



Working Matters: What You Need to Know

July 14, 2009

Rodney N. Warner, Esq

OPERATOR:

Greetings, and welcome to the Living Beyond Breast Cancer, "Working Matters: What You Need to Know" conference call. At this time, all participants are in a listen-only mode. A question-and-answer session will follow today's presentation. You will have the opportunity to ask questions via the Web and over the phone. You may submit a question via the Web at any time by using the "Ask a Question" feature on the left side of your screen.

All questions will be addressed at the end of the program. If anyone should require operator or technical assistance during the call, please press star-zero on your telephone keypad. As a reminder, this conference is being recorded. It is now my pleasure to introduce your moderator, Ms. Elyse Spatz Caplan. . . .

ELYSE SPATZ CAPLAN, MA:

Thank you, Christian, and welcome, everyone, to Living Beyond Breast Cancer's teleconference, "Working Matters: What You Need to Know."

We deeply appreciate all the time that you've spent in your busy day to join hundreds of other people for today's teleconference program. . . . My name is Elyse Spatz Caplan. I'm the director of programs and partnerships at Living Beyond Breast Cancer.

This is the first time that Living Beyond Breast Cancer has offered a teleconference on this subject of "working matters." We've realized that, after a diagnosis of breast cancer, the time spent navigating your health care can be time-consuming, challenging, and at times . . . a bit overwhelming. Pair all of this with . . . concerns or questions . . . regarding your work or career while in treatment or recovery, and this just adds one more layer of information you need [before you can] move forward with your life.

Knowing your legal rights is critical and essential to . . . feeling empower[ed both] inside and outside the workplace. Learning effective

communication strategies will help you . . . adeptly talk with your colleagues and manag[e] this aspect of your life.

As we all know, there are many complexities to our legal rights generally, including rights under the Americans with Disabilities Act and the Family Medical Leave Act. [Complexities also exist when] . . . negotiat[ing] conflict or workplace discrimination. Knowing what is relevant to your situation will help you with your day-to-day work life and possibly [make you more aware of] options for long-term [problem-solving], if that's needed.

As mentioned, LBBC teleconferences are interactive in nature. I'm very pleased to announce a few new features: All of you are sort of on the ground floor of LBBC moving forward with enhanced technology for our teleconference programs. Starting with today's program, many of you who are participating online will benefit from a PowerPoint slide presentation. Also, if you feel more comfortable asking a question online, [that option is available]. We will go back and forth between online questions and live questions for those [who] are dialing in by telephone. After today's program, the slideshow and the MP3 recording of our program will be available on LBBC's Web site, <http://www.lbcc.org>. . . .

. . . As always, for those of you that are interested in peer emotional support, our toll-free Survivors' Helpline is a wonderful resource where you can talk one-on-one with another woman who's been there and done that, who's experienced breast cancer. . . . That toll-free number . . . is (888) 753-LBCC (5222). . . .

. . . So, getting down to the program, let me tell you about our featured speaker today, Mr. Rodney Warner. Rodney Warner is the Project Attorney for the Law and Health Initiative for Cancer Survivors. Mr. Warner has been an attorney since 1994 and has practiced law in private practice, state government, and nonprofit organizations in Connecticut and Pennsylvania.

Rodney has worked for ten years with the State of Connecticut Commission on Human Rights and Opportunities, investigating and mediating employment discrimination. Rodney is a Hodgkin's lymphoma survivor and counsels and represents cancer survivors under a project partially funded by the Lance Armstrong Foundation [<http://www.laf.org>].

So, please welcome Mr. Rodney Warner to the program.

RODNEY N. WARNER, ESQ:

Thank you, Elyse.

You know, as she said, I'm a staff attorney at the Legal Clinic for the Disabled [<http://www.legalclinicforthedisabled.org>]. My position is funded by a grant from the Lance Armstrong Foundation. And I have a background in employment law, which I practice mostly in Connecticut and, to an extent, here in Pennsylvania.

[For] some of the topics we're going to cover, the laws are kind of state-specific. The big laws, the ADA [Americans With Disabilities Act] and FMLA [Family Medical Leave Act], are federal laws, so they apply no matter [which state you live in]. . . . But there are also some relevant state laws, [with details that] . . . vary from state to state. I really can't address all [of] those laws, because I don't know [them] all . . . and I'm not sure where you're all calling from.

So, moving on, without further ado, disabled employees and the laws that protect them.

I wanted to put this in some perspective. I dealt with cancer, and my employer was very supportive. My brother dealt with cancer, and his employer was very supportive. According to a 2006 survey of people dealing with cancer and caregivers, most employers do [try to] work with the employees who are dealing with cancer.

Unfortunately, as you can see from the survey results, it's not everybody. I think it's wise for everyone to deal with their employment situation



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with their eyes wide-open. . . . Statistically speaking, you're probably going to be okay, but there is a chance that you might be in a situation [where] you're not okay. [So you need to] prepare yourself for that.

These were some of the survey questions, and these were some of the responses: 20 percent of the people [surveyed] felt that cancer did have — well, there was a negative view on their work as a result of the employee having cancer. . . . A fair number, over a third [of those surveyed], felt that they were unable to do the job as well as before they got cancer. Ten percent . . . felt they were removed from a job, 10 percent had to change jobs, [and] 3 percent felt they were turned down from a job [due to cancer].

So, it depends on how you look at it. There are a small percentage of people who do suffer negative consequences because of their cancer. But, based on this survey, the vast majority of people are okay. They get through the situation, and they don't have problems with their employers [as a result of their cancer]. However, like I said before, it's wise to go into this with your eyes open, learn about your rights and protect yourself as best you can.

I was one of those who felt I needed to change jobs because of my cancer. So, it's not totally uncommon. So, I'm going to start off with the employment discrimination statutes, the federal Americans with Disabilities Act. It's a civil rights act that was enacted in 1990 that covers employers with 15 or more employees. So, if you work for someone who has less than 15 employees, this law does not concern you — it does not protect you.

Depending on where you live, there may be state laws that cover smaller employers. But, if your employer has 15 or more employees, then you are covered by the ADA.

One of the things the ADA requires [is for the employer to] reasonably accommodate disabled — not only employees but applicants. This is a civil rights act [that] is along the same lines as other civil rights acts that prohibit discrimination based on sex, or based on [skin] color.

Now, the ADA prohibits certain things, and it requires certain things. You're not supposed to be fired [due to your disability]. They're not to avoid hiring you [because of a disability]. You're not supposed to have unequal working conditions because of your breast cancer, or any other kind of physical disability or mental disability. . . . They're also not supposed to . . . retaliate against

you . . . as a result of, say, complaining to management about disability discrimination. You're not supposed to suffer consequences because you requested an accommodation, [or] . . . harassment based on [your] . . . disability. We've probably all heard of sexual harassment, but there have been instances of disability harassment, which . . . also violate the law.

. . . I usually do this presentation in person. So, this is kind of the true-or-false question [I might ask in a presentation]: Diagnosis of cancer entitles a job applicant or employee to protection under the ADA, [true or false]? The answer is, "False."

What your diagnosis is, in and of itself, really doesn't give you protection under the law, whether it be cancer or diabetes or arthritis — whatever the physical disability is. What really matters is whether you fit under the definition of a qualified individual with a disability. Once again, even if you did have a severe physical disability, if your employer . . . [does not have the required number of employees under the law], the ADA doesn't cover you. It would be four or more employees under Pennsylvania law.

So, there is a lot of vocabulary that needs to be gone over with the Americans with Disabilities Act, like just about every other federal law and state law. A qualified individual with a disability is a person with a substantially limited major life activity resulting from a medical condition, side effects, or treatment side effects .

