

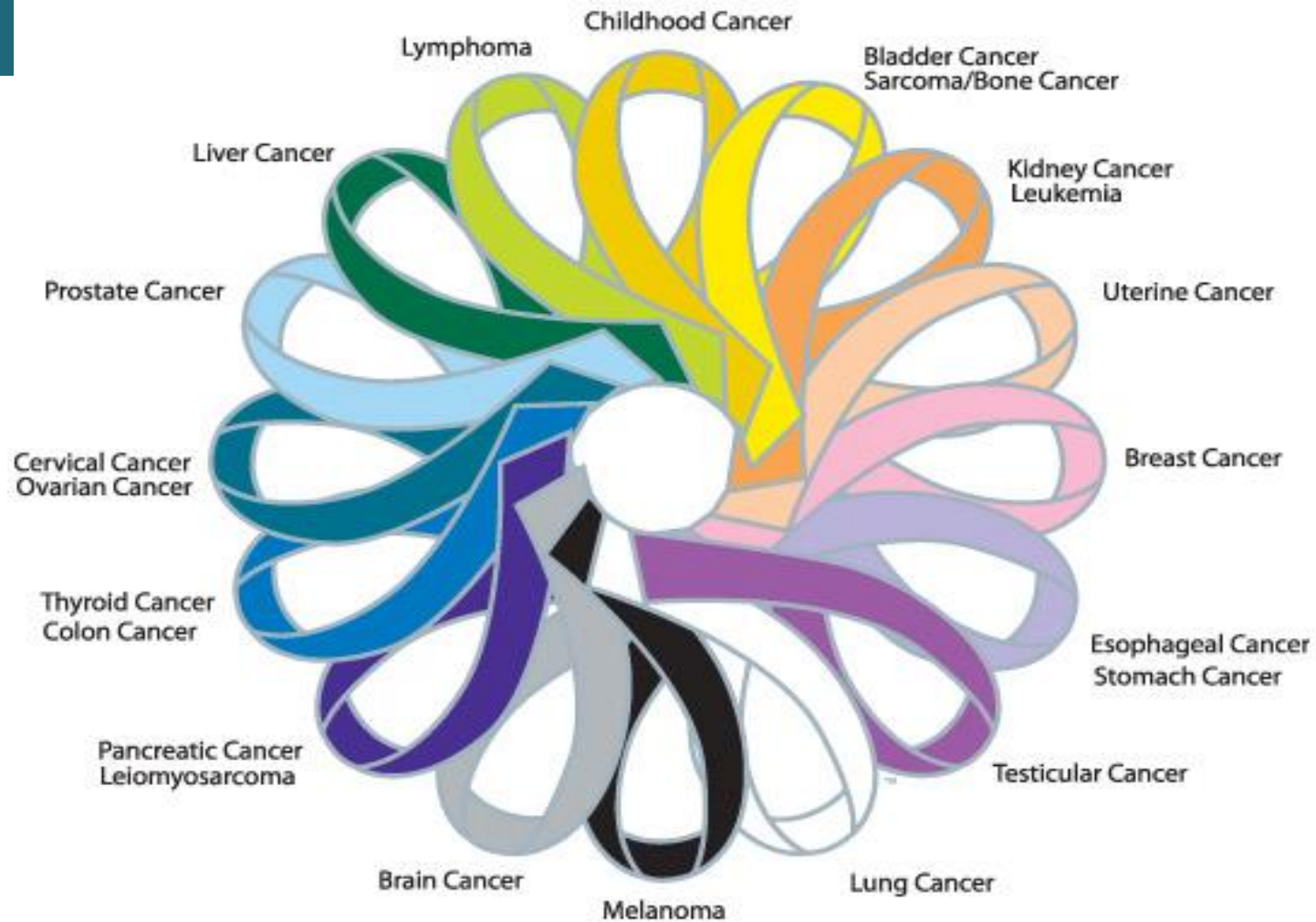
When Cancer Comes to Work

Presented by Kelly Lipscomb

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1.688 million

cancer diagnoses in 2017
(National Cancer Institute)



15.5 million

cancer survivors expected to rise to 20.3 million by 2026

Diagnosis Can Be A Very Difficult Time:

Tips for Working Patients

Handling Diagnosis

- Follow-up appointment after initial shock of diagnosis subsides
- Focus on your health first; ask your doctor key questions
- Understand how the condition and treatment may affect your work (request need for accommodation from your doctor)
- What to do about your job?

