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When Is Covid a Disability? Courts Tackle Issue in Bias Cases

By Erin Mulvaney

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- Courts weigh ADA's coverage of workers with Covid-19
 - Cases could expand case law on perceived disabilities
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Ninoshka Matias was fired the same day she reported a positive Covid-19 test and asked for leave to quarantine. Her termination letter indicated that after only a few months on the job, she wasn't "a good fit."

A federal judge in Pennsylvania last week allowed Matias to proceed with a discrimination lawsuit challenging her discharge, indicating that Covid-19 potentially could be considered a disability under the Americans with Disabilities Act. The case is one of several percolating in courts—including one last month against Campbell Soup Co.—that will test a gray area over the virus's interplay with the federal disability bias law.

The ruling cited Biden administration guidance about how "long-haul" Covid symptoms may qualify as a disability. However, whether the ADA also protects workers who contract the virus—prior to the onset of long-term symptoms—remains an open question.

"Covid could be a disability depending on the symptoms at issue," said Michelle Olson, a shareholder at Vedder Price in Chicago. "This case shows that an employer could be subject to liability even if someone doesn't have prolonged symptoms."

Still, there isn't a definitive answer on whether Covid itself falls into one of the ADA's three categories of disability, which would trigger anti-discrimination protections or, in some cases, reasonable accommodation requirements. The ADA covers workers who have physical or mental disabilities, are perceived as disabled, or have a record of impairment.

Without a clear answer on the ADA, workers who fall ill have little recourse if they're fired because they contracted Covid. They had some protections last year under the Families First Coronavirus Response Act, which allowed them to take paid leave if they had coronavirus symptoms or needed to quarantine, but that law expired in December.

“Congress intentionally set out to disconnect people’s biases about disability as a proxy for incapacity,” said Jasmine Harris, a law professor at the University of Pennsylvania, who specializes in disability and anti-discrimination law. “Covid is something that the courts are taking seriously and the ADA is a helpful remedial lens here. There are questions still about how to treat Covid in existing case law.”

Minor or Not?

Illnesses such as a cold or the flu traditionally aren’t considered ADA disabilities because they are temporary or minor.

In Matias’s case against Terrapin House, a residential facility for autistic individuals, Judge Joseph F. Leeson Jr. noted that Covid-19 already has lasted in the U.S. for 19 months and had a more substantial impact than the seasonal flu. It thus can’t be “viewed objectively” as minor, said Leeson, who sits on the U.S. District Court for the Eastern District of Pennsylvania.

It was also key in the ruling that Matias presented symptoms of long-haul Covid, including loss of smell and taste, said Brian Mead, a labor and employment attorney at McDermott Will & Emery.

“The court really latched on in the analysis to the guidance that shows long-term symptoms related to Covid-19,” Mead said. “The difference between having a cough or a substantial lung impairment is the difference between being covered by the ADA or not covered.”

Attorneys for Matias and Terrapin House didn’t respond to emailed requests for comment.

Perceived Disability

Matias’s case also explores a relatively undeveloped prong of the ADA that prohibits bias against workers who are “regarded as” having a disability by their employers, even if they aren’t actually disabled.

These types of cases argue that an employer exaggerates the disability that a person appears to have based on stereotypes and misinformation, said Ruth Colker, a law professor of constitutional law and disability discrimination at The Ohio State University.

During the AIDS crisis, for example, employers might fire a worker who tests positive, even if there wasn’t a direct threat of that disease spreading at the workplace, she said, adding that it’s about acting on a stereotype.

“This is not a case for the proposition that a court has held that having Covid-19 means that you are a person with a disability,” Colker said of the “regarded as” argument in the Matias case.

The University of Pennsylvania’s Harris said Covid-19 cases have the ability to expand on case law for perceived disabilities, which have been a largely dormant area in the law. She said it could be an opening for a part of the ADA that was intended to fight stigma related to disabilities.

"This could help build out this area of law," Harris said. "We want to develop a case law and some legal protections for people perceived to be threats even when they are not."

She added that the issue of Covid-19 as a perceived threat dovetails with long-haul cases because it connects to the fear and stereotypes that lead to discrimination.

"It's a much more nuanced analysis," Harris said. "It's a highly individualized inquiry whether it meets the definition under federal law or specific federal statutes. I couldn't say Covid categorically fits neatly."

Mild to Severe

Covid-19's effects range from mild symptoms to severe illness, and often individuals experience symptoms for a limited period of time, and eventually no longer test positive.

The illness doesn't completely align with the ADA's other two disability prongs, which require a physical or mental impairment that limits one or more major life activities like breathing and working, or a record of impairment, such as a cancer survivor in remission.

"Covid-19 standing alone, generally doesn't equal a disability," said Myra Creighton, a partner for Fisher Phillips LLP in Atlanta. Each case will be fact-based and individualized for actual disability, a record of disability, or a perceived disability, she said.

Harris said views on whether Covid-19 is an actual disability could affect whether a worker is entitled to reasonable accommodations, including telework or leave. Courts and employers also will have to wrangle with the direct threat of the virus, leave laws, and an individualized disability assessment, she said.

Leave Issues

Outside of her ADA claim, Matias also alleged violations of the FFCRA, which temporarily granted some pandemic-related paid leave and job protections.

Since that law lapsed last year, workers with Covid may qualify for rights granted under the federal Family and Medical Leave Act and similar state laws. The FMLA requires employers to provide up to 12 weeks of unpaid leave to workers with "serious health conditions" that require inpatient medical care or continuing treatment.

Vedder Price's Olson said employees with long-haul Covid likely will be exhausting their leave without the emergency federal paid leave protections, and she said there is a good argument that Covid-19 should make a covered employee eligible for FMLA leave.

"There are potential pitfalls for those who are trying to manage these issues," Olson said.

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