For many of us, cancer isn't disabling in and of itself. The treatment is more disabling than the disease is. Even if the side effects [from] treatment [are] what's doing the damage, then you're covered under this law. You have to be qualified to perform the job. With or without reasonable accommodation, you can perform the essential functions of the position. We'll be going over those — that vocabulary.

What's a major life activity? Now, the ADA was recently changed, and now it's much more friendly to those of us dealing with cancer. A major life activity under the newly amended law includes normal cell growth, functioning immune system, reproduction, as well as the more traditional hearing, speaking, breathing, learning, reading, communicating and, to a lesser extent, working. Cancer by definition is abnormal cell growth, either as a result of the cancer, or, quite frequently, [as a result of] the chemo [or] . . . radiation. [For] many of us, our immune systems are not functioning

[well during cancer treatment]. Many of us — both male and female — have problems reproducing because of the side effects of treatment. So, this major life activity, many of the examples can fall under — those of us dealing with cancer can fall under these categories .

Now, it has to be a substantial limitation. And this is compared to the average person. Are you unable to perform this activity, or are you significantly restricted as to how the activity can be performed? Are you not able to learn? Are you unable to read? . . . Are you having problems with normal cell growth? Is your immune system significantly restricted? Are you unable to reproduce?

That would be kind of the analysis as to whether or not you would fit under the ADA. This is some of the changes that were made into the Americans with Disabilities Act as of the start of this year: An impairment that's in remission is a disability if it would substantially limit a major life activity when active.

Thankfully, many, many of us dealing with cancer are able to get into remission. That is, at least in my case, there was no sign of cancer [after treatment]. Under the wording of the statute, as it was interpreted by the federal courts prior to this year, if you were in remission — if you didn't have any symptoms, if nothing was going on as far as anybody could tell — the [ADA] . . . did not apply to you. Congress changed the law so, if you are in remission, you are protected by the Americans with Disabilities Act.

Mitigating measures such as medication, medical supplies, or appliances are not to be taken into account when determining if the impairment substantially limits a major life activity. This was another big issue under the old language of the statute, because if people had certain medications or certain appliances [helped them to] . . . function relatively normally, courts were deciding that they were not disabled. The Congress didn't like that and decided to change the law.

So, when . . . your situation is analyzed under the law, you may be taking certain medication which is controlling your cancer, or controlling the side effects. We would take that medication off the table and look at, okay, if you had an active disease, what would be happening to you? How disabled would you be? How impaired would you be? That's kind of what we look at, [in order] to see if you're . . . disabled enough to fall under the ADA.



Congress also made a big emphasis on — one of the definitions of the ADA is whether or not you could be protected ... if your employer regards you as having an impairment.

This is a situation where ... your boss learns that you have cancer or thinks you have cancer and, in his or her head, just assumes that you're not going to be able to work; [that] you're going to be coming in late. [That] you're not going to be predictable. [That] you're not going to be ... able to do the job. Even though that's not the case, even though those aren't the facts — if you're employer regards you as having those problems, even though that's not the fact, you can be still covered under this law. As a matter of fact, if you didn't have cancer at all, but for some reason your boss thought you did and you suffered discrimination as a result, you could be protected under the ADA.

Now, for those of us trying to get protection under the ADA, there's kind of a balancing act, and this balancing act was much more difficult under the law as it was written prior to this year. You have to be sick or injured enough to be disabled [before you] fall under the ADA's protection, but you can't be so sick or injured that you can't do your job. [If] you can't do the essential functions of the job with or without reasonable accommodation, [ADA will not protect you].

Now, after the amendments — that is the change that came into effect this year — it's a lot easier to make this balancing act. Because ... the language was changed so you don't have to be so sick. You don't have to be so impaired to fall under the protections of the Americans with Disabilities Act.

Prior to these changes, the courts were giving the statute a very, very narrow interpretation. You had to be very, very sick. It was very difficult to [qualify under ADA, because under the previous, more narrow definition of the law, one had to] be [sick enough to be] considered disabled but ... [still] able to do [the] job [in question]. Hopefully, Congress has cured that problem with [recently implemented] changes. ...

Another vocabulary ... phrase [regarding ADA is] ... "essential functions." These are fundamental, not marginal, job duties. They can be essential for any number of reasons, [and these functions are] the reason the position exists. There are few people who can do the job. Maybe you were hired to perform that particular function. What are the key tasks of your job?

[Example]: As an attorney, [is it a key function, or] ... fundamental part of my job to physically go to court and ... argue motions or pick juries? Is [the act of using a] ... keyboard an essential function of my job? That I use a phone? [Essential functions are] ... going to vary from job to job. Some of the essential functions that can come into issue [are] a work schedule. Is it a fundamental job duty that you be at work at 8 o'clock in the morning? Can you do the job if you can come in a couple hours late, or an hour late? Is it essential that you ... lift certain things, or [a] certain [amount of] weight, or perform certain physical tasks ... ? That's supposed to be looked at on a case-per-case, job-by-job inquiry.

A reasonable accommodation is a change. It can be a change to an application process. If a person is blind, [he or she] obviously can't go through the ... traditional application process, with paperwork to fill out. Changes to the work environment, circumstances, how the job is normally performed. Maybe if somebody has a breathing problem, and they're working in an area that's very dusty, or [has] a lot of chemicals. Can that be changed?

You want to be able to enjoy the equal benefits and privileges of employment, [just] as non-disabled co-workers [do. ... Any] reasonable accommodation [arranged by an employer for the benefit of a disabled employee] must be effective. That is, it [needs to] address your needs due to your disability, due to your breast cancer, due to the impairments that are resulting because of the treatment.

If you need to ask for a reasonable accommodation, a written request is preferable, [but] it is not necessary. You do not need to tell your boss, tell the HR [human resources] department, "Pursuant to the Americans with Disabilities Act, I request a reasonable accommodation to the essential functions of my position." You do not need to use that legalese. You don't need to use magic words. The request can come from another person. It doesn't have to come from you. ... If you're in a union environment, [the request can come from] a shop steward. It can come from your doctor. It can come from a spouse.

Larger employers may have a system or a policy concerning the request. If you have an employee handbook, check it out. It ... may have a procedure. It may say you need to either talk to HR ... or talk to your supervisor. [Your employer] might [want or require an accommodation-request] ... in writing.

When it comes to communicating these kinds of issues with human resources, with personnel, with your supervisor, I highly recommend — writing is better than speaking. Put things in writing. Because if bad things happen, and if things end up in front of a government agency, [or] in front of a lawyer, [or] in front of a judge, you're going to want to establish what the employer knew, [which individuals] ... knew it, and when ... they [knew] it.

So, put things in writing. If there are conversations, if you ask these things in a meeting, keep notes. When you go back to your workspace, take out a piece of paper and write down, "I had this conversation with Bill Smith, my supervisor. I told Bill X, Y, and Z. Bill told me A, B, and C. Bill told me he was going to talk to HR to try to work something out. Bill told me he'd get back to me by next Tuesday."

Create documents. Create the paper trail so you can document the facts of the situation. Like I said at the start of the presentation, in all likelihood, things will work out. But, in case it doesn't, you're going to want to protect yourself.

Now, the reasonable accommodation is going to vary with the person, the position, the employer. Maybe you need a leave for doctor visits, treatments, recuperation. This kind of dovetails with the Family Medical Leave Act.

