



Working It Out: Your Employment Rights as a Cancer Survivor

Carson Jacobi:

It's now my privilege to introduce the next keynote speaker, Susan Slavin. She's is a litigation partner in the firm of Slavin, Angiulo, & Horowitz in Jericho, New York, which handles a wide range of legal services that include employment, employment discrimination, and health law. A long time community activist, Susan is the founder of the Breast Cancer Legal Advocacy Project, which has trained attorneys to advocate on behalf of breast cancer patients on a variety of issues. She has advised various cancer activist organizations and her firm filed a brief with the United States Supreme Court representing 11 women's rights, civil rights, and health care advocacy groups on the protection of the rights of women and their equal access to health care and health insurance coverage. Susan has dedicated her advocacy efforts on behalf of the catastrophically ill to the memory of Pamela Hanifan, a friend and mother who died from breast cancer at the age of 29 on February 5, 1980, and for whom Ms. Slavin's daughter Elizabeth Pamela is named. Welcome, Susan.

Susan Slavin:

Good morning. It's wonderful to be here. I'm very honored to be here, especially with my fellow panelist, and indeed it is a particular honor to be here with Barbara Hoffman. Once again we've gone back a number of years in advocating and it's wonderful to see you and all of the other people and including the audience. I'm a little casual so I'm going to sort of get a little comfortable. I'm a litigator as opposed to an academician. So let me first say when they said to me that they wanted me to [tell] law stories, I have to tell you as a litigator and as an attorney, your eyes sort of wax over when you hear that someone's going to tell law stories. So that means like I'm close to retire or death. I am not. I'm here, I'm still practicing, and I love it. Let me also say that it's been an honor and a privilege to advocate on behalf of the catastrophically ill for well over ten years. You folks touch me in ways that have never been ... I've never been [un]affected. There is an indomitable human spirit that I have never seen before and all of the rights that Barbara laid out for you are rights that, as we've said over the years, these are your rights. These are civil rights. These rights are no different than the right to vote, the right to be free of discrimination based on gender, age, or whatever. So why is it people who are disabled or have a catastrophic illness are unaware of their rights? Basically, as Barbara said, the laws are relatively new. Okay. So, but I want to set the framework here. This is not a begging, hat-in-hand lecture. You have to beg no one. These are your rights as citizens. So you have them. They're in your pocket. They came with you today. The only thing we're going to do is sort of shake them up and let them like rise to the surface like hydraulic lifts. The problem as I've seen it over a decade in folks with catastrophic illnesses and not being able to sort of avail themselves of the civil



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rights is that the milieu is different. The environment is different. This is not like an accident at a red light where the car smacks, that's it. You have a dent. You have lawsuit. No, no, no. This is different. First of all, the setting is different. You've been diagnosed with a catastrophic illness. That already is enough to hit you. In the era of managed care, you've got to fight with your insurance company. You know a primary care physician; can I get the best facility? Can I go out of network? The last thing you're thinking about is, "I am going to lose my job?" Because generally in my well over ten years of doing this, when a person is first diagnosed, I mean the workplace could ... arm around you and go, "There, there. We're there to help. Anything we can do." And I've found over the years that when the hair comes out and the wigs go on, there's like a subtle change in the workplace and that's what we want you to be aware of. I do not want you all to be litigated. I do not want you to have lawsuits. Trust me, I as a litigator would like to be out of this kind of advocacy. I love it. I do a lot of different kinds of law. It is the fuel that fires my soul, but we want to empower you. Not to fight, to be your own advocates. We want you to have a, a dialog, a conversation with your employers. Okay. And you're coming in from a power of strength when you know your rights. So, let me just set the scene. All right, it is when you're empowered you can have a conversation and then you can speak from that forum. Okay. Law stories. Look, as Barbara said, and I think, the statistics have proven that the vast majority of employers do not discriminate. Okay. Well, they didn't bring me up here to give you the examples of nondiscrimination. They brought me up to tell you what goes on. And as I said, first let me say to you that, again, it's subtle. It's just not going to come jumping out at you. And I've said over the years, when I think I have seen the most repugnant conduct on behalf of employers in a workplace against an employee because of a catastrophic illness, then and only then do I get another call. I would say though, I'm going to give you a few examples real fast so you can sort of, you know, tuck it away back there. Probably the lowest level that I've ever seen, I had a woman in New York. She worked for a photography plant. They, I'm not very technical, in fact I'm not technical at all. I dictate emails to my secretary. I'm very embarrassed about that, but I do. In fact the folks that are running this today, when they said it was going up on the webcast, I said, "What's that?" In any event, okay, so this woman worked in New York City for a place where they take photographs. They have a lot of the technical equipment and they take photographs and they do something with it. And she worked for them for 19 years and she gets cancer and she goes through a bone marrow transplant and then she needs radiation at Mt. Sinai. She comes back after the bone marrow transplant, to the workplace, and she needs to have radiation. She gets home one day from radia-



