at work is their supervisors' and co-workers' misper-

ceptions 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 have long absences from work or not be able to focus on duties. Today, however, unlike one hundred years ago when cancer was a literal "death sentence," most working-age cancer survivors return to work and have relatively the same productivity rates as other workers.[5]

1. What is cancer?

Cancer is a group of related diseases characterized by the out-of-control growth of abnormal cells caused both by external and internal factors such as chemicals, radiation, immune conditions, and inherited mutations. Different cancers have different risk factors. Many people with one or more risk factors never develop cancer, while others with this disease have no known risk factors. Different types of cancer vary in their rate of growth, pattern of spreading throughout the body, and response to treatment. Many types of cancer may be cured by surgery, radiation, chemotherapy, hormone therapy, and/or bone marrow transplant.[6]

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 its 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.[7]

2. When is cancer a disability under the ADA?

Cancer is a disability under the ADA when it or its side effects substantially limit(s) one or more of a person's major life activities.

Example: Following a lumpectomy and radiation for aggressive breast cancer, a computer sales representative experienced extreme nausea and constant fatigue for six months. She continued to work during her treatment, although she frequently had to come in later in the morning, work later in the evening to make up the time, and take breaks when she experienced nausea and vomiting. She was too exhausted when she came home to cook, shop, or do household chores and had to rely almost exclusively on her husband and children to do these tasks. This individual's cancer is a disability because it substantially limits her ability to care for herself.

Example: A telephone repairman with an advanced form of testicular cancer has chemotherapy and surgery that render him sterile. He is an individual with a disability under the ADA because he is substantially limited in the major life activity of reproduction.

Even when the cancer itself does not substantially limit any major life activity (such as when it is diagnosed and treated early), it can lead to the occurrence of other impairments that may be disabilities. For example, sometimes depression may develop as a result of the cancer, the treatment for it, or both. Where the condition lasts long enough (i.e., for more than several months) and substantially limits a major life activity, such as interacting with others, sleeping, or eating, it is a disability within the meaning of the ADA.

Cancer also may be a disability because it was substantially limiting some time in the past.

Example: A company president was hospitalized for 30 days immediately following his diagnosis of blood cancer. Because his treatment, which included chemotherapy and a bone marrow transplant, weakened his immune system he was unable to care for himself for six months and had to avoid interactions with almost everyone except his doctors, nurses, and immediate family members. This individual has a record of a disability.

Finally, cancer is a disability when it does not significantly affect a person's major life activities, but the employer treats the individual as if it does.

Example: An individual with a facial scar from surgery to treat skin cancer applies to be an airline customer service representative. The interviewer refuses to consider him for the position because she fears that his scar will make customers uncomfortable. In basing her decision not to hire on the presumed negative reactions of customers, the interviewer is regarding the applicant as substantially limited in working in any job that involves interacting with the public.

Example: After making a job offer, an employer learns that an applicant's genetic profile reveals an increased susceptibility to colon cancer. Although the applicant does not currently have and may never in fact develop colon cancer, the employer withdraws the job offer solely based on concerns about productivity, insurance costs, and attendance. The employer is treating the applicant as if he has a disability.

Under the ADA, the determination of whether an individual currently has, has a record of, or is regarded as having a disability is made on a case-by-case basis.

OBTAINING, USING, AND DISCLOSING MEDICAL INFORMATION

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

Job Applicants

Before an Offer of Employment is Made

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

No. An employer may not ask questions about an applicant's medical condition or require an applicant to have a medical examination before it makes a conditional job offer. This means that an employer cannot 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 (e.g., 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 an applicant who appears to be sick or tired how he is feeling. An employer also may ask any applicant questions pertaining to the performance of the job, such as:

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

The ADA also 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 (e.g., 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. Others choose to disclose their cancer when applying for a job because they will need a reasonable accommodation to do the job (e.g., flexible working hours to receive or recover from treatment). A person with cancer also is permitted to request an accommodation after becoming an employee, even if she did not ask for one when applying for the job or after receiving the job offer.

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

An employer 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 an accommodation will be required to perform the job, an employer may ask whether the applicant will need an accommodation and, if so, what type.

Example: 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: An applicant for a bank teller position arrives at the job interview wearing a scarf on her head and explains that it is because she is currently undergoing chemotherapy and has lost her hair. The bank has a policy of generally prohibiting tellers from wearing hats, caps, or headscarves while at work. The interviewer may explain the workplace policy and ask the applicant whether she may need a reasonable accommodation (i.e., modification of the policy until her hair grows back).

The employer also must keep any information an applicant discloses about his medical information confidential. (See below: "Keeping Medical Information Confidential")

After an Offer of Employment is Made

Once an employer has made a job offer, it may ask questions about an applicant's health and may require a medical examination as long as it treats all applicants for the same type of position in the same manner. A job offer is not considered "real," however, until the employer has obtained and evaluated all readily available non-medical information.