Depending on the circumstances, maybe you need to take more rest breaks. [Maybe you need to] ... change [your] work schedule. Working at home generally is frowned upon, but, once again, it depends on the situation. Some places may have a blanket ban on using a phone for personal reasons. Maybe, based on your disability and your treatment, maybe they'll let you [r] call [s to] a doctor [be an exception to that rule].

A big issue ... can be the final two: allocating marginal tasks to co-workers and reassignment to another job. ... The more you're required changes impact your co-workers, [and] management, the more pushback you may get from them. The ... [level of] impact these changes [have on] the workplace ... may [determine how] difficult [it is] to get these changes implemented. It doesn't mean you don't deserve these changes. It doesn't mean you're going to get these changes. It just — the more impact there is with other employees, the more impact there is on the bottom line, then the more potentially this could be a problem.

Now, under the ADA, when you need a reasonable accommodation, it's kind of like a tug-



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of-war. And when you're requesting an accommodation, you're going to say, "Well, this is reasonable. It's not a big impact. It's not going to take much time. It's not going to affect my co-workers. It's really not a big deal!"

Now, management, if they don't like your requested reasonable accommodation, they can claim that . . . you're asking for too much. "This is just too much. We can't do this." And the legal [wording] under the statute is "undue hardship."

So, if they don't want to go along with your requested accommodation, the defense that they can use is, "I'm sorry, what you're requesting [creates] an undue hardship," that is, it's a significant [and] difficult [change] or expense incurred by the employer. You look at the nature and the cost of the change in the workplace, the resources and the size of the facility, the impact of the accommodation upon the facility, including the impact on other employees.

[Strains on the economy, such as the ones we are currently experiencing, impact employer decisions.] . . . If an employer has less resources, if an employer has fewer employees, a change could potentially have more of an impact. With the economy not doing very well, it may be harder for employees to get reasonable accommodation[s], depending on the impact [those changes have] on the workplace. Not having as many resources, not having as many people, that could be a legitimate defense by an employer if they say "no" to a reasonable accommodation.

One thing before I move on — let me slide back. One more thing here. An important [mindset to take on] . . . — is [that] when you're asking for a reasonable accommodation, what you should be doing is you should be working together [with the employer]. It should be a back-and-forth. If you're requesting an accommodation and the employer, for whatever reason, doesn't like it, [the employer] should suggest another [accommodation]. They should suggest something else.

Ideally, that's what should happen. But both sides should be creative and try to work this out. That's kind of what the ADA has in mind. Now, the ADA, like I said before, is essentially a civil rights law. Another vocabulary term in civil rights law is "disparate-treatment." That is, there's a certain class of people that are being treated worse than other employees. . . . That could be . . . those with disabilities. It could be African Americans.

It could be Muslims. It could be Puerto Ricans. Under the ADA the civil rights law for people with disabilities is people with disabilities.

So, is the request of the accommodation something that's been granted to a non-disabled co-worker, but not granted to you? Do you want a change in schedule? Do you want to be able to show up for work late? Do you want time off [for recuperation or treatments]? If [those workplace changes have been] . . . granted to another non-disabled co-worker, first of all, it strengthens your claim that the request is reasonable. It wouldn't present an undue hardship, because these other employees got to do the same thing.

Now, if they're not giving to you what they've given to non-disabled employees [you may be able to prove discrimination occurred]. . . . Once again, if things turn sour and [your situation] get[s] in front of lawyers, this [information] might be used as evidence of discriminatory intent [by your employer], against you, because of your disability.

Now, if you're denied [a reasonable] request, and a disabled male co-worker was granted [that same] accommodation . . . you might not have a disability claim. What you may have is a sex-discrimination claim, because if disabled male co-workers are given an accommodation [that is] denied to female disabled co-workers, that potentially could be evidence of sex discrimination.

So, once again, this battle between reasonable accommodation and undue hardship, the employer is obligated to provide an effective accommodation, but not necessarily the one that you request or that you want. There should be an open dialogue between . . . the employee and employer as to how to solve the problem. Let's say, you want to solve the problem in a certain way, and the employer comes up with a different way to solve the problem. It may not be your idea. You may not necessarily really like it, but under the ADA you really need to work together.

. . . If you kind of hold your breath and stomp your feet and say, "No, this isn't what I asked for. I'm not going to do it," you are really endangering your potential legal rights. . . . Because, under the law, not only [are] . . . employers required to cooperate with employees, but employees have to cooperate with employers. And if you find yourself in that situation, what I would suggest you do is really, seriously think about what the employer-management is suggesting. If it's okay with your doctor, give it a try. Really give it a good try. If it works, then the problem's solved. If it doesn't work,

you can genuinely, and in good faith, go to management and say, "Okay, I suggested A, B, and C. You didn't like [those] idea[s]. You told me I had to do X, Y, and Z. I tried X, Y, and Z, and I tried [those] for a month, and [they're] not working. So, what you suggested isn't working. Can we give A, B, and C [that I originally suggested] a try? . . ." So, that's what I would suggest you do if you find yourself in that situation.

Now, this is a real-life example of a disabled individual who had to ask for a reasonable accommodation. This is Robert Barnett, [from] the [U.S. Supreme Court] case of Robert Barnett. [In 1990], he was working as a baggage handler for US Air. And not surprisingly, as a baggage handler, he developed back problems. He transferred to a less demanding job in the mailroom, but this was a unionized shop. The way you [usually ended up] work[ing] in the mailroom [was to] periodically . . . post for the jobs in the mailroom. The people with the most seniority got to work in the mailroom.

. . . [The] time came and someone with more seniority than him posted for this job. He went to management and said, "I've got this back problem. I can't be a baggage handler, but I can work in the mailroom. I know I don't have the most seniority, but under the ADA I want you to reasonably accommodate my disability and keep me in the mailroom and essentially bump someone with more seniority out of the mailroom."

Now, this went all the way to the U.S. Supreme Court. And the U.S. Supreme Court found in favor of US Air. It found that, given there was apparently this bona fide seniority system based on union contract, [that] to essentially throw out this whole system of transfers and posting . . . was too great a change, that [requiring that of the employer] would [create] an undue hardship for the employer. . . .

So, union contracts . . . can be an issue. And it comes up — it's come up a couple times with the people calling me looking for help. Just because something is in a union contract is not a guarantee that management *can* do it. There are ways to fight this. There are ways to get around this.

Mr. Barnett was not able to get around it, but, if you were working in a unionized situation, it doesn't help if there's something in the contract . . . preventing you from getting an accommodation. But [that doesn't mean the situation is] insurmountable. Because not only . . . does management have to comply with the



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American's With Disabilities Act, unions have to comply [with it] as well.

This was my situation. At the time, I was working for the Connecticut Commission on Human Rights and Opportunities. . . . Most of my time was spent investigating and mediating claims of employment discrimination. I was diagnosed with Hodgkin's lymphoma, and your lymph glands are part of your immune system. So, essentially my immune system was hampered by the cancer, and then I had all the chemo and radiation, which did a job on my immune system as well.

My [regular] job duties [included] working in an office. I've got my co-workers coming and going. I've got members of the public coming and going. I'm interacting with co-workers. I'm interviewing people face-to-face. However, I did have my own office. I did have a door. And I could close the door and get away from people. Shortly before my treatment . . . the agency that I worked for had a policy of allowing people doing my kind of work to work at home. They could work at home a couple days a month, but they decided to change that policy before I got sick.

So, as a reasonable accommodation, I asked [to] work at home, and only on projects where I [didn't] need to meet with people personally. I [could] just do it over the phone. I could do e-mails. I [could] look at files. I [could] write reports. I [could] write memos, that sort of thing. You know, get me away from the public. Get me away from everybody's coughing and sneezing, which I thought was a good idea, but my employer — not so much.

