As Coronavirus-Related Job Losses Surge, Employers Should Brace for an Influx of Disability Discrimination Lawsuits – New York Law Journal – Justin Kelton

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The Coronavirus has wreaked havoc on New York's workforce and economy, with unemployment rates hitting all-time highs. While it is understandable that a global pandemic like the Coronavirus can cause job losses for completely justifiable reasons, it is also likely that the massive number of COVID-related terminations will lead to a tidal wave of employment-related lawsuits. Many of these claims will focus on allegations of discrimination against employees with virus-related disabilities. In preparation for this influx of litigation, this article provides an overview of "failure to accommodate" claims under the Americans with Disabilities Act ("ADA"), which will be a centerpiece of Coronavirus litigation for years to come.

Does Coronavirus Constitute a "Disability" under the ADA?

A plaintiff can make out a *prima facie* case of disability discrimination arising from a failure to accommodate by showing that: (1) the plaintiff had a disability under the meaning of the ADA; (2) the employer had notice of the disability; (3) with reasonable accommodation, the plaintiff could perform the essential functions of the job; and (4) the employer refused to make such accommodations. *McBride v. BIC Consumer Products Mfg. Co., Inc*., 583 F.3d 92, 96-97 (2d Cir. 2009).

The ADA Amendment Act of 2008 ("ADAAA") defines "disability" to include "a physical or mental impairment that substantially limits one or more major life activities." 42 U.S.C. § 12102(1). In order to qualify, a plaintiff must "(1) show that [she] suffers from a physical or mental impairment, (2) identify the activity claimed to be impaired and establish that it constitutes a major life activity, and (3) show that [her] impairment substantially limits the major life activity". *Kravtsov v. Town of Greenburg*, No. 10–CV–3142 (CS), 2012 WL 2719663, at *10 (S.D.N.Y. July 9, 2012).

If the plaintiff can establish a qualifying impairment, the next question is whether the impairment "substantially limits" a major life activity. The ADA does not define "substantial limitation," but the standard "is not meant to be [] demanding." 29 C.F.R. § 1630.2(j)(1)(i). Thus, a condition is a qualifying "disability" under the ADA "if it substantially limits the ability of an individual to perform a major life activity as compared to most people in the general population." *Risco v. McHugh*, 868 F.Supp.2d 75, 108 n. 47 (S.D.N.Y. 2012).

The ADAAA defines "major life activities" to include "the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions." 42 U .S.C. § 12102(2). In addition, "major life activities" include, without limitation, "caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working." *Id*.

There is no general rule about whether Coronavirus will constitute a qualifying disability; rather, a case-by-case analysis is required. However, many of the symptoms caused by Coronavirus—which can involve fevers, shortness of breath and difficulty breathing, chest pain, and severe diarrhea—appear to fall within the categories recognized under the ADAAA. Therefore, individuals suffering from these symptoms may be able to establish a qualifying disability.

What is a Failure to Make Reasonable Accommodations?

An individual claiming that she was denied a reasonable accommodation "bears the burdens of both production and persuasion as to the existence of some [reasonable] accommodation . . . ." *McElwee v. Cty. of Orange*, 700 F.3d 635, 642 (2d Cir. 2012). "Once the plaintiff has demonstrated that there is a 'plausible accommodation, the costs of which, facially, do not clearly exceed its benefits,' the defendant bears the burden of proving that the requested accommodation is not reasonable." *Id*. (*quoting Borkowski v. Valley Cent. Sch. Dist*., 63 F.3d 131, 138 (2d Cir. 1995)).

The ADA "envisions an 'interactive process' by which employers and employees work together to assess whether an employee's disability can be reasonably accommodated." *Jackan v. N.Y.S. Dep't of Labor*, 205 F.3d 562, 566 (2d Cir. 2000). Thus, in certain cases, "it may be necessary for the [employer] to initiate an informal, interactive process with the [qualified] individual with a disability in need of the accommodation." 29 C.F.R. § 1630.2(o)(3) (emphasis added). This obligation exists when a plaintiff makes his employer aware, or when it is obvious, that "an accommodation is needed." *Brady v. Wal-Mart Stores, Inc*., 531 F.3d 127, 135 (2d Cir. 2008).

However, a failure to engage in an interactive process does not form the basis of an ADA claim, in the absence of evidence that accommodation was possible. *Sheng v. M&TBank Corp*., 848 F.3d 78, 86–87 (2d Cir. 2017). Therefore, there is no independent cause of action for failure to engage in an interactive process. Nevertheless, "an employer's failure to engage in a good faith interactive process can be introduced as evidence tending to show disability discrimination, and that 'the employer has refused to make [a reasonable] accommodation.'" *Id*.

> *Ultimately, the decision of whether an accommodation is "reasonable" is "necessarily fact-specific" and "determinations on this issue must be made on a case-by-case basis."*

Wernick v. Fed. Reserve Bank of NY, 91 F.3d 379, 385 (2d Cir. 1996)

There are many different types of accommodations that have been held to be "reasonable" under the circumstances of individual cases. For example, a "reasonable accommodation" may include "reassignment to a vacant position." 42 U.S.C. § 12111(9)(B). However, the ADA "does not require creating a new position for a disabled employee." *Graves v. Finch Pruyn & Co*., 457 F.3d 181, 187 (2d Cir. 2006). Other types of accommodations that can be deemed reasonable in appropriate cases can include physical changes (such as modifying a workspace), accessibility and remote technology (such as using videoconferencing and remote-access technology), policy modifications (such as adjusting work schedules so employees can go to medical appointments and complete work at alternate times or locations), or job restructuring (reassigning certain marginal functions of a job).

Liability, Damages, and other Remedies

Liability for failure to provide a reasonable accommodation "ensues only when the employer is responsible for a breakdown in [the interactive] process." *Bohen v. Potter*, No. 04-CV-1039, 2009 WL 791356, at *13 (W.D.N.Y. Mar. 23, 2009) (alteration in original). An employer impedes the process when it knows of the employee's disability, the employee requests accommodations, the employer does not assist the employee in seeking accommodations, and the employee could have been reasonably accommodated but for the employer's lack of good faith. *Id*.

If a plaintiff is successful in proving disability discrimination, the ADA provides for both equitable relief (such as reinstatement) and monetary damages, including wages, out-of-pocket losses, benefits, damages for mental or emotional distress, and punitive damages in appropriate circumstances. In addition, the court may award attorneys' fees and other costs associated with bringing a lawsuit.

The Takeaways: Be Careful, and Be Prepared.

The Coronavirus crisis has unfortunately caused a wave of layoffs, furloughs, salary reductions, and other adverse employment actions. At the same time, a significant portion of the workforce has experienced serious medical difficulties. This combination will inevitably lead to a multitude of employment lawsuits premised on allegations of disability discrimination. Employers should familiarize themselves with the ADA and make good faith efforts to provide reasonable accommodations to those affected. And employers who believe they may have exposure should consult with experienced counsel to determine the best course for avoiding litigation if possible—and defending if necessary.

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