How Medication Affects the Existence of an ADA Disability

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How Medication Effects the Existence of an ADA Disability

by Thomas Simmons*

Last year, the United States Supreme Court declared that mitigating measures must be considered in assessing the existence of an ADA disability. Under the ADA, a person has a disability - and is protected from discrimination on account of disability - if the person has an impairment which substantially limits a major life activity. Of the three elements to this statutory definition (impairment; substantially limits; major life activity), the one with the greatest degree of flexibility is the "substantially limiting" element.

In Sutton v. United Airlines, Inc., 119 S. Ct. 2139 (1999), the plaintiffs had myopia; short sightedness. Everyone agrees that myopia is an "impairment," and that it has an effect on seeing, which everyone agrees is a "major life activity." What the parties could not agree on, was whether the plaintiffs' myopia had a substantially limiting effect on their ability to see when their vision was fully correctable with eyeglasses.

The Court decided that the plaintiffs were not disabled because the benefit of eyeglasses removed any substantially limiting effect of the plaintiffs' impairment. The rule which emerged from Sutton was that mitigating measures, such as eyeglasses, must be considered in the context of the "substantially limiting" element of the definition of a disability. Thus, people who wear eyeglasses and thereby have normal vision are not disabled under the ADA. Individuals who use prosthetic devices which allow them to be fully functional do not have ADA disabilities. Similarly, people who have impairments which are fully treatable with medication are not substantially limited, and therefore not disabled.

In August, the Eighth Circuit Court of Appeals decided a case which interpreted the rule of Sutton. The Eighth Circuit Court of Appeals hears cases from the region which includes South Dakota. Federal law in South Dakota is determined by decisions of this court.

The case is Otting v. J.C. Penney Co., __ F.3d ___ (8th Cir. 2000). Rhonda Otting had epilepsy. She took medication which reduced the frequency of her seizures. After working in several departments in an Iowa J.C. Penney store for nearly two years, she took time off for medical treatment. When she was ready to return, her doctor imposed one restriction: that she may not climb ladders.

Rhonda Otting's job at Penney's was in the shoe department where sales assoc-

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U.S. Supreme Court to Decide Two ADA Cases

by John A. Hamilton

High Court Hears Arguments in Garrett

On October 11, 2000, the United States Supreme Court heard oral arguments in one of the most significant cases in recent history in the area of disability law. As reported previously, Garrett v. Alabama Board of Trustees involved a university worker's claim of discrimination based on breast cancer, which was combined with the case of Milton Ash, who claimed that Alabama's Department of Human Services violated the ADA by failing to accommodate his asthma. The Supreme Court will decide if these claims are barred by the 11th Amendment due to state immunity.

In the meantime, the Court will have two more lower court decisions to consider when deliberating. On September 18, 2000, the Sixth Circuit Court of Appeals, in Popovich v. Cuyahoga County Court of Common Pleas, ruled that Congress failed to act pursuant to a valid exercise of power when it subjected state defendants to the ADA. The appeals court stated that because disability is not a suspect class, it is constitutionally permissible for states to discriminate on the basis of disability so long as the classifications that it draws are rationally related to a legitimate state interest. However, just a week prior to Popovich, the Tenth Circuit Court of Appeals ruled the opposite way. In Cisneros v. Wilson, the Tenth Circuit held that Congress did act pursuant to a valid exercise of power when it enacted the ADA. That court found the enactment of the ADA to be a congruent, proportional response to the problem of disability discrimination.

A decision in Garrett is expected in 2001.

Golf Cart Takes Path to Supreme Court

The Ninth Circuit Court of Appeals affirmed a federal district court's ruling permitting golfer Casey Martin to use a cart during competition as a reasonable modification that would not fundamentally alter the nature of the competitions under the ADA. Martin v. P.G.A. Tour, Inc., 17 NDLR 98 (9th Cir. 2000). The Seventh Circuit had reached the opposite conclusion in Olinger v. United States Golf Association, 17 NDLR 99 (7th Cir. 2000).

A split among federal circuits oftentimes will result in the United States Supreme Court accepting a case for review, and this was no exception. On September 26, the Supreme Court agreed to hear arguments on whether Casey Martin has a legal right under the ADA to ride in a golf cart during professional competition. It was back in 1997 when Martin first sued the PGA Tour, citing a provision of the Americans with Disabilities Act that bars discrimination on the basis of disability "in the full enjoyment of ... facilities ... of any place of public accommodation." A federal judge ruled that allowing Martin the use of golf cart would not "fundamentally alter" the nature of PGA Tour events. The Ninth Circuit Court of Appeals agreed last March. However, the following day, the Seventh Circuit Court of Appeals ruled the opposite way in a similar case against the United States Golf Association, paving the way for the Supreme Court's acceptance of the P.G.A.'s appeal.