Now, my employer agreed to change my duties so I didn't need to interact with people face-to-face, but they had this fear [that] if they allowed me to work at home, they [would] have to allow everybody else to work at home. So, they told me, "Okay, you don't need to talk to anybody in person, but you have to come to our office. You have to work in your office, but you can close the door."

. . . I really didn't want to endanger my job over this issue. And under the old language of the statute, I wouldn't be considered disabled. Under the new language, I think I would have been. Later on, when I go sicker and I relapsed, then they did accommodate me. But, this was really early in my situation.

This is really a practical issue. Do you really want to rock the boat? And if you are in a situation like this, you should really talk to [your] employer.

There are disclosure issues. There's privacy issues involved with the ADA in the workplace. An employer may not ask an applicant's medical condition, or require a medical examination before making a conditional job offer. They can't talk about what your health is. They can't talk about what your disease-history might be. It's really something that should not be on the table. It's not something that should be discussed.

What can be asked is — and I don't know how many employers use this language, but it's the language of the law — can you perform the essential functions of the job with or without reasonable accommodation?

[As for job] . . . applicant[s], if you self-disclose you had breast cancer [in the past], or [that] you have breast cancer [presently], that kind of opens the door a little bit for the employer to ask, "Okay, can you perform these essential functions of the job with or without reasonable accommodation, in light of your treatment, in light of your situation? Can you still do that?"

I really would tell people not to discuss their health situation during a job interview. If the employer is stupid enough to bring it up, then you're going to have to decide what you want to do. Do you want to talk about it? Do you just want to tell them, "That's an illegal question and I'm out of here"? That's up to you. Maybe you really need this job. But, that's kind of a case-by-case, situation-by-situation [issue that] you're going to have to deal with, and hopefully it won't come up.

Now, if you're a current employee and you're not a job applicant, there are certain situations where . . . management can ask about a medical situation . . . if it appears to be affecting [your] . . . ability to do the job or do it safely. There has to be some kind of drastic change in performance in order to justify an employer asking this kind of question. Maybe you're late every day for a week. Maybe you're sleeping at your desk. Maybe you drove a forklift into a wall. It can't be the run-of-the-mill HR issues that come up — that you're kind of snappy to the secretary, or maybe you sent a snotty e-mail to somebody. That's not sufficient grounds for an employer to ask about your medical history.

Now, an employer can ask for . . . documentation if you're asking for, or returning from, a medical leave. [They can also ask for documentation] to explain or justify a requested reasonable accommodation. That's one of the things with an accommodation — they can ask

for some medical proof, some medical documentation that you need this reasonable accommodation. And, as a matter of fact, they can even send you for an independent medical exam . . . if you've asked for a reasonable accommodation.

Now, here's some fine print. . . . I practice in Pennsylvania. Pennsylvania State law provides similar protections of the ADA, but [the law] covers smaller employers. Technically speaking, if you worked for an employer that only employs ten people, they can violate the ADA because the ADA doesn't apply to them.

However, if you live in a state which has a similar law but covers smaller employers, then you may get some protection. . . . And there are other big cities, and I'm sure smaller cities, too, where there's a city ordinance against disability discrimination. So, the city of Philadelphia has an ordinance on the books that covers disability discrimination for just about everybody.

The big deadline to think about is 180 days. It was 180 days when I was working in Connecticut. It's 180 days in Pennsylvania. That gives you six months. Six months from the time that you were discriminated against, 180 days from the time that you were denied a reasonable accommodation, from the time that you were denied potentially a — let's say you feel you were turned down for a raise because of your cancer. That's another possible basis for a discrimination claim.

If you went by the 180 days and the ADA applies for you — and this is just in Pennsylvania, I can't vouch for any other place — you could still file under the ADA. That [filing] potentially might get you the help of the Federal Equal Employment Opportunities Commission, or if you work for the city — in the city of Philadelphia, the Philadelphia agency that works with us.

Okay, so that was the employment discrimination section of the presentation. We're moving on to the Federal Family Medical Leave Act. FMLA covers only employers with 50 or more employees. The ADA is 15, one-five, FMLA is five-zero. There are a lot of employers that are too small to come under the Family Medical Leave Act. It is a major obstacle to people getting protection under the FMLA, especially given all the jobs that are created by small employers.

The employee must work for at least 1,250 hours over the previous 12 months to qualify. This can't include vacation time, unpaid leave. You



actually have to work 1,200 — at least 1,250 hours over the previous 12 months to qualify. If you've met those requirements, you can be entitled to 12 weeks of unpaid leave during any 12-month period of time. This is a federal law enforced by the Federal Department of Labor.

Now, you can take it at all one shot, all 12 weeks, all in a bunch. You could take it intermittently, maybe a couple days a week, or maybe a week a month for a year. You could use it to work fewer hours in a day. The employer can require that, if you have any paid sick leave, if you have any paid vacation time, that you use that as part of these 12 weeks. The leave can be taken for recovery and treatment of an employee with a serious health condition, or caring for a spouse, a child, or a parent with a serious health condition.

This doesn't include aunts. It doesn't include uncles. It doesn't include grandparents. It doesn't include partners, either same sex or otherwise. If you are in an unmarried relationship, because you are not married, you are not caring for your spouse, and the employer may not grant you family medical leave.

A serious health condition, that definition is much more broad than the definition under the ADA: illness, injury, impairment, physical or mental condition, in-patient medical care in a hospital, or continuing treatment by a healthcare provider. I think just about any type of cancer would fall under this definition. Certainly, breast cancer, you're going to need continuing treatment by a healthcare provider — be it a hospital, in-patient, outpatient — somewhere you're going to need ongoing help.

When you come back from your family medical leave, you're supposed to be essentially getting your old job back, or if not your old job back, an equivalent position with equivalent benefits, pay, and other terms and conditions of employment. ... The employer is not forced to ... have you accrue benefits [during] the time you're out. [But] the employer cannot retaliate against you, or otherwise downgrade your job duties, pay, or benefits because leave was taken.

I'll give you an example. We had a caller — it was a woman — I think she might have been treated for breast cancer. She worked for a company that operated parking lots — operated ramp garages and parking lots — and she was the parking-lot attendant.

She worked for two years. She was there long enough, [and] the employer was big enough [for

her situation to fall under FMLA]. It had 50 or more employees. She needed to take two months off for cancer treatment. Prior to her cancer, she worked a 9 to 5 job, Monday through Friday. She told her employer that that was the only kind of schedule that she could work.

After two months of being out, [her employer] said, "Okay, you're back from treatment. We're glad to have you back. However, the only job we have for you is a 16-hour-a-week job on the weekends." They violated the Family Medical Leave Act. She was not given her old job back. She was not given an equivalent position back.

I told her about this. She decided not to go forward with legal action against her former employer. She felt she was getting unemployment compensation, she didn't want to deal with it, and she's kind of moved on with her life. The sad part of this story was the reason she couldn't work on the weekends: ... her sister had died of cancer, and there were times on the weekends where she needed to take care of her sister's kids. But, essentially because of cancer, she was forced out of her job.

Now, moving on to state laws. Some states have their own Family Medical Leave Acts. I know New Jersey does and Connecticut does. Others do not. Pennsylvania does not have a state Family Medical Leave Act. Whatever state you're living in, if it's not Pennsylvania, New Jersey, or Connecticut, you're going to have to talk to your local state's Department of Labor and find out if you have a [specific act governing medical leave] ... that could protect you, that might cover [a workplace that employs fewer than] ... 50 employees.

