

## LEGISLATIVE UPDATE

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### **Side Effects from Essential Medication May Be ADA Disability, Third Circuit Rules**

The Third Circuit federal appeals court held on an issue of first impression that the adverse side effects of medication may constitute a disability only if the treatment is required “in the prudent judgment of the medical profession” and there is no available alternative that is equally effective but lacks similarly disabling side effects. *Sulima v. Tobyhanna Army Depot et al.*, No. 08-4684 (3d Cir. Apr. 12, 2010). The Court affirmed summary judgment in favor of the employer, holding that there was insufficient evidence that the treatment that caused the alleged disabling impairment was medically necessary. The Third Circuit has jurisdiction over, among other states, New Jersey.

#### **The Facts**

Ed Sulima worked for Defense Support Services (“DS2”), a defense contractor that provides a workforce at the Tobyhanna Army Depot. Sulima claimed he suffered from morbid obesity and sleep apnea and was prescribed certain weight-loss medications to deal with his conditions. He alleged that the medications caused him frequent bowel issues. On October 28, 2005, Sulima’s supervisor observed Sulima leave his workstation several times and remained in the restroom for a total of approximately two hours during his shift. When the supervisor spoke to Sulima about the frequent breaks, Sulima told him that they were due to his medication. He asked Sulima to provide a physician’s note. The next day, Sulima provided a physician’s note that stated, “Due to gastrointestinal disorder Ed [Sulima] may need to use the restrooms more than the usual.” Sulima subsequently told his supervisor that he would ask his doctor if he could take a different medication. Sulima’s long breaks continued, however, and a supervisor at Tobyhanna asked DS2 to transfer Sulima to a different work area. After Sulima learned of the transfer request, he provided a physician’s note stating that his medication had been changed and that he no longer required frequent restroom breaks. At this point, there were no other open positions at Tobyhanna, and Sulima was offered a layoff. He accepted the offer on December 12, 2005.

Sulima later sued DS2 for disability discrimination and alleged he was laid off due to his disability or because he was regarded as disabled. Sulima also alleged he was harassed because of his disability and DS2 terminated him in retaliation for having requested an accommodation of extra time to use the restroom. DS2 moved for summary judgment on all claims, which the district Court granted. Sulima appealed.

#### **Whether Treatment Constituted Disability**

Under the ADA, an individual is disabled if he has “a physical or mental impairment that substantially limits one or more of the major life activities of such individual.” 42 U.S.C. § 12102(2). Sulima argued that he was disabled due to the side effects of his medication. The U.S. Court of Appeals for the Third Circuit observed that the factual situation was “somewhat different from a typical ADA claim” because the claimed disability was caused exclusively by medication, not the underlying condition. Nevertheless, adopting the Seventh Circuit’s holding in *Christian v. St. Anthony Med. Ctr.*, 117 F.3d 1051 (7th Cir. 1997), the Third Circuit agreed that the effects of a treatment for a medical condition may constitute a disability only if the plaintiff can show that the treatment:

1. is required “in the prudent judgment of the medical profession,”

2. is not just an “attractive option,” and
3. is not required solely in anticipation of an impairment resulting from the plaintiff’s voluntary choices.

Applying the *Christian* standard, the Court found that Sulima’s gastrointestinal problems, which were caused by the side effects of his weight-loss medication, did not constitute a disabling condition because Sulima did not show the medication was required “in the prudent judgment of the medical profession.”

After the employer questioned Sulima about his frequent restroom breaks, he was advised by his physician to stop taking the medication. Sulima also presented no evidence showing that, in the judgment of the medical profession, the medication was the only efficacious treatment for him or that other equally efficacious treatment would cause the same side effects. Consequently, the Court concluded the side effects of Sulima’s medication did not constitute a disabling condition and affirmed summary judgment for DS2 on the disability discrimination claim.

### **Whether Regarded As Disabled**

Sulima argued that, even if he did not have a disability, the employer regarded him as disabled. The Court noted that to prevail on a “regarded as” claim, a plaintiff must show the employer either “mistakenly believed that [the employee has] a physical impairment that substantially limits one or more major life activities” or “mistakenly believed that an actual non-limiting impairment substantially limits one or more major life activities.” In determining whether a substantial limitation exists, a court may examine the “nature and severity of the impairment,” the “duration or expected duration of the impairment,” and the actual or expected “permanent or long term impact” resulting from the impairment. 29 C.F.R. § 1630.2(j)(2).

The Court concluded that Sulima failed to satisfy these standards because DS2 did not regard Sulima as having anything other than a temporary condition associated with his weight-loss medicine. He presented no evidence that DS2 thought his gastrointestinal problems was substantially limiting, i.e., that they would last for an extended period of time. To the contrary, in response to DS2’s inquiry regarding his long breaks, Sulima stated that he would change the medication. Because these facts did not demonstrate that DS2 regarded Sulima as having a disability, the Court affirmed summary judgment for DS2 on this claim.

### **Whether Retaliation Occurred**

Sulima argued that the employer retaliated against him as a result of his need for frequent restroom breaks. To prove an ADA retaliation claim, the plaintiff must show he had a “reasonable, good faith belief” that he was entitled to request an accommodation. The Court found that Sulima’s claim failed because, at the time of the alleged request for frequent restroom breaks, Sulima did not have a good faith belief that he was disabled. The evidence showed that, at most, Sulima believed he had a temporary condition caused by his medication.

### **Lesson**

With this case, the Third Circuit confirmed that side effects may, in limited circumstances, constitute a disabling condition under the ADA. Yet, the proof required to meet these circumstances remains high. It is insufficient for a plaintiff simply to point to side effects alone. He must offer medical evidence supporting the need for the medication as the only efficacious means to address the underlying condition, and not merely an “attractive option.”