The questions the Supreme Court will consider are:

- Whether Title III of the ADA regulates standards established for competitors in athletic competitions held at places of public accommodation;
- Whether, if so, Title III requires professional sports organizations to grant selective waivers of their substantive rules of athletic competition to accommodate disabled competitors.

Even if the Court rules in Martin's favor, it will be interesting to see what applicability this case may have beyond golf.
The information in this article is a collaborative effort on the part of the staff of SDAS to identify and answer the questions that we are most often asked about special education. The majority of the people who call our agency are parents of students with disabilities. They all have a unique and specific perspective of the special education process as it applies to their child or their school district.

Despite the uniqueness of each call, patterns emerge from these conversations. These patterns seem to indicate a need for more detailed information by parents and school districts. We do not get a lot of calls from school districts. We do get a lot of calls about school districts. Staff also attend many IEP meetings every year. We find that school administrators occasionally have unique interpretations of the requirements of the Individuals with Disabilities Education Act (IDEA).

Following is a list of questions and answers. The answers are based on federal regulations and state administrative rules.

1. How does a student become eligible to receive special education and related services under the IDEA?

A student must be within the age range specified in 34 C.F.R. 300.121 and must satisfy both parts of a two-part test. First, the student must meet the definition of one or more of the categories of disabilities specified under the IDEA, which are set out at 34 C.F.R. 300.7(c)(1) through (c)(13) and at Administrative Rules of South Dakota (ARSD) 24:05:24.01:01 through 24:05:24.01:30. A student may also qualify under 34 C.F.R. 300.7(b) based on developmental delay. The federal rules leave it to the discretion of the state and local school districts to include a child for eligibility in this category. South Dakota sets out its definition of developmental delay at ARSD 24:05:24.01:09. The definition is limited to children ages three, four and five.

The second part of the eligibility test requires that the student be shown to be in need of special education and related services as a result of his or her disability or disabilities. "Special education" is defined at 34 C.F.R. 300.26 and at ARSD 24:05:13:01(26).

2. How does one know if the student meets the definition of disability under one or more of these categories?

This decision must be made through an evaluation process. An evaluation is described at 34 C.F.R. 300.530-300.536 and ARSD 24:05:25:01 - 24:05:25:05. It is the initial step in the provision of special education to a student with a disability. It is the key to detecting the existence of a qualifying disability or disabilities. If eligible, the evaluation also helps determine the special education and related services the student requires.

3. What is the process for asking for an evaluation?

A child suspected of having a disability must be referred for evaluation. ARSD 24:05:24:01 defines "referral" as "any written request which brings a student to the attention of a school district administrator (building principal, superintendent, or special education director) as a student who may be in need of special education. A referral made by a parent may be submitted verbally, but a district administrator must document it. Other sources of referrals may include the following:

1) Referral through screening,
2) Referral by classroom teacher,
3) Referral by other district personnel,
4) Referral by other public or private agencies; and
5) Referral by private schools, including religious schools."

The next section of the rules describes the duties after referral. ARSD 24:05:24:02 states: "Upon receiving a referral the school district shall conduct an informal review or may proceed with the evaluation process. An informal review includes a conference, if appropriate and necessary, either in person or by telephone, with the person making the referral and a review of the student’s school records."

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Citizens had to climb a ladder to retrieve stocked shoes. Her boss informed her that she could not return to work with any restrictions. She asked about the possibility of working in another department, since the shoe department was the only one which involved climbing a ladder. Her boss refused and she was terminated.

Ottling sued and a jury found in her favor. There was little question that she had been discriminated against, and that her employer had failed to reasonably accommodate her condition of epilepsy. In fact, the jury awarded her $100,000 in punitive damages in addition to her $28,000 in lost wages and other compensatory damages. The more difficult question was whether the jury had been correct, in light of Sutton, that Ottling had a qualifying disability, since her epileptic symptoms were partially controlled by the medication she was taking.

The court of appeals ruled in Ottling's favor. It said that although her seizures were only sporadic, they still occurred two to three times a month. When she had a seizure, it would last between 30 seconds and two minutes, during which time she would be unable to see, hear, speak, walk or work (all of which are ADA "major life activities"). Ottling could not take baths unattended because of the risk of drowning if a seizure occurred. Thus, even with the effect of her medications taken into consideration, the court concluded that Ottling's impairment substantially limited one or more major life activities. Therefore, she had a disability for ADA purposes.

The Ottling court held that an individual can have a disability even if the impairment is partially controlled by mitigating measures. Still, questions remain about the Sutton rule. How should the side effects of medication be considered in the equation? After all, some side effects may themselves be substantially limiting. What about people who refuse to employ mitigating measures - does it matter why they choose to forego the use of treatment or devices? Some people may refuse medication or prosthetics for valid reasons, while for others the decision may be questionable, even irrational. How is a court to weigh these factors, if at all? These questions must be left to be resolved by future cases.

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