These are the workplace issues that I kind of thought up based on my own experience.

As far as effective communication, like I said before, when you're asking for an accommodation ... try to get management on-board with you. It's the two of you. It's you and management. The two of you are going to work together to deal with this common problem. The common problem is you have this obstacle. The obstacle is cancer and its treatment. ... You want to get together and deal with this problem so you can keep your job. [You want to] keep your paycheck. Hopefully you've got benefits. And [you want to] do a good job.

Now, they need to get the work done [as] efficiently and effectively as possible. So, as much as you possibly can, [try not to make this] ... an adversarial situation. Try to get yourself [and the

employer] on the same side, as much as you can. Obviously, this is going to depend on the situation, the personality of the manager. But, that's what I try to tell people, as best as you can do that.

Now, as far as negotiating a conflict, again, try to communicate effectively what you need. Make suggested solutions that at least try to meet everybody's needs. Management has certain needs. You have certain needs. Try to be flexible. Try to build common ground by showing your shared interests. You want to do this job. You want to do it well. They want someone to do the job. They want someone to do it well. And if you work through this, if you do this creatively, and hopefully neither side will be pointing fingers and saying bad words. Hopefully the two of you can work together.

Kind of put yourself in management's shoes. If you had an ... employee come to you with your request, how would you view that? How would you look at it? How would you evaluate it? Hopefully, the manager will put himself in your shoes, say, "Okay, this is my situation. These are my job duties. These are the limitations that I'm dealing with. How can we do this?"

Now, any kind of negotiating with ... management, with your boss — be it a reasonable accommodation, be it a promotion, be it a raise — whatever the situation is, you have to understand what kind of leverage you have. If you don't have an accurate idea of what leverage you have when you're negotiating, then you're not in a good spot. You're not going to be able to get all that you could get. Or you [may] run the [risk] of [not] playing your cards the right way, and losing in the end. The more unique, valu[able], and difficult-to-replace your experience and skills are, the more leverage you have. The more valuable you are to the organization, the more you can ask from them.

But, you don't want to overplay your cards, especially in this kind of an ... economy. ... If you're saying how important you are, and how irreplaceable you are, then that really might make people in management unhappy. And then they say, "Oh, you're really irreplaceable? Well, we'll show you. Here's your pink slip. We'll find somebody else."

As far as co-workers are concerned, when I was dealing with cancer, I was very much out of the closet. I told people [I had cancer] because, first of all, I was an attorney. I specialized in employment discrimination. I worked for an



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agency that was supposed to fight employment discrimination. So, personally, I felt fairly protected. I didn't have a problem with getting out of the closet.

[Your individual experience] depends on your co-workers. Co-workers may be very supportive. They helped me a lot. They were a huge help to me when I was going through cancer. There are people who just don't want to know. They don't want to know your personal business. There may be others [who] feel [that] "Jill's got breast cancer. She's going to be out a lot. I'm going to have to do her work now." The co-workers may feel ... that this [illness] is going to be a burden to them. ... [And their fear of that burden, or their increased pressures at work because of it] ... may put them in a bad frame of mind.

This [choice to disclose your cancer diagnosis] is a very personal choice. It's going to have to be made based on what your personality is, what you're comfortable with, the dynamics of the workplace, how many people you're working with. [Ask yourself this question]: How supportive do you think they're going to be?

As far as your medical condition, it's really none of your co-workers' business. There is no requirement that you talk to your co-workers about your condition. If you don't want to tell them, you don't have to tell them. If there is a conflict with co-workers, my rule-of-thumb suggestion is this: If your [company is] big enough to have a human resources department, [go to them with the disclosure, and] hopefully they're competent [and] ... know what they're doing. Get the supervisor involved, and just try to work it out. Don't wait until it blows up. Don't wait until it gets nasty. Don't wait until it's stressing you out, so you're staying up at night [worrying].

If it reaches to the point where you're feeling you're being harassed by co-workers because of your breast cancer, because of your disability, then that might raise to a legal issue. You really need to get management on-board with this. You really need to get management and HR notified of the situation. And you really need to — once again — paper the file. You need to start writing stuff down. You need to send memos, keep copies saying so-and-so said this to me, so-and-so said this, so-and-so did this. I told [this person this information] at [a] certain ... date ... [and] time. [Detail what your expectations are — what you want them to do in response to your complaints. Tell the management]: "I want this addressed. I need

to have this dealt with. I don't want to deal with this, and I shouldn't have to deal with this." [And document the outcome.]

You need to write this down, because, like I said earlier, harassment due to a disability is against the law. Internal policies [and departments may be able to assist you if a discriminatory action occurs]. If you ... work for a big corporation, there may be an affirmative-action department whose job it is to help people with disabilities deal with the workplace. You're going to want to check your personnel handbook [to find that out].

I kind of tagged, at the end of the presentation, some resources in case you find that ... it's reached the point where you do need some legal help. For those of you in Philadelphia or the surrounding Pennsylvania counties, Legal Clinic for the Disabled [<http://www.legalclinicforthedisabled.org>] can help you. If you live any place in Pennsylvania, there's the Disability Rights Network of Pennsylvania [<http://drnpa.org>]. There's the phone number and the Web addresses.

ELYSE SPATZ CAPLAN, MA:

Rodney?

RODNEY N. WARNER, ESQ:

Go ahead.

ELYSE SPATZ CAPLAN, MA:

Excuse me one second. This is Elyse. Your presentation has been wonderful. I'm receiving feedback already from people saying how excellent the presentation is. I'm wondering, since the slides will be made available on LBBC's Web site after the presentation, if we sort of sum up now and ... move into the question[s] and answers. Then if there's time at the end, maybe you can highlight some of the national resources for all of our listeners.

How's that sound?

RODNEY N. WARNER, ESQ:

Sounds good to me.

ELYSE SPATZ CAPLAN, MA:

Wonderful.

RODNEY N. WARNER, ESQ:

... As far as the ADA is concerned, if you have breast cancer, you're probably going to fall under the definition of [having a] disability. If you need a reasonable accommodation, it's going to have to be effective, and you're going to have to work with management as to how to get there.

As far as the Family Medical Leave Act, the big stumbling blocks are: Have you worked there long enough, and is your employer big enough [that the law applies to them]? Those are the two major stumbling blocks with the Family Medical Leave Act.

As far as dealing with co-workers, dealing with management, I guess my best suggestion is to — once again, if you're talking with management about these issues, make sure [that] if you're not [communicating with them] ... in writing, [that you] keep notes so you can establish who knew what and when, [and whether they took action when you requested assistance].

But what I really hope [is that you are able to work things out with your employer, and all your documenting will be unneeded], as I [said at the beginning of the program]. Hopefully your workplace will be a source of support, and will be a source of help to you when you're going through this.

Unfortunately, that's not always the case. Hopefully you'll be able to go through this ... with your eyes open, knowing what your rights are, and being able to access some resources to help you through your situation.

Okay, moving on to the questions. Elyse?

ELYSE SPATZ CAPLAN, MA:

Okay, Rodney. Thank you so much. You covered so much important, important territory. I'm not going to spend much time summarizing, other than to say thank you so much for touching on all of the various important aspects, as well as identifying that many of the [laws] ... vary from state-to-state.

So, I just want to underscore that there are some national resources that are available that are in the slides to review, as well as individual state differences. So, everyone should check — since we have such a diverse national audience on our teleconferences — state specifications and guidelines in laws, as well as some of the national resources.

With that, I would like to turn it back to Christian, and remind the group that we have [received] questions online that I will read [aloud. And we will also be] ... taking telephone questions.