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tion and on her phone machine the boss says to her, "You're fired." Okay, basically, "You're fired." And she calls him up and she says, "Why?" And he says to her, he said to her—remember what Barbara said, "Perception of a disability." Remember talking back to the Americans with Disabilities Act, not only a disability, a perception of a disability or a record of a disability. So the boss says to her, "Look, you're undergoing radiation and when you come into our plant, your radiation is going to emit some rays and it's going to screw up the equipment. So therefore we can't have you around." I mean, that is, that's like ridiculous, but she got fired. We had to bring a lawsuit. We all know that that's not true, but it's perceptions. I guess the case that was the most well known that we've had is a woman, she was a legal secretary in the state of New York, oh, anecdotally by the way, anecdotally, I have no statistics, I'm not a statistician, I see the most discrimination, we get the most calls in the fields of education, in the fields of small doctors' offices, dentist offices, chiropractors' offices, in the field of stock-brokers, in the field of advertising. I happen to just, that's where we get the most calls. That's where I see the most discrimination going on. I can't give you any stats, but that's what I see. Small offices as opposed to the larger companies that have human resources. And the next panelist that comes after me, Nancy's going to be talking about companies and how to enter the workplace. It is our hope that over the years that you try and be with companies that are more sophisticated, that know these laws. The larger companies as opposed to what I call the mom and pops. Okay, so let's harken back to the case that changed the law in the state of New York. Jane Kerishtat was a legal secretary, worked for uh Jessel Rothman, the Law Offices of Jessel Rothman. The timeline is pretty consistent. Jane gets breast cancer, she goes out to have a mastectomy comes back in three days and like eight years ago. That was like an incredible thing. I mean they were still letting you be in the hospital after three days as opposed to now. Okay, she comes back to work. He says to her, "You're disabled. Go out on disability." She says, "I'm not disabled. I feel fine." He messengers over to her home disability forms. She said, "Take the forms back. I'm not disabled." All right, she goes back to work. She needs chemotherapy and radiation. She starts on a Friday, chemotherapy. She starts on a Friday after work, as every one of my cancer clients over the years. There's not a one of them doesn't do it after work on Friday or late in the afternoon so they can spend the weekend, you know if they get sick or whatever and come back. By the way, as a result of these laws, you don't have to be "the super employee." That's why these laws are here to protect you, the Family Medical Leave Act. So if you're not feeling well, avail yourself of your rights, which are in your pocket and now are coming up. All right, but Jane was back at work on Monday. Four days later she was fired, okay. And she was



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fired, we maintain, for a perception of a disability, not for a disability. So we go to trial and we have fellow colleagues here tonight, today, and lawyers always know when, and we've been trained in law school that do, never ever ask a question on the stand that you don't already know the answer to. I mean that's like the cardinal law. Well, I must have forgot it that day. I'm at trial, we have the judge, we have the whole nine yards and, and I want to read you this quote because I think this is very important. In the opening, the employer, talks about a perception of a disability, the employer says, about the legal secretary, "She was hired, as I told you, to work a full-time legal secretary job from eight to four. I understand 35 hours a week with some steno skills." When she was hired she had all of those skills. What happened up to October 9, 1992, is irrelevant. That was the day of her diagnosis. No one is denying that she was a good legal secretary. No one is denying that she wasn't a great legal secretary. No one is denying that she didn't know how to use WordPerfect. "The problem was that no matter how great and how confident she was up to October 1992, she lost those skills. She lost those skills." Almost ten years later I still don't understand how having a mastectomy makes you lose your skills. I'll leave that up to you. We know that that's ridiculous. We know it's ridiculous. Up on the stand, we have the office administrator and I say to the office administrator, "Um Ms. Hoppy, Why did you fire Jane four days after the chemotherapy?" The first, she, she was going to undergo a year regimen. And this is the answer that I got from the office administrator. She said in substance, "Well, my cleaning lady had breast cancer. And when my cleaning lady had breast cancer, she was retching her guts up on the bathroom floor. So that's how I knew that Jane couldn't work." And I was like, "Judge, wake up, here you go." Just in case I, I couldn't not believe that this woman had the perception that Jane Kerishtat could not work for a whole year because she knew someone who was undergoing chemotherapy. So I followed it up with a question that you never should ask, because you don't the answer to, so I say to her, "Is there another reason?" Because I frankly thought that if she was foolish enough to answer the first question, boy, she might give me something on the second. "Is there another reason that you fired Jane Kerishtat because you perceived that she couldn't work?" And she said, "Well, yes. Statistically, people with cancer cannot work when they're undergoing treatment." "Are you a statistician?" "No." "What's your post-high-school education?" "Uh, a course at Adelphi." "What is the basis of your belief that Jane Kerishtat couldn't work?" And she said to me, quote, unquote, this has been quoted extensively, "The school of hard knocks." Let me tell you that we won the case, that in the state of New York they changed the law to accommodate, to mandate a reasonable accommodation. So it's now akin to the federal law. Okay. That's



