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Workplace Accommodations and Other Lessons From the Pandemic

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Introduction

Individuals have filed various kinds of pandemic-related lawsuits alleging discrimination and other claims. The author provided written testimony to the EEOC summarizing the types of COVID-19 cases seen through the spring of 2021, at the Commission's meeting on the Workplace Civil Rights Implications of the COVID-19 Pandemic.[1]

This paper does not repeat that information, but instead updates it in part, and collects the developing case law on certain ADA issues that have arisen during the pandemic.

Pandemic Case Law and EEOC Guidance

1. COVID-19 can be a disability.

Most cases seeking pandemic-related accommodations are based on conditions—separate from COVID-19—that create a recognized and heightened risk. In those cases, there is no need to prove that COVID-19 is a disability. On the other hand, the plaintiff may need to prove the heightened risk, particularly if the CDC has not identified the condition as a risk factor. *Compare Frederick v. Allor Mfg., Inc.*, No. 220CV12790TGBRSW, 2022 WL 598746, at *5 (E.D. Mich. Feb. 28, 2022) ("[A]lthough susceptibility to severe illness as a result of COVID-19 may constitute a disability in some factual scenarios, Frederick has not provided any evidence to support a claim that his history makes him particularly susceptible to COVID-19.").

Other cases present the question directly whether COVID-19 is a disability. The EEOC states that COVID-19 is a physiological condition affecting one or more body systems, and as a result, it is a "mental or physical impairment" under the ADA. It also states that a person infected with the virus causing COVID-19 who is asymptomatic, or who has only mild symptoms (like the common cold or flu) that resolve in a matter of weeks with no other consequences, will not have an actual disability. But depending on specific facts, an individual with COVID-19 might have an actual disability, and the EEOC gives several examples. For more details, see Questions N.2 through N.8 in *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*, last update on March 14, 2022.[2]

In addition, a condition that is caused or worsened by COVID-19, but is separate from the virus, may be a disability under the ADA. *See What You Should Know*, *supra*, at N.9.

In several recent cases, the court denied motions to dismiss because the plaintiffs alleged sufficient facts to show that their COVID-19 was a perceived disability. *Alvarado v. The Valcap Group, LLC*, No. 3:21-CV-1830-D, 2022 WL 953331, at *4–5 (N.D. Tex. Mar. 30, 2022) (collecting authorities on both sides); *Guerrero v. Summit Aerospace, Inc.*, No. 21-CV-24006, 2022 WL 579499 (S.D. Fla. Feb. 25, 2022); *Booth v. GTE Federal Credit Union*, No. 8:21-CV-1509-KKM-JSS, 2021 WL 5416690, at *3–6 (M.D. Fla. Nov. 20, 2021). Note too, that while Texas

[1] This testimony is available online at https://www.eeoc.gov/meetings/meeting-april-28-2021-workplace-civil-rights-implications-covid-19-pandemic/east.

[2] The EEOC guidance is available online at https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws.

law generally tracks the ADA, some state laws may have a broader definition of disability. *See, e.g., Arazi v. Cohen Brothers Realty Corp*., No. 1:20-CV-8837-GHW, 2022 WL 912940, at *9–10 (S.D.N.Y. Mar. 28, 2022) (decided under New York city and state statutes).

In another case, *Brown v. Roanoke Rehab. & Healthcare Ctr*., No. 3:21-CV-00590-RAH, 2022 WL 532936 (M.D. Ala. Feb. 22, 2022), the court denied a motion to dismiss, finding sufficient allegations that the plaintiff's COVID-19 was both an actual and a regarded-as disability. *See also Brown v. The Reny Company*, No. 4:21-CV-395-KPJ, 2022 WL 992696, at *4 (E.D. Tex. Mar. 31, 2022).

But there is contrary authority. In *Thompson v. City of Tualatin*, No. 3:21-CV-01587-MO, 2022 WL 742682 (D. Or. Mar. 11, 2022), a case challenging a masking requirement, the court observed that "[t]he vast majority of cases of COVID-19 last fewer than 20 days. Thus, being perceived as having COVID-19 is not a cognizable disability under the ADA." *Id*. at *2 (citation omitted).

In *Payne v. Woods Services, Inc*., No. CV 20-4651, 2021 WL 603725 (E.D. Pa. Feb. 16, 2021), and in *Williams v. The City of New York*, No. 20-CV-8622 (JPO), 2022 WL 976966, at *5 (S.D.N.Y. Mar. 31, 2022), the court found that the plaintiffs had not alleged sufficient facts to show that their COVID-19 was a disability. And in *Johnson v. Gerresheimer Glass Inc.*, No. 21-CV-4079, 2022 WL 117768, at *6 (N.D. Ill. Jan. 12, 2022), the court dismissed a disparate-treatment claim because although the plaintiff alleged that the employer knew she had tested positive for COVID-19, she failed to allege that the employer knew of the debilitating symptoms she had experienced.

In *Baum v. Dunmire Property Management, Inc*., No. 21-CV-00964-CMA-NYW, 2022 WL 889097 (D. Colo. Mar. 25, 2022), the plaintiff alleged that she was fired because her father had COVID-19. The court purported to give deference to the EEOC guidance on COVID-19 as a disability, but apparently (and mistakenly) thought that only Long COVID could be a disability, and since the plaintiff's father died in the hospital after only 15 days, his COVID-19 could not have been a disability. *Id*. at *5. This makes no sense, is contrary to the ADAAA and its authorities, and is contrary to the EEOC guide on COVID-19 that the court claimed to find helpful. *What You Shuld Know*, *supra*, at N.2 ("The limitations from COVID-19 do not necessarily have to last any particular length of time to be substantially limiting.").

In *Alvarado v. ValCap Grp., LLC*, No. 3:21-CV-1830-D, 2022 WL 19686 (N.D. Tex. Jan. 3, 2022), the court found that simply being exposed to someone with COVID-19, and quarantining for seven days on advice of a doctor, was insufficient to show that the employer regarded the plaintiff as actually *having* COVID-19.[3] *See also Parker v. Cenlar FSB*, No. CV 20-02175, 2021 WL 22828 (E.D. Pa. Jan. 4, 2021) (similar).

Also, the fact that an employer may have perceived someone as being at higher risk of serious illness because of his *age* did not reflect a perceived *disability*. *Hice v. Mazzella Lifting Techs., Inc*., No. 2:21CV281, 2022 WL 636640, at *7–8 (E.D. Va. Mar. 4, 2022).

[3] On the other hand, the court in *Alvarado* allowed the plaintiff to proceed on certain EPSLA leave claims.

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