So, please listen carefully to the instructions for getting into the questions.



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OPERATOR:

Thank you, Elyse. We will now be conducting a question-and-answer session . . .

ELYSE SPATZ CAPLAN, MA:

. . . Christian, I think I'd like to start with an online question that we have.

OPERATOR:

Okay.

ELYSE SPATZ CAPLAN, MA:

And I would like to read that: "I am a two-year breast cancer survivor, and I may lose my job within the next six months. What are my rights in pursuing COBRA [Consolidated Omnibus Reconciliation Act of 1985] coverage? Most importantly, what are my rights as I approach my job search, to ensure that I will receive [medical] coverage [with] prospective employers? How can I get advice on this?" So, Rodney, can you help with that?

RODNEY N. WARNER, ESQ:

Well — if you do lose your job, you should be getting a notice as far as COBRA is concerned. . . . Assuming you're getting — you're obviously getting health insurance through your current employer. . . . There should be notice.

COBRA is not something I'm all that familiar with, but it's my understanding is there's various times — I believe you can get it up to 12 months. Depending on the circumstances, you may be able to get that stretched out to as many as 36 months, depending on your circumstances.

As far as getting coverage with a new employer, there's no requirement that an employer offer anybody health insurance. . . . There's no law that everybody has to be provided health insurance. So, even if you get a new job, you may still have to get coverage through your COBRA plan for as long as possible.

Of course, the downside of COBRA is essentially you are paying not only your share, but the employer's old share. And, that's kind of the downside of COBRA. I have that e-mail address written down, and I will try to get a better answer to that question and e-mail it to the person who sent that in.

ELYSE SPATZ CAPLAN, MA:

Well, Rodney, if you send it to us at LBBC, we can make sure that the folks get back in touch with us. I'll just add that there are some new guidelines around COBRA that are in place with the [Obama] administration. . . . So, I think some very, very recent changes have been implemented.

So, I would definitely encourage the person who asked that question to continue to ask questions about it, because some recent changes may be in place that may be more supportive. With that, I'd like to take another online question. That is, "Could you please talk briefly, Rodney, about the process to apply for disability federally? When does someone know that they're actually ready to apply and/or qualify for [disability benefits]?"

RODNEY N. WARNER, ESQ:

Apply for disability — I assume Social Security disability benefits. It's not clear from the question.

ELYSE SPATZ CAPLAN, MA:

Uh-huh. I think — why don't you take it from that standpoint?

RODNEY N. WARNER, ESQ:

Okay. I'll just assume that. There [are] many ways you can apply for Social Security Disability. You can do it over the phone. You can do it online. You can do it in person at a Social Security office.

. . . To qualify for this, you have to essentially have a condition [that] is going to prevent you from working for at least 12 months. If, because of your breast cancer and the treatment, you are going to be unable to work for 12 months or longer, then it is worth a try to apply for Social Security Disability.

It does not cost anything to apply for Social Security Disability. If you think this is something [that] might be right for you, Social Security does have a good Web site [<http://www.ssa.gov>]. They actually have an online question-and-answer [portion on the site] where it takes you through the steps [for the application process], [<http://www.socialsecurity.gov/applyfordisability/adult.htm>]. It'll give you an idea as to whether or not you . . . qualify for benefits. . . .

Once again, you're going to probably — you're going to want to talk to your doctor. Get that doctor's opinion, because SSA is going to want to talk to your doctor, and probably send a questionnaire to your doctor. If the doctor doesn't think you're going to be disabled for 12 or more months, then your application isn't going to get anywhere. So, that's kind of important.

ELYSE SPATZ CAPLAN, MA:

Okay. Thanks for addressing that important question. I have one more online, and then we'll switch over to some telephone questions. "Does Connecticut Disability Act cover smaller

employers? And does Connecticut have its own FMLA?"

RODNEY N. WARNER, ESQ:

I last practiced in Connecticut in 2004, so I'll give you the answer as of 2004. The Disability Act does cover smaller employers. I'm trying to remember the number of employers — I think it's four [employees that requires the employer to comply with this law]. It's smaller than 15 [employees], and I think it's four. But, assuming this Sheryl is from Connecticut, I would suggest she go to the Blue Pages [in the phone book] and look up Commission on Human Rights and Opportunities. [It should be listed] under the State of Connecticut. [When you call] that commission, ask them . . . what the state law protects, [and] what size the employer [must be before it is impacted by the law]. [Editor's Note: Get more information about Connecticut's FMLA, as of June 2009: http://www.das.state.ct.us/Hr/om/FMLA_Statewide_Policy6_09.pdf]

Connecticut does have its own Family Medical Leave Act. As a matter of fact, there's a . . . different Family Medical Leave Act. There's one for state employees, and there's also a different Family Medical Leave Act for people who work [for] private [agencies], and I believe public employers in the State of Connecticut [fall under a separate law].

ELYSE SPATZ CAPLAN, MA:

Okay. Thank you very much, Rodney. And Christian, can we take some telephone questions now?

OPERATOR:

Yes, we can. Our first question comes from [a woman] from Philadelphia, Pennsylvania. Please proceed with your question. Your mic is now live.

CALLER:

Hi . . . I'm a five-year cancer — breast cancer survivor. My question is, how often can you apply for family medical leave within that 12-month period?

RODNEY N. WARNER, ESQ:

It's my understanding that . . . once you have family medical leave — and once you've exhausted it — essentially the clock starts ticking for another 12 months. . . . So, once you exhaust, you go through all your FMLA benefits, essentially you have to wait another 12 months to ask again. However — and this is kind of a big "however"



— you can ask for a medical leave under the Americans with Disabilities Act as a reasonable accommodation. Let's say you find yourself in a situation where you need a medical leave, [but] you can't get that through the Family Medical Leave Act. You can request it as a reasonable accommodation pursuant to the Americans with Disabilities Act, and in Pennsylvania, under State Disability Discrimination Law.

So, there might be more than one way to get this leave.

CALLER:

Okay. That's good to know. Thank you.

RODNEY N. WARNER, ESQ.:

You're welcome.

ELYSE SPATZ CAPLAN, MA:

Thank you.

OPERATOR:

Thank you. Our next question comes from [a woman in] Centreville, Virginia. Please proceed with your question. Your mic is now live.

CALLER:

Hi, Rodney. Thank you so much for all your information.

RODNEY N. WARNER, ESQ.:

You're welcome.

CALLER:

I'm a two-and-a-half year cancer — breast cancer survivor. Following my treatment, I took a voluntary demotion.

RODNEY N. WARNER, ESQ.:

Uh-huh.

CALLER:

I was moved to a new location so I would have a shorter commute.

RODNEY N. WARNER, ESQ.:

Right.

CALLER:

Fast forward two-and-a-half years, I look great, and I'm doing well. And they want to put me back into a supervisory position — go back to my original location, which is 45 minutes away.

Is there a way to sort of preserve all the quality-of-life changes that I've made? I don't want to do it. I think I'm one of those people that you were talking about. I do feel like I've got some leverage [after] 20 years of service [with my company]. And they were absolutely fabulous to me during my treatment.

But, now I'm all better, and they want to change. They've said, "Well, nobody told you it was permanent." [And I replied], "Well, nobody told me it was temporary."

RODNEY N. WARNER, ESQ.:

Are you a unionized employee?

CALLER:

I'm a federal employee.

RODNEY N. WARNER, ESQ.:

You're a federal employee?

CALLER:

I'm a federal employee, and I am not unionized.

RODNEY N. WARNER, ESQ.:

Okay. Well, since you're a federal employee, you would not fall under the Americans with Disabilities Act. You would fall under what's called the Rehabilitation Act of 1973.