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the story. By the way, Jane Kerishtat is doing very well today, ten years later. We wanted to do some empowerment, in terms of what you can do to help yourself. And I tell you the story of a woman by the name of Patricia who was an office administrator for a large medical group in New York. She gets a rather horrific form of lung cancer. As with most of my cancer survivors, she gets her treatment on the weekends. She comes in early, comes in late, whatever. She does the ... person's job. Okay, after a few weeks, one of the doctors comes into her, one of the owners, and he looks around her office, something like this. And it's a particularly devastating diagnosis, and he looks around her office like this and he says to her, "You know, when your gone we're going to change the wallpaper here." Now he was referring to the "gone" as the "Big Gone" and you know, obviously she then called me. And I said to her, "Keep a log. This is very important. Keep a log. Keep a diary of contemporaneous notes of comments like this. Because it's feelings—it's subtle. Now of course I don't want to you say, "Excuse me, Doctor, can you repeat that?" You know, no, no, no, no. Let's be a little subtle here. But it has very important evidentiary value for us. I told my clients, "Don't do it on a computer. Don't rewrite it to make it neat for me, because it loses its evidentiary value." Just handwritten notes on a spiral notebook when you get home from work. Keep a log. It does two things. It empowers you because you know what your rights are. And number two, down the road, if we need evidence indicia of discrimination, we have it. Obviously with this case, we went to trial and right after the opening they settled the case. Very few of these cases go to trial, and just because I don't want us to get this, the laws that Barbara referred to, the state laws and the civil rights laws, and the federal laws, these are user-friendly laws. You do not have to hire attorneys. The state and the EEOC albeit, it's their agencies, sometimes they work a little slow, but these are very empowering. You can go in there for free. You know, look up in the Yellow Pages the state human rights or the EEOC, the investigators will help you draft out a complaint. These are user-friendly laws, which is wonderful, in all of the states.

Sometimes we've had cases, and this is not unusual, where people, again harkening back to what Barbara said, "co-workers," is not unusual and this important for your logs or your diaries, that you know physical parts of your workplace get changed. I've had clients whose offices were changed, whose extensions were changed. One case I'm remembering right now is a draftswoman for a large engineering company in Manhattan, an architectural company. And she had that old-time work ethic, which was really very incredible, and she had two bouts of ovarian cancer. Came back after the first, came back after the second, and draftspeople need those high stools. The stool was



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gone. The stool was gone. I mean there were a lot of other stools, but her stool was gone. So, she had to, I mean not only is there a humiliation but it's like she was not afforded the proper, basic tools of her job that were there before. And when this company underwent a rift, a reduction in force, okay, who was one of the first people to get fired? It was my client. And I trust and tell you that when we litigated that one, during depositions, when I asked the management of the company, because let me take a step back. A rift, a reduction in force, especially in these economic times or any economic times, you know there are legitimate rifts. Companies have to downsize, but what they cannot do in the personnel office is say, "Bring me in the lame, the disabled, let's get rid of them. You know, we'll save on our insurance. We'll, you know, we'll save on our, our benefits, we'll save..." No they can't do that. That's improper and not legal. All right, so these are, these are cases that happen day in and day out because no one is going to walk up to this microphone and say get rid of the person with cancer, you know, during the personnel meeting of who we should cut. Okay, so we have the woman who's a draftperson. When we went to, prior to trial you have depositions and in the depositions I said to, I don't know, one of the executives, "While you were deciding who to let go for general legitimate business purposes was the word "cancer" ever brought up?" "Um, mm, yeah, uh." Yes. Thank you, I, thank you, thank you, you know. So of course the whole thrust, of course they denied that, they denied that the cancer was the reason for the reduction in force. But you know as well as I do, I was able to make the argument, "What the heck are they talking about that for in a personnel decision anyway?" You know, when somebody's going to be let go, it's an improper situation. And the next speaker, Nancy, will talk to you about when you go to get an interview and what can be asked and what can't. That case settled at trial prior to jury selection. And that case is memorable to me for a lot of reasons, but in particular for this one. You have to understand, when people have been fired in the workplace it strikes at our very core, you know. When we work it's who we are. Yes we have families. Yes we have children and mothers and fathers. But you know the first thing people ask you is not, you know, how many kids you have, it's, "What do you do?" What do you do, we have to do something. Which is important, I understand this. And when you're fired you are stripped of that very dignity, okay. And if I have seen this over the years, my clients want to go to trial. They want to sit there and they want to tell the jury that story. Well that could be really nice; however, as I always say, "Litigation is like the black box. You put your hand in, you never know where it's coming out and the jury may not award you." In this case, this woman was offered a six-figure settle, which is a really terrific settlement. Because I know you didn't have a chance to look at, you know, or absorb



