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Cancer as a Disability After the American with Disabilities Act Amendments Act

Chances are you know someone in your workplace who is undergoing cancer treatment or is in remission. The National Cancer Institute estimates that approximately 11.7 million Americans with a history of cancer were alive in January 2007, and that 1,596,670 new cancer cases would be diagnosed in 2011.¹ It is estimated that 40 percent of cancer patients are working-age adults.²

Before the American with Disabilities Act (ADA) Amendments Act of 2008 (ADAAA), numerous courts had reached the conclusion that an individual with cancer was not legally disabled under the ADA.³ Fortunately, as a result of the passage of the ADAAA on Jan. 1, 2009, workers diagnosed with cancer will most likely be considered qualified as disabled individuals, even when the employee's cancer is in remission.⁴ This column will discuss *Hoffman v. Carefirst of Fort Wayne Inc.*,⁵ the principal case that applied ADAAA standards in determining whether cancer is a qualified disability and accommodated the needs of employees who have cancer.



Hoffman v. Carefirst of Fort Wayne Inc.

In *Hoffman*, the court held that, under the ADAAA, an employee whose renal cancer was in remission was considered a disabled individual. The plaintiff, a service technician, was diagnosed with Stage III renal carcinoma in November 2007 and underwent surgery to remove his left kidney. Hoffman returned to work on Jan. 2, 2008, with no specific restrictions or limitations from his doctors on his ability to work or the number of hours he could work. Hoffman worked out of his home in Angola, Ind., from January 2008 to January 2009, performing his usual job responsibilities as a service technician, and did not miss any significant time from work (other than regularly scheduled visits to his doctor).

In January 2009, the company acquired a contract that would require service technicians, including the plaintiff, to travel more frequently and to work approximately 65 to 70 hours per week. On Jan. 28, 2009, Hoffman's supervisor asked Hoffman to come in for a meeting, at which the supervisor told Hoffman that he (the supervisor) was concerned about Hoffman's health and also about how this new schedule would affect him physically. The supervisor explained that, in addition to working 65 to 70 hours per week, Hoffman would have to go to Fort Wayne, Ind., to work on a night shift once a week and would be on call on weekends. Hoffman

responded: "I can't do that. If you do that, you will put me in the grave." The next day, Jan. 29, 2009, Hoffman provided a handwritten note from one of his doctors stating the following "Patient may not work more than 8 hours/day, 5 days/week. Dx: Stage III renal cancer." Hoffman also told his employer, "If you are going to make me do this 70-hour workload, I will probably not be able to be employed by you."

The employer gave Hoffman the option of resigning or working the overtime hours like everyone else was doing. Hoffman replied that he would not resign or work the extra hours. The employer then told Hoffman that someone would deliver a termination letter to his home but, later that same day, told Hoffman that he was not terminated and that he could work 40 hours per week at the company's office in Fort Wayne, which added two hours of driving to his workday. After several conversations between the parties, Hoffman told the employer that he (Hoffman) had been terminated and that his attorney would be contacting the employer.

The plaintiff filed a lawsuit alleging that his termination was in violation of the ADAAA. His employer filed a motion for summary judgment arguing that, under the ADA, the plaintiff was not disabled in January 2009. The employer claimed that Hoffman did not have a physical impairment that substantially limited any major life activity in January 2009: his cancer was in remission, he had returned to work without restrictions, he had carried out his regular job duties 40 hours a week as a service technician for a full year, and he had not missed any significant time from work. The employer also argued that Congress did not intend to consider that all cancer survivors who were in remission, with no medical evidence of active disease, were disabled as a matter of law for the rest of their lives.

