

## THE EMPLOYER'S LEGAL RESOURCE: EEOC TARGETS CANCER DISCRIMINATION

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On August 7, 2014, the Western District of Oklahoma granted summary judgment in favor of the EEOC on the issue of whether an employee treated for cancer was disabled under the ADA. The case arose after Midwest Regional Medical Center terminated nurse aid and cancer patient Janice Withers. In November 2011, Withers was diagnosed with skin cancer and began a series of fourteen radiation treatments. After her first radiation session in mid-December 2011, Withers' physician sent a letter to Midwest Regional stating that he was treating Withers' cancer with radiation and requesting that she be permitted to complete her treatment. After two months of treatment, Withers frequently called in sick and missed her scheduled shifts due to nausea and fatigue, residual side effects of her radiation treatment. Her supervisor placed her on a leave of absence from March 5 – 12, 2012, and she was terminated on March 9, 2012 for failing to comply with the company's no call/no show policy on March 6, 7, and 8, 2012.

The EEOC filed suit on Withers' behalf alleging Midwest Regional discriminated against her for having cancer. The first issue for the court was whether Withers was a person with a disability as defined by the ADA.

The ADA contains three definitional prongs for determining whether an individual has a disability:

- a physical or mental impairment that substantially limits one or more major life activities of such individual;
- a record of such an impairment; or
- being regarded as having such an impairment.

Though a question of fact existed regarding the first and third prongs, the court held that Withers was disabled as a matter of law under prong two. The court reasoned that the written correspondence from Withers' physician to Midwest Regional disclosing her diagnosis and treatment plan constituted a "record" under the ADA, thereby rendering summary judgment appropriate on the issue of disability.

Things were murkier when the court examined Withers' discharge. Midwest Regional said it discharged her for excessive absenteeism. The court found that an issue of fact existed as to whether Midwest Regional's proffered reason for discharging Withers was legitimate as opposed to a pretext. Although Midwest Regional claimed Withers violated the no call/no show policy when she did not call in on March 6, 7, and 8, 2012, such a position was inconsistent with how Midwest Regional had enforced its policy in the past. The court denied the EEOC's motion as to the reason for the discharge, and this issue is likely heading to a jury trial.

Two days after filing this suit against Midwest Regional, the EEOC filed a similar action against an Ohio-based employer that had terminated an employee who also suffered from cancer. Employers need to be cognizant that the EEOC is aggressively pursuing ADA issues and that employees with cancer are an emerging class of plaintiffs for the EEOC. As a key takeaway, employers should always assume cancer is a disability under the ADA and should provide reasonable accommodations to allow an employee to perform the essential functions of his or her job. While employers have the right to enforce call-in policies, regardless of whether an employee is disabled, the rules must be enforced uniformly to ensure that termination decisions do not backfire when employers are called to the carpet.

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