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Tenth Circuit Holds Employee's Migraines Not a Disability Under ADA

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In a signal that the courts do not regard the 2008 amendments to the Americans with Disabilities Act (ADA) as a basis to declare every ailment or condition to be a "disability" under federal law, the U.S. Court of Appeals for the Tenth Circuit recently held that a plaintiff who was diagnosed with migraine headaches was not "disabled" under the *ADA*. *Allen v. Southcrest Hospital*, No. 11-5016, 2011 U.S. App. LEXIS 25488 (10th Cir. Dec. 21, 2011). Employers should not get too excited, however, as the court did not declare that migraines can never be a disability. It did clarify, in a manner that likely will be helpful for employers faced with ADA litigation, what an employee must establish to claim the ADA's protections.

The plaintiff was a medical assistant, working in a medical practice. The allegations at issue in the case began after she transferred to work for a particular doctor, who had a busy practice that was especially hectic on the three days during the doctor's compressed office hours. Shortly after the transfer, the plaintiff claimed that she began having migraines. These migraines varied in severity – as some days she could go to work, while other days she had to stay home – and she was prescribed medication for the pain. In August 2009, after requesting and being denied FMLA leave and allegedly being denied a reasonable accommodation for her migraines, the plaintiff resigned, because of "migraines and hypertension." Although she later tried to rescind the resignation, the employer told her that her resignation was accepted the day she tendered it and that her employment was terminated.

The plaintiff filed a lawsuit, claiming violations of the ADA and the FMLA. The employer moved for summary judgment on the ADA claim, arguing that the plaintiff was not "disabled" by the migraines, as she admitted that she was capable of driving and "going about her normal life while experiencing them." The district court granted the employer's motion, and the plaintiff appealed.

On appeal, the Tenth Circuit began its opinion by restating the test for a disability under the ADA, namely that "[a] plaintiff must prove that she suffers from a physical or mental impairment that substantially limits one or more major life activities." Thus, the plaintiff had to show that: (1) she had a recognized "impairment;" and (2) the impairment substantially limited one or more of her major life activities.

In this case, there was no dispute that the migraines were an "impairment." What was disputed, however, was whether the migraines "substantially limited" the plaintiff's major life activities. She claimed that the migraines affected her ability to "work," to "care for herself," and to "sleep."

In arguing that she was not substantially limited in her ability to "care for herself," the employer relied on the plaintiff's admissions that she often got up and went to work on days that she had the migraines. Indeed, the court quoted the plaintiff's deposition, where she testified that she got up, got dressed, got washed, and drove to work. The plaintiff claimed, however, that on days when she suffered migraines – even if she went to work – she "crashed and burned" when she got home, taking medication and falling asleep almost immediately. The plaintiff relied on this "crash and burn" argument, claiming that her migraines limited her ability to care for herself in the evening, as she was "compelled" to go to sleep, due to her migraine medication.

The Tenth Circuit did not accept the "crash and burn" argument. The court noted that an allegation of "sleep disturbance" was not sufficient, in and of itself, to prove that the plaintiff was disabled. It also noted that the plaintiff had failed to submit evidence of how early she went to bed, how long she slept, or what activities of daily living she was not able to do on those nights. Moreover, the court reflected that because everyone sleeps each night and no one can care for themselves while sleeping, the plaintiff lacked evidence to show how her need to "crash and burn" actually "compared to the average person's ability to care for herself in evenings after work." Finally, the Tenth Circuit noted that "many non-disabled people have nightmares or disturbed sleep patterns," and the court held that the plaintiff had not shown that her migraines impeded her ability to sleep or "care for herself."

The Tenth Circuit also addressed whether the migraines had substantially limited the plaintiff's ability to "work." Here, her admission that she only suffered from migraines when she was working for one particular doctor was fatal to her claim. She argued that the Americans with Disabilities Amendments Act of 2008 (ADAAA) allowed her to establish a disability in "working," even if all she could show was that she could not perform one job. The court disagreed and held that to be disabled in the major life activity of "working," "an employee must be significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes . . . . " The court looked to the Equal Employment Opportunity Commission's (EEOC) regulations (prior to the May 2011 amendment), which made clear that one has to be unable to perform a "broad class of jobs" in order to be disabled. While this language was eliminated in the EEOC's May 2011 regulations, there was no indication that the new regulations were to have retroactive effect, and, therefore, the court applied the earlier version of the regulations. As a result, the court dismissed the plaintiff's ADA claims.

What Does this Decision Mean for Employers?

This decision is a reminder that there is no such thing as an "automatic disability," and an employer should never assume that an employee who has an impairment that is listed as a potential "disability" in the ADAAA is indeed "disabled" under the law. Even under the arguably looser definition of a disability created by the ADAAA, the question of whether someone is "disabled" is a fact-intensive inquiry, which depends on the effect the impairment has on the individual employee. In order to demand the protections of the ADA, the employee must prove that the impairment "substantially limits" them.

In light of this decision, employers should consider the following:

- Make sure that someone who is knowledgeable about the ADA is responsible for addressing employees' reasonable accommodation requests. Incorrectly deciding whether someone is "disabled" can have grave implications for future litigation in both the disability discrimination and failure-to-accommodate contexts. It is recommended that employers appoint individuals who are knowledgeable about the ADA to facilitate the interactive and reasonable accommodation processes.
- Conduct training on the ADA and the EEOC's regulations interpreting the ADAAA for managers and HR staff. A thorough understanding of the regulations is critical for those making determinations of whether someone is "disabled" under the ADA. In addition, as regulations are continually changing, employers should provide refresher training.
- Be aware of the free resources that exist to assist employers in addressing employees' reasonable accommodation requests. Employers have free resources available to them to assist in their interactive and reasonable accommodation processes. The Job Accommodation Network (JAN), www.askjan.org, is a free resource, and various state and local vocational rehabilitation services may also be available resources.

Conclusion

The overall message remains that employers should be careful as to how they handle employees who assert disability claims under the ADA. Employers should not be afraid, within the bounds of the law, to require an employee to establish that he or she has a disability under the law, before granting leave or other accommodations.

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