The Indiana District Court found itself in the difficult situation of having to be the first court to apply the standards of the new ADAAA to a case arguing whether cancer in remission is a disability. The court disagreed with the employer and concluded the following:

This Court is bound by the clear language of the ADAAA. Because it clearly provides that "an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active," and neither side disputes that Stage III Renal Cancer, when active, constitutes a disability, this Court must find that Hoffman was "disabled" under the ADAAA. In other

words, under the ADAAA, because Hoffman had cancer in remission (and that cancer would have substantially limited a major life activity when it was active), Hoffman does not need to show that he was substantially limited in a major life activity at the actual time of the alleged adverse employment action.⁶

This was the only issue for the court to decide, because the employer's motion for summary judgment simply stated that Hoffman had allegedly failed to establish his prima facie case that he was disabled, and therefore there was no need for the court to engage in the reasonable accommodation analysis. There is an important lesson to be learned from the *Hoffman* decision. If you are representing an employer in a disability discrimination case, do not focus your attention on whether the individual is a qualified individual with a disability. Instead, concentrate on proving that the employee was effectively accommodated and, if not, ask whether the accommodation requested was an undue hardship. In my opinion, the strongest argument for the employer was that Hoffman had voluntarily resigned since the employer rescinded the termination.

However, the plaintiff would have been able to prove that the accommodation he requested was reasonable on its face and thus would have been able to place the burden on the employer to prove that it was an undue hardship to allow Hoffman to continue working from his home in Angola. The problem the employer would have faced was that Hoffman had been allowed to work from his home effectively for a year. The plaintiff could have also argued that making him work from Fort Wayne after he requested reasonable accommodation was retaliation and, because he had not been effectively accommodated, he could not continue working for the employer.

Accommodating Employees with Cancer

Once an employee with cancer notifies his or her employer of the need to make an adjustment or change at work because of his or her medical condition, the employer should immediately engage in an interactive process to provide the employee a reasonable accommodation that effectively meets the employee's needs. Reasonable accommodations must be provided to qualified employees regardless of whether they work part-time or full-time, or are considered "probationary."⁷

In general, an accommodation is "any change in the work environment or in the way things are customarily done that enables an individual with a disability to enjoy equal employment opportunities."⁸ The following are examples of accommodations employees with cancer may need:⁹

- leave for doctors' appointments, treatment, or recuperation from treatment;
- periodic breaks or a private area in which to rest or take medications;

- adjustments to a work schedule (flexible schedule);
- authorization to work from home;
- modification of temperature in the office;
- reallocation or redistribution of marginal tasks to another employee;
- reassignment to another job; and
- an exception to a dress code or another company policy.

The requested modification or adjustment will be considered "reasonable on its face" if it appears to be "feasible" or "plausible."¹⁰ When requesting reasonable accommodation, an employee does not need to use any magic words; he or she simply needs to tell the employer that an adjustment or change at work is needed because of the employee's cancer. I would also advise employers that, if the employee simply requests an adjustment or modification and the employer knows the employee has a disability such as cancer, the employer should not ignore the request because the employee did not state it was needed because of the disability.

After the employee requests reasonable accommodation, the employer may request documentation from a doctor only when the disability or the need for reasonable accommodation is not obvious. Once the employer determines that documentation from a doctor is needed, the employer may request only documentation that is sufficient to establish that the employee has cancer and why the accommodation is needed. The employer may not request the employee's entire medical record.

Once the employee with cancer requests accommodation, the employer must provide the accommodation requested unless unreasonableness or undue hardship can be demonstrated in the particular circumstances.¹¹ Undue hardship means that providing the reasonable accommodation would result in significant difficulty or expense for the employer. However, even if the employer concludes that the accommodation would be too expensive or difficult, the employer should determine whether there is another easier or less costly accommodation that would effectively meet the employee's needs.