5. What should an employer do when it learns that an applicant has or had cancer after she has been offered a job?

The fact that an applicant has or had cancer may not be used to withdraw a job offer if the applicant is able to perform the fundamental duties ("essential functions") of a job, with or without reasonable accommodation, and without posing a direct threat to safety. (A "direct threat" is a significant risk of substantial harm to the individual or others in the workplace that cannot be reduced or eliminated through reasonable accommodation. (See Questions 6, 7, and 18 below.) The employer, therefore, should evaluate the applicant's present ability to perform the job rather than make unfounded assumptions. To do this, an employer also may ask the applicant medically related follow-up questions about his cancer, such as whether he 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.

Example: An applicant is asked to complete a medical history questionnaire and have 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 exam 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.

6. When may an employer ask an employee if cancer, or some other medical condition, may be affecting her ability to do her job?

An employer may ask questions or require an employee to have a medical examination only when it has a legitimate reason to believe that cancer, or some other medical condition, may be affecting the employee's ability to do her job, or to do so safely. Sometimes an employer will be able to ask for medical information because it knows that the person has cancer and reasonably believes that the cancer itself, its treatment, and/or side effects are causing the employee's performance problems. At other times, an employer may ask for medical information when it has observed symptoms, such as fatigue or difficulties with memory or concentration, or has received reliable information from someone else (e.g., a family member or co-worker), indicating that the employee may have a medical condition that is causing performance problems.

Example: 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 for some type of cancer. The partner may ask the receptionist questions about whether her cancer treatments are causing the performance problems and, if so, how long the treatments are expected to continue and whether she needs a reasonable accommodation.

Poor job performance, however, often is unrelated to a medical condition and should be handled in accordance with

an employer's existing employment policies.

Example: 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 counsel 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 evidence that his absences stem from a medical condition.

7. 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: 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, how long she can be away.

8. Are there any other instances when an employer may ask an employee about cancer?

An employer may ask an employee with cancer:

- for information, including reasonable documentation, explaining the need for a reasonable accommodation requested because of cancer;
- for medical information that is part of a voluntary wellness program;[8]
- to justify the use of sick leave by providing a doctor's note or other explanation, as long as all employees who use sick leave are required to do the same and the information requested does not exceed what is necessary to verify that sick leave is being used appropriately; and,
- for periodic updates on his condition if the employee has not provided an exact or fairly specific date of return, or where the employee requests leave in excess of that which the employer already has granted.[9]

Of course, an employer may call employees on extended leave to check on

their progress or to express concern for their health.[10]

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 would need emergency treatment or require some other assistance at work;
- to individuals investigating compliance with the ADA and similar state and local laws; and,
- as needed for workers' compensation or insurance purposes (for example, to process a claim).

9. May an employer explain to other employees that their co-worker is allowed to do something that generally is not permitted (such as work at home or take periodic rest breaks) because she has cancer?

No. Telling co-workers that an employee is receiving a reasonable accommodation amounts to a disclosure of the employee's 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 EEO laws, including the ADA.

10. 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.

Example: 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 is HIV-positive or has AIDS. The salon owner should act to discourage the rumors and gossip but may not disclose that the employee has cancer.

An employer also may not explain to other employees why an employee with cancer has been absent from work.

ACCOMMODATING EMPLOYEES WITH CANCER

The ADA requires employers to provide adjustments or modifications to enable people with disabilities to enjoy equal employment opportunities unless doing so would be an undue hardship (i.e., a significant difficulty or expense). Accommodations vary depending on the needs of an 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.

11. What types of reasonable accommodations may employees with cancer need?

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

- leave for doctors' appointments and/or to seek or recuperate from treatment[11]
- periodic breaks or a private area to rest or to take medication
- adjustments to a work schedule

Example: An engineer working independently on a long-term project has to undergo radiation for cancer every weekday morning for the next eight weeks. The employer should consider whether it could provide a flexible schedule (e.g., allow him to come in later or work part-time) to accommodate his treatment.

- permission to work at home[12]
- modification of office temperature
- permission to use work telephone to call doctors
- reallocation or redistribution of marginal tasks to another employee

Example: 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 another job

Example: As a result of lymphedema[13] 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.

Some employees with cancer may need accommodations other than the ones listed above. The employer, therefore, should discuss with the employee her particular limitations and whether there is anything the employer can do to enable her to work. For example, an employer might explore the possibility of providing certain equipment (e.g., a chair or stool to help with fatigue), a temporary transfer, or changes in how work is performed (e.g., altering when or how a function is done to help with concentration problems).

12. 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.

Example: A nurse 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.

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.

13. May an employer request documentation when an employee who has cancer needs a reasonable accommodation?

Yes. An employer may request reasonable documentation where a disability or the need for reasonable accommodation is not obvious. An employer, however, is entitled only to documentation sufficient to establish that the employee's cancer is a disability and that explains 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.

