

Third Circuit Rules That Medication Side Effects Can Constitute a "Disability" Under the ADA

The Third Circuit Court of Appeals recognized in a recent precedential opinion that side effects from medication can, by themselves, constitute a disability under the Americans with Disabilities Act, even when the underlying condition does not constitute a disability. The case is *Sulima v. Tobyhanna Army Depot*, Case No. 08-4684 (3d Cir. April 12, 2010). The opinion text may be accessed at the web address:

<http://www.ca3.uscourts.gov/opinarch/084684p.pdf>.

Ed Sulima is morbidly obese and suffers from related sleep apnea. At his doctor's direction, he took weight loss medication which caused gastrointestinal issues that led him to spend overly excessive time in the restroom. Sulima explained the underlying cause to his employer and produced a supporting physician's note. His employer attempted to transfer him to another location, but no alternative work was available. Sulima soon after accepted a voluntary layoff, apparently believing he would be included in impending involuntary layoffs.

Sulima brought suit, alleging his employer discriminated against him on the basis of his disability in attempting to transfer him and in laying him off. Sulima did not argue that his obesity and/or sleep apnea were disabilities under the ADA (i.e., that either constituted an "impairment" that "substantially limited" a "major life activity" as those terms are used in ADA lexicon). Rather, Sulima claimed that the side effects of his medication met the definition of a cognizable ADA disability.

The Third Circuit agreed in principle and held that side effects from medical treatment may themselves constitute an ADA disability, assuming they substantially limit a major life activity, if (1) the treatment is *required* in the "prudent judgment of the medical profession," and (2) there is no equally effective available alternative which lacks the disabling side effects. In reaching this decision, the Third Circuit joined the Seventh, Eighth and Eleventh Circuits in recognizing ADA claims based on medical treatment side effects.

The Third Circuit recognized that such a claim is theoretically possible. However, on the facts presented, it held that Sulima had not presented evidence sufficient to meet the test because the weight loss medication was not "required" (his physician recommended that he stop taking the medication due to the side effects) and there was no evidence that there was no equally efficacious alternative without the side effects.

In light of *Sulima*, employers must recognize that an employee taking medication causing disabling side effects may be entitled to protection under the ADA - even if the underlying condition is not itself an ADA disability. Employers presented with such an issue should engage in an interactive process with the employee toward identifying whether a reasonable accommodation would permit him/her to perform the essential functions of the job, and must carefully consider whether any adverse employment actions could be viewed as disability discrimination or retaliation for any assertion of the employee's ADA rights.

If you have any questions or comments about this E-Flash, please contact Post & Schell, P.C. Labor and Employment Attorney Robert Toy. Bob can be reached at rtoy@postschell.com or 215-587-1091.

Disclaimer: this E-Flash does not offer specific legal advice, nor does it create an attorney-client relationship. You should not reach any legal conclusions based on the information contained in this E-Flash without first seeking the advice of counsel.