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that chart that Barbara told you. But in the law of damages, you know, a jury just can't pick out what they want. There are caps in the law. Okay, so my clients offered six-figure settlement and she doesn't want it. And the judge, a federal judge says to her, "Look, you know, a trial is stressful. A trial is taxing on your health. The jury may not award." And she said, "I want to sit there and tell my story." Which is understandable, but I will tell you one of the difficulties is the, I say to my clients, "I don't do revenge. I don't do vengeance." You don't get that in the law. The only thing you're going to get at the end of the day in a lawsuit is money. Which is a very nice form of apology but it's very hard, I've seen it in over a decade, for my clients when it comes time to settle—there it is such an emotional thing. How could they have fired me and, and I lose my friends, etcetera. It becomes, it's a very emotional thing. So this is where, in my practice of over ten years, I never take a case like this unless I work with the social workers. The social workers who can help in terms of the emotions that go with it because it's not just a lawsuit you've got going on. It's a lot of other things. So again, avail yourself of all that is out there. I wanted to talk a little bit about a reasonable accommodation and Barbara, this is one of the best parts of the law, what is a reasonable accommodation? Well if you, you are entitled to that. You're under the umbrella of coverage. You're entitled to a reasonable accommodation under the federal law at 15 or more employees and most state laws. Okay. What do cancer people want more than anything else as a reasonable accommodation? Schedule change, schedule adjustments, okay. You know, you're not asking, you know, for an iceberg. You're asking for a schedule change. A reasonable accommodation is attention. It's a balance and the way we describe this, if you go into the law books, you will not see reasonable accommodation—cancer, A, B, C, D. Multiple sclerosis, A, B, C, D. No, it's not defined like that. It is an accommodation that you work out with your employer. And this is where we have a reality check because we are here as advocates for you because we love doing it. But the employer has rights also. So I just don't want you to think that, "Wow, I can go in there and say, 'I want my part-time, my full-time job,' have a full-time job turned into a part-time and they have to do that." No they do not. No they do not. "They" meaning the employer. It's a balancing test and an employer can say, "This is an undue hardship or a burden on the company." The best example that I always give is, I have a small law firm, and lawyers do law because they can't do numbers. I mean, that's why I'm not an accountant. I don't do blood, so I'm not a doctor. Okay. So I have an office administrator who is wonderful and she, you know, she makes sure, she makes, makes it possible for me to come to Philadelphia and not be, you know, at the law firm today. In any event, so if my office administrator, who I care for dearly,



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came to me and said, "Look I have whatever illness and I need six months off as a reasonable accommodation." Gosh, I would love to give to her, but it would probably put my business under, and as an employer I wouldn't have to. So what I'm saying to you is that in a reasonable accommodation it's not a free ticket. It's not a blank ticket. So you have to work with your employers. I see that I'm getting right close to my time. Terrific—I told them tell me because I tend to go over. Alright, let me tie this up with a few things. In terms of a reasonable accommodation the other story which is a very fast story is that we're in New York City and a woman raises her hand and says, "I am a professor of political science at the university ...," she needed to have surgery in a few weeks. And it was in the beginning of the semester and the university wants her to take the whole semester off. I said, "Do you want to take the whole semester off?" She said, "No." I said, "You do not have to. With all due respect, there are god-knows-how-many first-year political science professors in, in the city of New York that the university can bring in to substitute for a few weeks." That's a reasonable accommodation. Alright, you have to work with your employers. I think at the end of the day what I really want to say is these are your rights, you know them. Be careful. I hope during the panel discussion we can talk a little bit about some problems which are the long-term disability, if you're available, if you're eligible for an long-term disability policy, a workers' comp, a Social Security disability, that causes problems in terms of the Americans with Disabilities Act. So I want to let you know about those things, but at the end of the day, I say employers because we, we do for employers also, in terms of educating them. You know, miniscule as opposed as to how we do for patients, but when I say to employers, "Employers, work with your employees. Help them through this blip in their lives. Because when you do, at the end of the day you will have the most loyal employment relationship and what can be better than that?" Thank you very much and God bless you all.

Carson Jacobi:

Thank you, Susan, for that excellent presentation. I don't know where you get that energy.