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Consider More Than An Employee's Underlying Condition Under the Americans With Disabilities Act

Treatment For the Condition Could Also Create A Disability

05.10.2010

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Employers generally are familiar with the definition of disability under the Americans with Disabilities Act (ADA) – a physical or mental impairment that substantially limits one or more of an individual's major life activities. Employers typically focus on the employee's diagnosed medical or mental health condition when trying to determine if an employee suffers from a disability that would require accommodation under the ADA. Recent decisions in the federal appellate courts suggest, however, that employers should also consider the side effects from treatment for an impairment when assessing whether an employee has a disability. Those cases suggest that side effects from treatment could constitute a disability, regardless of whether the underlying condition would be a disability.

The Third Circuit Court of Appeals recently decided such a case. In *Sulima v. Tobyhanna Army Depot*, a morbidly obese employee with sleep apnea brought a discrimination claim against his employer under the ADA. On appeal, he did not claim that his obesity or his apnea constituted a disability. Rather, his alleged impairment was based solely on a disorder or condition resulting from the medication used to treat his medical conditions. To put it delicately, the employee's medication caused gastrointestinal difficulties that required him to spend inordinately long periods in the restroom, rather than attending to his job duties.

The court ruled that side effects from medication could constitute a disability in limited circumstances. According to this court, side effects from treatment may constitute a disability if the treatment is required in the prudent judgment of the medical profession and there is not an available alternative that is equally efficacious and that lacks similarly disabling side effects. It is not enough to show that the treatment was merely prescribed or recommended by a physician.

In the *Sulima* case, the court ultimately ruled that the medication's side effects did not constitute a disability because, when confronted by his employer about his lack of production, he was able to switch medications, which substantially resolved the problematic side effects. The Third Circuit's decision is not binding on employers in North Carolina, but it could signal the way a North Carolina court would treat side effects from medication. Therefore, prudent employers will carefully analyze not only an employee's diagnosed condition, but also the treatment for the condition, when assessing their responsibilities under the ADA.

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