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Can Prescription Drug Side Effects Cause a Disability Under the ADA?

By Jerilyn Jacobs, Esq.

It is not unusual to watch a television commercial for a prescription drug and think the laundry list of side effects sounds a lot worse than the condition the drug is meant to treat in the first place. But nasty prescription drug side effects can be a problem not only for patients, but for their employers as well. What happens when an employee claims to be disabled under the Americans with Disabilities Act ("ADA") based on the side effects of the drugs taken for a condition rather than for the condition itself? A growing consensus is emerging that such a claim is viable under the ADA. Despite the consensus, however, employees are having a difficult time prevailing on such claims.

On April 12, 2010, the United States Court of Appeals for the Third Circuit (which covers Delaware, New Jersey, and Pennsylvania) became the latest federal circuit to hold that prescription drug side effects may, in certain circumstances, constitute a disabling impairment under the ADA. *Sulima v. Tobyhanna Army Depot*, 602 F.3d 177 (3d Cir. 2010).

The employee plaintiff, Ed Sulima, suffered from morbid obesity and sleep apnea (a condition caused by the obesity). For several years, he took weight-loss medications for his condition. In October 2005, Mr. Sulima's supervisor noticed that Mr. Sulima spent two hours of his work shift in the restroom. When asked about the situation, Mr. Sulima said it was a result of his medications, and he produced documentation from his doctor to confirm it. Although the condition continued, Mr. Sulima informed his employer that he would see his doctor about taking different medications. Soon, another supervisor sought to transfer Mr. Sulima to a different work area. Mr. Sulima then produced another doctor's note, which stated that his medications had been changed and he could now work

without needing frequent long breaks. Nevertheless, the employer decided to transfer him, and Mr. Sulima accepted a layoff because by that time no other work was currently available in the facility. Mr. Sulima never went back to work, and he is currently employed elsewhere.

Mr. Sulima sued his employer in federal court under the ADA, but both a federal district court in Pennsylvania and the court of appeals held that judgment was properly granted to the employer.

The first issue the court of appeals addressed was whether Mr. Sulima had a claim at all, inasmuch as his disability was the result of prescription drug side effects and not the underlying health problem (obesity). The court of appeals, agreeing with the district court and three other courts of appeal that have considered the issue, held that a claim can exist under the ADA based on prescription drug side effects. However, the court adopted the same limitations that the Seventh Circuit (which covers Illinois, Indiana, and Wisconsin) previously adopted for ADA cases based on prescription drug side effects: first, the treatment must be required "in the prudent judgment of the medical profession"; second, the treatment is not just an "attractive option" to the patient; and third, the treatment is not required solely in anticipation of an impairment resulting from the plaintiff's voluntary choices.

Applying this standard, the court held that Mr. Sulima was not disabled under the ADA because his medications were not medically required. The availability of other weight-loss treatments that did not cause gastrointestinal difficulties caused the court to conclude that Mr. Sulima could not show his treatment was required in the prudent judgment of the medical profession. The court wrote, "[B]ecause Sulima did not demonstrate that the medications that were causing his problems were medically necessary, their side effects cannot be considered as impairments within the meaning of the ADA."

That did not end the court's inquiry. Mr. Sulima also claimed that even if he was not disabled under the ADA, he was perceived as disabled by his employer. However, because Mr. Sulima's condition lasted only a couple of months and because the note from Mr. Sulima's doctor said Mr. Sulima would no longer need long bathroom breaks, the court found no evidence that the employer regarded him as disabled.

The court's opinion is consistent with the legal conclusions that other federal appellate courts have made. The ultimate result - that the employee could recover - is consistent with cases from other courts as well. That cases would come out this way also is consistent with intuition: a treatment rendering a person disabled, when the underlying condition itself does not, is unlikely to be a necessary treatment. Nevertheless, employers should be cautious. Even when an employee cannot show that a prescription drug's side effects rendered him disabled, he might be able to show that his employer perceived him as disabled. Employers would be wise to take cues from the employer in *Sulima* by handling such situations in a reasonable and methodical way. If they fail to do so,

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they may well find that, for them, the cure truly is worse than the disease.

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