CALLER:

Okay.

RODNEY N. WARNER, ESQ.:

Those provisions — essentially, the provisions of the ADA — well, the original provisions of the ADA were modeled after the Rehab Act. . . . So, you have similar protections, though the language was not changed like the ADA was. So, let me get this straight. Do you want all the benefits of being a supervisor but not having the commute? . . .

CALLER:

... I don't want to, I don't want the level of — I don't want to supervise anymore, and I don't want to commute. I took a demotion believing that that was my situation. I have some things in writing . . . but [I don't have anything in writing] . . . saying this is permanent. I don't have quite those words.

RODNEY N. WARNER, ESQ.:

Well, do you have anything in writing saying it's temporary?

CALLER:

I do not.

RODNEY N. WARNER, ESQ.:

Okay. Well, you know, that's . . . kind of a hard situation because there may be some federal policies, federal issues out there that I'm not all that familiar with. If you were working in a — if you were working for a private employer . . . I'm pretty sure they could probably say, "Okay, if you don't take this job, we're going to fire you."

CALLER:

Right.

RODNEY N. WARNER, ESQ.:

I'm not . . . sure if that's the case if you're a federal employee.

CALLER:

No, I don't think they can fire me at this — well, I guess they could. But — oh, I forgot — chemo brain. Sorry —

RODNEY N. WARNER, ESQ.:

You know, I don't think under the ADA . . . because usually when it comes to changing jobs . . . the accommodation's usually going to be temporary [under] the ADA.

CALLER:

Right.

RODNEY N. WARNER, ESQ.:

It's a temporary transfer to an open position.

CALLER:

Correct. Okay.

RODNEY N. WARNER, ESQ.:

But, once again, you're operating under a different statute, the Rehabilitation Act, and there may be various kinds of civil service rules and regulations that apply to a federal employee that don't all apply to the rest of us.

CALLER:

Okay . . . [I didn't] get it in writing the first time, so now that they're . . . wanting to change it, I've asked for it in writing and it's gone all silent on the other end. So . . . I would say be very honest about what you want.

CALLER:

Oh, I have.

RODNEY N. WARNER, ESQ.:

Say, "You know what? I've gotten this demotion. I'm making less money, but I've got a better quality of life. I would really rather not take my old job back. "

CALLER:

Uh-huh.

RODNEY N. WARNER, ESQ.:

"So, if it's at all possible, I would like to stay here." . . . And I would explicitly put it in management's lap. Say, "Okay, if I refuse this job, what are the consequences?"

CALLER:

Uh-huh.



RODNEY N. WARNER, ESQ:

... put it in black-and-white and ... make sure it's very clear.

CALLER:

... and that's what I've ... asked for, and that's what they're working on —

ELYSE SPATZ CAPLAN, MA:

... I think just to sort of sum this up from what the two of you have talked about, and what Rodney's referred to in the past, document every conversation that you have. Put it in writing so you have that [record].

We wish you the very best of luck in trying to maintain the accommodation that was provided to you that sounds like you're the most comfortable with. So, best wishes.

OPERATOR:

Thank you. Our next question comes from [a woman in] Taunton, Massachusetts. Please proceed with your question. Your mic is now live.

CALLER:

Hi, Rodney. I appreciate this forum. I recently — I went through the whole rigmarole that you were talking about trying to get reassigned to another job.

RODNEY N. WARNER, ESQ:

Uh-huh.

CALLER:

But, as soon as that happened, everything fell quiet. Within a very short time, I was terminated by a hospital I was working for.

RODNEY N. WARNER, ESQ:

Yep.

CALLER:

How do you find the right lawyer, one with the very sharp teeth? And what do you ask for?

RODNEY N. WARNER, ESQ:

Well, you know what, if you go online, I actually have three slides on finding private attorneys. [Editor's Note: Look for the two slides titled "Private Attorneys" in the Powerpoint at lbcc.org]

CALLER:

Wonderful.

RODNEY N. WARNER, ESQ:

I'll tell you that, in a nutshell, if you know of an attorney who's in private practice [but] doesn't necessarily do employment law [he or she may be

able to refer you to an attorney;]. ... Let's say you know somebody who does personal injury or estate planning, or whatever. He [or she] probably has [clients ask about] ... employment issues, and probably refers out ... to a particular attorney who specializes in employment work.

CALLER:

Now, unfortunately, I did miss the beginning of this program.

RODNEY N. WARNER, ESQ:

So —

CALLER:

Have you ever written a book?

RODNEY N. WARNER, ESQ:

Have I ever written a book? No, I have not written a book. I've written some articles. I haven't written a book. But —

CALLER:

I'll be waiting for it.

RODNEY N. WARNER, ESQ:

There's also — you can go a Web site. It's called the National Employment Lawyers Association [http://www.nela.org]. ... On their homepage, on the left of the homepage you can do a search for their members. ... Essentially, it's a professional organization of attorneys who specialized in representing employees in employment matters. Now, just because they're a member of this organization doesn't mean they're good.

CALLER:

Yeah.

RODNEY N. WARNER, ESQ:

It just means they belong to this professional organization. But, it can — it kind of sends you in the right direction.

CALLER:

So, how do you find out if that — I guess that's my main question. How do you find out who is good? I mean, they could tell you, "Yeah, I can take the case, but, there's got to be" —

RODNEY N. WARNER, ESQ:

... Ideally, if you don't know any attorneys as friends, family, [ponder who you do know in the legal field and get a referral]. Have you ever had to use an attorney? [Have you ever] gotten into an accident, written a will? Who did you use for — as an attorney — [in those instances]? Get that name, get that number, call that person [and] say,

"My friend Joe, you got him a couple thousand dollars for that car accident. I have an employment issue. Do you know somebody ... [you could] refer [me to] for employment issues?"

CALLER:

Yeah.

RODNEY N. WARNER, ESQ:

Also, you can check with the — I assume it's under the Massachusetts — I think it's called the Supreme Judicial Court in Massachusetts [http://www.mass.gov/courts/sjc/index.html]. ... You can contact the group that's in charge of disciplining attorneys, either through a Web site or [by] phone and say, "Okay, I'm considering hiring this lawyer in [Worcester]. His name is Bill Smith. Has Bill Smith been disciplined? Has there been any ethical — ethics, you know, charges against Bill Smith?" And you can actually find out that information.

CALLER:

Wow, that's great. Thank you so much.

RODNEY N. WARNER, ESQ:

You're welcome.

OPERATOR:

Thank you. Our next question comes from [a woman in] San Gabriel, California. Please proceed with your question. Your mic is now live.

CALLER:

Hi. ... I'm [in] California. I was just recently diagnosed with breast cancer this January, and I'm actually on the mend. But I'm still going through hormone therapy. I am currently moving on with my life. I left my other job. They weren't very supportive [of] me. Since I'm going through a lot, I decided to leave the job. I can still go back to that job. They told me I can go back.

But, what I'm doing right now is moving forward. So, I'm applying for other employment opportunit[ies]. However, this is my question. A lot of the employers that I'm applying for are looking for a drug test. ... And they're requiring not only urine tests, but also hair samples.

How do I get around that, because I'm currently taking Xanax? I'm also taking hormonal therapy. How do I get around that?

RODNEY N. WARNER, ESQ:

Assuming that everyone has to take a drug test, you can't. You need to be honest. Now, when you're filling out [the forms prior to the drug test] — especially if you ... say on [the form] ... "I'm not



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taking anything," I don't know if what you're taking might result in a false positive [for illegal substances].

CALLER:
Right.