Most employees facing cancer will need a leave of absence. Once an employee requests a leave of absence as a reasonable accommodation, the employer must determine the employee's rights under the ADA and the Family Medical Leave Act (FMLA) separately. It is important for employers to be aware of this because ADA leave and FMLA leave may run concurrently, but the rights of the employees under each statute are different. Under the ADA, an employee who needs leave because of cancer or another disability is entitled to such leave if there is no other effective accommodation and the leave will not cause undue hardship for the employer.¹²

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For example, an employee who is in probationary status may not be entitled to leave under the FMLA but may be entitled to leave as a reasonable accommodation under the ADA. Similarly, an employee may have exhausted his or her 12 weeks of leave under the FMLA but may be entitled to additional leave of absence under the ADA. Under the FMLA, an employer must continue paying the employee's health insurance premiums, but, under the ADA, the employer does not need to continue the health insurance benefits unless the employer does so for other employees in similar leave status. Also, the ADA requires that the employer hold the position of the employee on leave open while he or she is on leave, unless the employer can show that doing so would cause undue hardship.

Employers sometimes have misconceptions about the ability of cancer patients to continue working and being productive. Today, most working-age cancer survivors return to work and have relatively the same productivity rates as other workers have.¹⁵ Therefore, employers should be encouraged to train its supervisors on how to reasonably accommodate employees with disabilities such as cancer. Doing so, will avoid potential serious liability for the employer and will provide the employee an essential tool for a quicker recovery. **TFL**

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Ivelisse Bonilla is a partner at Averkamp & Bonilla PLC, where she represents employers and employees in all aspects of employment law. She has been specializing in labor and employment law since graduating from law school in 1997. She received her B.A. degree from American University in Washington, D.C., in 1991; her J.D. degree, cum laude, from the Inter-American University of Puerto Rico in 1997; and her LL.M. degree from Georgetown University Law Center in 2001. She is a member of the bar for the Commonwealth of Puerto Rico; the U.S. District Court for the District of Puerto Rico; the U.S. Court of Appeals for the First Circuit; the state of Arizona; the U.S. District Court for the District of Arizona; and the U.S. Court of Appeals for the Ninth Circuit. She is a member of the National Employment Lawyers Association and serves on the Executive Committee of the State Bar of Arizona Labor and Employment Law Section and on the Executive Committee of the FBA Tucson Chapter. She can be reached at ib@abdilaw.com.

Endnotes

¹American Cancer Society, Cancer Facts & Figures 2011.

²American Cancer Society, Cancer Facts & Figures 2005.

³*Ellison v. Software Spectrum Inc.*, 85 F.3d 187, 190 (5th Cir. 1996) (plaintiff with breast cancer not disabled); *McNiff v. Town of Dracut*, 433 F. Supp. 2d 145 (D. Mass. 2006) (plaintiff's cancer did not substantially limit major life activity of working and was thus not a "disability" under the ADA); *Schertfager v. Boynton Beach*, 42 F. Supp. 2d 1347 (S.D. Fla. 1999) (plaintiff with breast cancer not disabled).

⁴Pub. L. No. 110-325, 122 Stat. 3553 (2008); 42 U.S.C. § 12102(4)(D); *Hoffman v. Carefirst of Fort Wayne Inc.*, 737 F. Supp. 2d 976 (N.D. Ind. 2010); *Norton v. Assisted Living Concepts Inc.*, 786 F. Supp. 2d 1173 (E.D. Tex. 2011).

⁵*Hoffman v. Carefirst of Fort Wayne Inc.*, 737 F. Supp. 2d 976 (N.D. Ind. 2010).

⁶*Hoffman* at 985.

⁷Equal Employment Opportunity Commission's Enforcement Guidance: Reasonable Accommodation and Undue Hardship under the ADA available at www.eeoc.gov/policy/docs/accommodation.html.

⁸29 C.F.R. pt. 1630 app. § 1630.2(o) (1997).

⁹See EEOC Questions and Answers About Cancer in the Workplace and the American with Disabilities Act available at www.eeoc.gov/facts/cancer.html.

¹⁰*US Airways Inc. v. Barnett*, 122 S. Ct. 1516, 1523 (2002).

¹¹*Id.*

¹²See Question 21 in the EEOC's Enforcement Guidance: Reasonable Accommodation and Undue Hardship under the ADA.

¹³EEOC Questions and Answers About Cancer in the Workplace and the American with Disabilities Act.