Example: An employee asks for leave to receive treatment for colon cancer. His oncologist provides a letter indicating that treatment of the condition will require surgery to remove a portion of the large intestines, along with chemotherapy and radiation. The employee will be totally unable to work for the next six months and, even after the cancer has been treated and the employee can return to work, he will have to use a colos-

tomy bag for the rest of his life for waste elimination. The oncologist's letter concludes that, although he hopes the employee will be able to return to a fairly normal life-style following his treatments, he will need to remain under close medical supervision for five years to detect and prevent any recurrence. 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 and the need for accommodation is not obvious, the employer may ask for documentation (e.g., a doctor's note) demonstrating why the accommodation is needed but may not ask for documentation establishing that the employee's colon cancer is a disability.

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

No. An employer does not have to provide an accommodation that would result in "undue hardship." Undue hardship means that providing the reasonable accommodation would result in significant difficulty or expense. However, if a requested accommodation is too difficult or expensive, an employer should determine whether there is another easier or less costly accommodation that would meet the employee's needs.

An employer also is not required to provide the reasonable accommodation that an individual wants but, rather, may choose among reasonable accommodations as long as the chosen accommodation is effective. If more than one accommodation is effective, the employee's preference should be given primary consideration.

15. 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.

16. Is an employer required to remove one or more of a job's essential functions to accommodate an employee with cancer?

No. An employer never has to reallocate essential functions as a reasonable accommodation but can do so if it wishes. In fact, it may be mutually beneficial to the employer and employee to remove an essential function that the employee is unable to do, at least on a temporary basis, because of

limitations caused by the cancer, its treatment, and/or side effects.

Example: A doctor becomes too fatigued from cancer treatments to perform surgery, but she still is able to conduct surgical consults and perform her research and teaching duties. Her employer may temporarily remove her from the surgery schedule, rather than placing her on leave, while allowing her to continue performing her other duties.

17. 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 (e.g., "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, an employer should be careful not to act on the basis of myths, fears, generalizations, or stereotypes about cancer. Instead, the employer should evaluate each individual on his knowledge, skills, experience, and the extent to which cancer affects his ability to work in a particular job.

18. When may an employer prohibit a person who has cancer from performing a job 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 to treat and cure 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.

The harm must be serious and likely to occur, not remote and speculative. Finally, the employer must determine whether any reasonable accommodation 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

The ADA also prohibits harassment based on disability just as other federal laws prohibit harassment based on race, sex, color, national origin, religion, or age. Harassment is actionable under the ADA when a person is subjected to offensive conduct that is sufficiently severe or pervasive to create a hostile or abusive work environment. Employees who believe that they have been harassed because of cancer may file a complaint as described below.

LEGAL ENFORCEMENT

Any person who believes that his or her Federal employment rights have been violated on the basis of disability and wants to file a complaint may do so in accordance with EEOC's Federal complaint processing regulations (29 CFR Part 1614). For a detailed description of the process, visit EEOC's web site at http://www.eeoc.gov/facts/fs-fed.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. Persons who believe that they have been retaliated against may file a complaint of retaliation as described above.

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[1] For example, disability laws in California, Pennsylvania, New Jersey, and New York apply to employers with fewer than 15 employees. The California disabilities statute also specifically covers individuals who currently have cancer or have had cancer in the past.

[2] The EEOC also coordinates compliance with Executive Order 13145, which prohibits discrimination in federal employment based on protected genetic information, such as information about the occurrence of a disease (such as cancer) or a medical condition in an applicant's or employee's family members. See EEOC Policy Guidance on Executive Order 13145: To Prohibit Discrimination in Federal Employment Based on Genetic Information (July 26, 2000) at www.eeoc.gov/policy/docs/guidance-genetic.html.

[3] See Questions and Answers About Diabetes in the Workplace and the Americans with Disabilities Act (ADA) at www.eeoc.gov/facts/diabetes.html, Questions and Answers About Epilepsy in the Workplace and the Americans with Disabilities Act (ADA) at www.eeoc.gov/facts/epilepsy.html, and Questions & Answers About Persons with

Intellectual Disabilities in the Workplace and the Americans with Disabilities Act, at www.eeoc.gov/facts/intellectual_disabilities.html.

[4] American Cancer Society (ACS), Cancer Facts & Figures 2005.

[5] See George M. Wheatley et al., The Employment of Persons with a History of Treatment for Cancer, 33 Cancer 441, 445 (1974)(concluding that "the selective hiring of persons who have been treated for cancer, in positions for which they are qualified, is a sound industrial practice").

[6] ACS, Cancer Reference Information at http://www.cancer.org.

[7] Id.

[8] 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 or cancer detection screening program), as long as any medical records (including, for example, the results of a mammogram or other diagnostic tests) acquired as part of the program are kept confidential.

[9] See Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act (ADA) at Question 16 (July 26, 2000) at www.eeoc.gov/policy/docs/guidance-inquiries.html.

[10] Id.

[11] 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 .

[12] See EEOC fact sheet on Telework as a Reasonable Accommodation at www.eeoc.gov/facts/telework.html.

[13] 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.

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