

**CONSIDERING THE EFFECTS OF
MEDICINE DOES NOT MAKE AN
EMPLOYEE “REGARDED AS”
DISABLED**

In Daugherty v. Sajar Plastics, Inc., 2008 WL 4587204 (6th Cir. 2008), a maintenance technician suffered from back pain. The court held the employer did not regard the employee as disabled from the major life activity of working, within the meaning of the Americans with Disabilities Act (ADA). The employer had concluded that the technician’s daily dosages of pain medication and possible dangerous side effects of those drugs presented a risk of impairment and injury while the employee operated the dangerous machinery that was integral to the maintenance technician’s position. The court held that the employer’s conclusion did not rise to the level of the employee being “regarded as” disabled. This was because there was no showing that the employer regarded the technician as unable to perform a broad class or range of jobs, in the maintenance field or in other categories.

**IN-PATIENT ALCOHOL TREATMENT
DOES NOT MEAN AN EMPLOYEE IS
“REGARDED AS” DISABLED**

In Kozisek v. County of Seward, Nebraska, 2008 WL 3915002 (8th Cir. 2008), the court held an employer did not regard an employee as disabled within the meaning of the ADA. This was despite the fact that the employer required the employee to complete in-patient alcohol treatment as a condition of keeping his job. This was because the requirement was not based upon misconceptions, myths or stereotypes. Rather, the requirement was based upon a very serious incident resulting in criminal charges against the employee and upon a licensed mental health therapist’s recommendation for the in-patient alcohol treatment.

**CONDUCT NOT SEEN BY A
HARASSMENT VICTIM IS ADMISSIBLE
TO SHOW HOSTILE ENVIRONMENT**

In Ziskie v. Mineta, 2008 WL 4891202 (4th Cir. 2008), the question was whether treatment experienced by a female employee was sufficiently pervasive or severe to create an abusive work environment. The employee claimed gender discrimination based on sexual harassment. The court held that the trial court had to consider evidence from co-workers as to conduct not personally witnessed by the employee to determine whether the employee bringing the claim was subjected to an abusive work environment.

**THERE IS NO LIABILITY FOR CO-
EMPLOYEE HARASSMENT UNLESS
THE EMPLOYER FAILS TO DISCOVER
OR REMEDY THE HARASSMENT**

In Andonissamy v. Hewlett-Packard Co., 2008 WL 4821742 (7th Cir. 2008), a co-employee harasser was not the victim’s supervisor. The court held that the employer thus could not be held liable under Title VII for hostile work environment created by the co-employee unless the employer was negligent in discovering or remedying the alleged harassment. The court ruled that even if the co-employee recommended disciplinary action and directed the employee’s performance, the co-employee did not hire or fire the employee. As further evidence that the co-employee did not have authority to hire or fire, the court found that the Human Resources Department first had to conduct an investigation and issue a recommendation before disciplinary action could be taken against any employee.

In addition, the employee failed to notify management about the alleged acts of harassment. Finally, the employee’s e-mail to a supervisor that made reference to the employee’s immigration status was insufficient to constitute

protected activity or a complaint of national origin discrimination sufficient to support a retaliation claim.

AN EMPLOYEE'S ADMISSION OF A NON-DISCRIMINATORY REASON FOR HIS SUSPENSION PREVENTED A DISCRIMINATION CLAIM

In Lightner v. City of Wilmington, N.C., 2008 WL 4767347 (4th Cir. 2008), a white male officer was suspended without pay for one week for ethical violations related to ticket fixing. The white officer admitted the real reason for his suspension was to cover up department wrongdoing. The court ruled, therefore, that because of the officer's admission of a non-discriminatory reason for his suspension, the officer could not assert a Title VII race discrimination claim.

PRIOR RACE DISCRIMINATION CLASS ACTION DETAILS ARE ADMISSIBLE TO SHOW PRESENT RETALIATION

In Buckley v. Mukasey, 2008 WL 3854498 (4th Cir. 2008), the trial court, in a retaliation case, excluded details about a prior class action alleging race discrimination against the employer. The Court of Appeals ruled this was improper in the African-American female's Title VII retaliation claim. The court ruled the prior litigation was relevant to show the employer's motive and intent. The employee did not seek to utilize the prior litigation evidence to demonstrate the employer's discriminatory motive, but rather to demonstrate a retaliatory motive. Specifically, the employee sought to prove with the prior race discrimination class action that the pendency of that litigation and the long history of its burden on the employer weighed heavily in the minds of the principal decision-makers. The employee sought

to establish that, ultimately, because of the prior class action, the employer failed to promote the employee because of her involvement in that litigation.

A COLLECTIVE BARGAINING AGREEMENT CAN BLOCK A REQUEST FOR A JOB TRANSFER ACCOMMODATION

In King v. City of Madison, No. 08-2052, decided December 4, 2008, the District Court granted the employer's motion for summary judgment in an ADA action. The ADA action alleged that the employer denied plaintiff's reasonable request for accommodation by failing to transfer her to a different job and ultimately terminating her on account of her disability. The Court of Appeals affirmed and ruled that the record showed that the employee could no longer perform some essential duties of her current position and that a collective bargaining agreement prevented the employer from transferring the employee to the job she requested. The Court ruled that the employer was not required to transfer the employee to a different job where such transfer would violate legitimate, non-discriminatory provisions of the collective bargaining agreement.

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