RODNEY N. WARNER, ESQ.:

The result might [suggest] that you're on [illegal] drugs, and then you're definitely not going to get the job. So, what you need to do is you need to be honest. What the employer should be doing is keeping any kind of medical information . . . in a separate file from your personnel information.

CALLER:

Now, during the interview — I know you mentioned earlier that you don't — you have the right to not say that [you are undergoing treatment for cancer. But in my case, I'm not going through that treatment anymore]. . . . In my case, the doctors had released me. I am going through some therapy, but during the interview I did not say anything [about my current medical treatments]. But, now they're asking for a drug test, [so they're going to know about the treatments because the test results will show what medicines I've taken].

RODNEY N. WARNER, ESQ.:

Right.

CALLER:

What do I tell them?

ELYSE SPATZ CAPLAN, MA:

I — Rodney, if I can . . . just interject. It sounds like what you said just before is that all individuals need to be honest. If there are questions that an employer is asking that are appropriate to be asked — is that true? Is that accurate to say?

RODNEY N. WARNER, ESQ.:

Well, are they asking you [about health issues during the interview, which, as I said before, would be illegal]?

CALLER:

They didn't ask me in the interview, so —

RODNEY WARNER: If they didn't ask you in the interview — so, they offered you a job?

CALLER:

Right.

RODNEY N. WARNER, ESQ.:

Okay. So, they made a conditional job offer. And as a part of the conditional job offer, you have to pass a drug test.

CALLER:

Right.

RODNEY N. WARNER, ESQ.:

[When] the time comes from the drug test, they're going to give you some forms to fill out.

CALLER:

Right.

RODNEY N. WARNER, ESQ.:

And the forms say, "Are you taking any medications, yes or no?" If yes, list all the medications you're taking. Correct?

CALLER:

Right.

RODNEY N. WARNER, ESQ.:

Is that what's going on?

CALLER:

Yeah.

RODNEY N. WARNER, ESQ.:

Then you have to list the medications that you're taking.

CALLER:

Right.

RODNEY N. WARNER, ESQ.:

... Based on all the chemo drugs that I took, if I spelled that out, and handed it off to my manager, he would have no clue as to what I was being treated for.

CALLER:

Okay.

RODNEY N. WARNER, ESQ.:

I mean, if I wrote down etoposide and gemcitabine and Navelbine, and God knows whatever else I took. Unless you're working for a pharmacy, who's going to know?

CALLER:

They'll know what Xanax is.

ELYSE SPATZ CAPLAN, MA:

... We can really appreciate here at Living Beyond Breast Cancer the challenge that you're facing and you're wary about . . . what the possible impact is of being honest. But, we hope that you got some information through our presentation today. Also, if you want to talk to other women who may have had to deal with those similar concerns, just as another reminder that LBBC has our Survivors' Helpline (888) 753-LBBC (5222) where you can talk to other women who've been in that situation. [The Helpline could get you

some] . . . support [from] other survivors who have dealt with workplace issues of that type.

RODNEY N. WARNER, ESQ.:

And there's one thing I want to add. . . . If there's a post-job offer, either a physical examination or a drug test, and if the job is taken away from you as a result of a drug test or a physical examination, that's a great, big red-flag, and you really do need to get some legal help with that.

ELYSE SPATZ CAPLAN, MA:

Okay. Thanks so much, [to the caller], and best wishes.

OPERATOR:

Elyse, are you going to be taking some Web questions at this time?

ELYSE SPATZ CAPLAN, MA:

Sure. I will take a Web question right now. Actually, I'm going to roll two into one, Rodney, because . . . I think one you'll be able to answer very quickly. The first one's coming from, actually, a health[care] provider, a patient advocate [who] works at a cancer center. Many of this person's patients are very worried about losing their jobs because of their cancer diagnosis.

Is there any general statement or a specific resource that you might be able to direct us to that may address rights around job loss because the cancer diagnosis? And then, just to follow that so you can sort of answer this together . . . there's another person [who] is living in the state of Pennsylvania, and her job is extremely physical in nature. When she takes a break, a five-minute break, it seems as though her boss causes a major stink. She's been with the company 15 years and wants to know are there any particular rights that she has about taking breaks, due to the physical nature of her job?

RODNEY N. WARNER, ESQ.:

As far as the first section is concerned, obviously there are no guarantees that any of us is going to keep our jobs. And that's especially true with the economy.

As far as somebody losing their job because they're being treated for cancer, I would [refer] this person working at the Cancer Center [to the contacts and information listed during] . . . my slide presentation. I've got links to various documents and various organizations. The patient advocate can call me, their patients can call me, and I will help them as best I can. I'm assuming



they will — they work in the Philadelphia area.

If you don't work in the Philadelphia area, there's other organizations that are part of the slide presentation. But, essentially, if they can perform the essential functions of the job, with or without a reasonable accommodation, they should be able to keep their job. It shouldn't be an issue. Hopefully, they're working for organizations large enough [that they are governed by the ADA and FMLA], and they've worked there long enough that they will qualify for family medical leave.

ELYSE SPATZ CAPLAN, MA:

Uh-huh.

RODNEY N. WARNER, ESQ:

As far as the manager looking down at somebody taking a break, once again, the issues that come to my mind is, is this a potential sex discrimination issue? Does he get snotty with males who are taking time off? Is she being singled out because she's a woman? Is she being singled out because she has a cancer history?

If she genuinely does need more time off, to take a little break because of her cancer treatment history, then I would highly recommend she get this in writing, she make an official request to hopefully help get this manager off her back. If she really does need this break because of her disability, her cancer treatment, or her history of cancer treatment, then this might be able to give her some protection. I don't know. Maybe this supervisor's a jerk to everybody. It's really hard to tell.

ELYSE SPATZ CAPLAN, MA:

Right. I mean, it is hard to tell from some of the questions because some of the details are missing. I would imagine, also, that the personnel policies of each individual company or organization may also address, in some instances, the issue of breaks during the workday.

But, I think your answer has provided some good questions for this person to consider . . . as she's evaluating how to get her needs best met and protect herself.

And with that, due to timing, I would just like to . . . thank . . . Rodney for his time and his expertise. I would like to call out one of the national resources. Again, this will be posted on Living Beyond Breast Cancer's Web site. But, for those of you living across the country, which [includes] many of you today, the Cancer Legal Resource Center is a nationwide resource [<http://www.cancerlegalresourcecenter.org>]. I just wanted to provide a national resource for folks on the call today. Rodney, do you have any summary comment before we sign off?

RODNEY N. WARNER, ESQ:

No. I just want to thank, you know, Living Beyond Breast Cancer for the opportunity to talk to everybody. And I hope everything works out well for everybody who's listening. Like I said, as part of the presentation, as part of the slides — toward the end I've listed various resources. If you do need help, then reach out, and hopefully somebody will be able to point you in the right direction.

ELYSE SPATZ CAPLAN, MA:

That's wonderful. . . . And keep in mind that you can listen again via the podcast. The transcript and the slides will be posted on <http://www.lbbc.org>. And again, for everyone, Living Beyond Breast Cancer's toll-free Survivors' Helpline: The phone number is (888) 753-LBBC (5222). We have many women who have dealt with lots of different issues in the workplace, as well as other breast cancer experiences. So, please know that we're here to support you in various different ways.

Thanks to Christian for his great facilitation. And we do hope everyone has a pleasant rest of their day.

OPERATOR:

Ladies and gentlemen, this does conclude today's teleconference. You may disconnect your lines at this time, and we thank you all for your participation. Have a wonderful rest of the day.

[END OF TRANSCRIPT]