Whether to Tell Your Employer That You Have (or a Family Member Has) Cancer

- Factors to consider:
 - The type of workplace: friendly and close-knit or formal and business-focused?
 - Your relationship with co-workers
 - Past practice in handling similar situations
 - Nature of prognosis

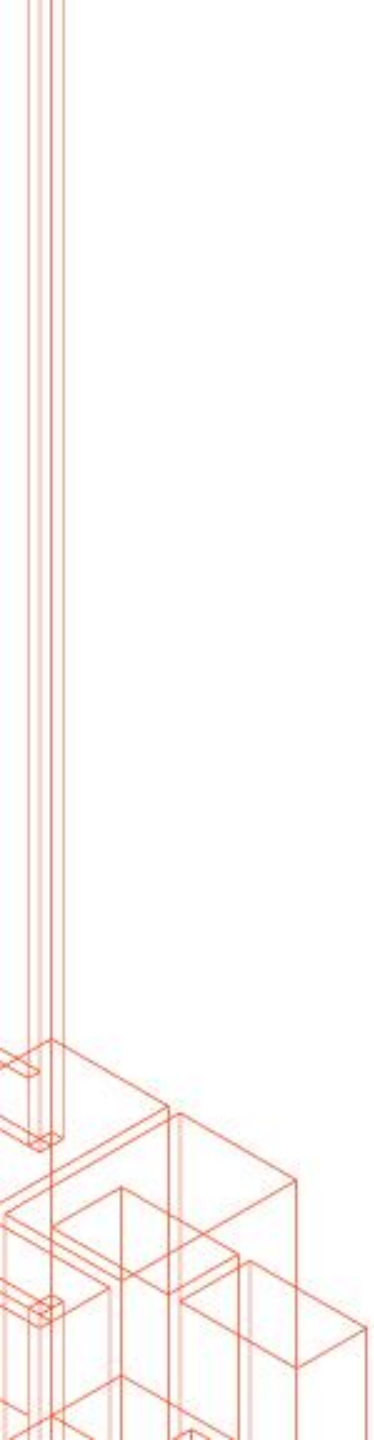
Pros and Cons of Telling Employer About Diagnosis

Pros	Cons
Facilitates need for accommodation, if necessary	Fear of retaliation
Can address possible misunderstandings	Fear of isolation
Leave (paid or unpaid) or flex-time	If employer does not know about diagnosis and your work is affected, may be seen as poor work performance
Employer can help educate you on benefits options	
Support from your professional community	
Employer cannot use disability-related performance issues as "poor performance"	

Leave Benefits and Overview of Applicable Laws

Law	Employers Subject to Law	Leave Available
ADA	15+ employees	No Limit
WLAD	8+ employees	No limit
FMLA	50+ employees	12 weeks
WFLA	50+ employees	12 weeks
WA Sick and Safe Leave	1+ employee	As accrued

Once You Tell Your Employer



The Interactive Process – What Does It Mean?

- EEOC Guidance Memorandum:

“[An] employer must provide a reasonable accommodation that is needed because of the limitations caused by cancer itself, the side effects of medication or treatment for the cancer, or both.”

- No “magic words” necessary to trigger interactive process.
- Family member, friend, health professional or other representative can request the accommodation on behalf of the employee.

How To Engage In the Interactive Process

- Understand the disability interactive process
- Employee must actively participate in the interactive process
- Interactive process requires communication and good-faith exploration of possible accommodations between employer and employee—neither side can delay or obstruct the process
- Participation in the interactive process is a continuing obligation
- Failure of an attempted accommodation does not excuse an employer from further participation in the interactive process

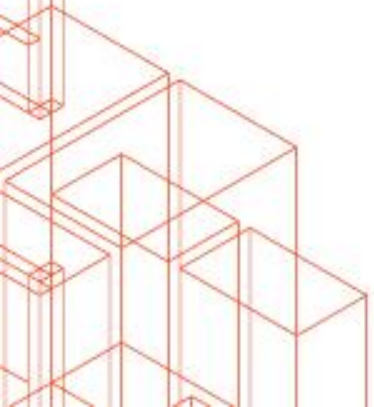
Failing to Engage In the Interactive Process

- Once employer identifies information necessary to propose reasonable accommodations, employee's failure to provide it violates the requirement to engage meaningfully in the interactive process
- Deprives employer of opportunity to provide appropriate accommodation
 - **Example:** *Hayes v. Walmart Stores*, Dist. Court, D. Oregon 2011: employee refused to complete accommodation form identifying substantial limitations and needed accommodations.
 - **Outcome:** Court held plaintiff's refusal to provide necessary medical documentation deprived defendant of fair notice that he was limited by disabilities and was seeking accommodations because of such limitations.
- Failing to give employee disability and medical leave as accommodation can lead to significant and financially disastrous results (*Jorud v. Michaels*)

Hopefully, Employers Show Support

- Explain leave and other benefits available
- Assign an HR rep that the employee can call directly
- Explain Open Door complaint process and Anti-Retaliation policy
- Discuss how employee wants to handle sharing news, if at all
- Don't forget the employee even when they are not at work!

Handling Side Effects of Treatment



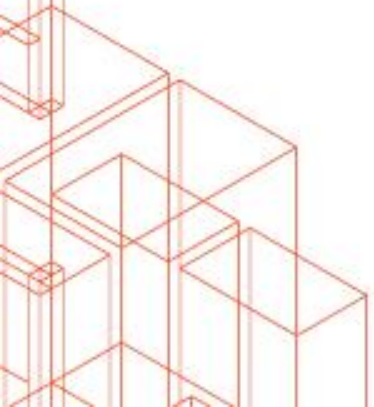
Accommodations for Side Effects of Cancer and Medication

- Chemotherapy and side effects (American Cancer Society)
 - “Chemo brain” Short-term memory lapse—forgetting things usually remembered
 - Difficulty concentrating—loss of focus, limited attention span
 - Difficulty word finding—names, completing sentences, searching for words despite available cues
 - Difficulty multi tasking
 - Slower thinking/processing

Accommodations for Side Effects of Cancer and Medication

- From perspective of oncologist/hematologist, Dr. Janet R. Hosenpud
 - Chemo brain can last 6-12 months
 - Brain not firing on all cylinders (foggy)
 - Could not find word for watch while staring at it
 - Directed pharmacist to double check prescriptions
- Implication of “regarded as disabled” and “record of disability”

Handling Impact of Drugs Used During Treatment



Cancer Treatment and Zero Tolerance Workplace Drug Policy

- State Supreme Courts and Federal Courts that have ruled on issue held: Employers may fire employees who test positive for THC—medical marijuana is Schedule I drug and illegal
- 41 U.S.C. § 8102 the Drug-Free Workplace Act requires drug-free workplace for federal contractors
- How to reconcile zero tolerance policy with compassion toward employee and potential for violation of Federal Drug-Free Workplace Act
 - → **But**, see Connecticut Federal case *Noffsinger v. SSC Niantic Operating Co. LLC*

Cancer Treatment and Zero Tolerance Workplace Drug Policy

- Employers should evaluate how to handle discipline for employee undergoing chemotherapy who tests positive in random drug screen
- Marinol—the legal Schedule III synthetic THC prescription has half life of 25-36 hours; metabolites can persist up to five weeks
- EEOC has also taken the position that inquiring into prescription medication taken by disabled employee may be done only in very limited circumstances involving public safety considerations

Cancer Treatment and Zero Tolerance Workplace Drug Policy

- If your employer wants to enforce a zero tolerance policy and you've tested positive for THC, and you've been taking Marinol or Naboline (another legal Schedule II synthetic), offer explanation (with medical support)
- If you provide evidence of prescription for Marinol or Naboline, then should be no violation of drug policy

Questions?