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Unprecedented: COVID-19 Litigation Insights, Volume 3, Issue 3

Welcome to our third issue of *Unprecedented* for the year. In today's issue, we look at the latest COVID-19 disability ruling and how that may affect future lawsuits, instances of wrongful dismissal cases, claims of profiteering, patent lawsuits, and problems with the SBA's loan forgiveness.

If you have any thoughts about our opinions and discussions, please let us know.

Thank you for reading.

James E. Simon, Co-Editor of *Unprecedented*

and

Joseph A. (Jay) Ford, Co-Editor of *Unprecedented*

COVID-19 Task Force

spilman
thomas & battle

Early Covid-19 Disability Ruling Offers Blueprint for Lawsuits

"The Montgomery, Ala.-based court is one of the first tribunals to weigh in on the issue."

Why this is important: As we enter into the third year of the COVID-19 pandemic, one of the biggest lingering questions in employment law is whether COVID is a "disability" under Title I of the ADA. On February 22, 2022, a federal judge in Alabama answered that question in the affirmative, and is allowing plaintiff Lucious Brown, a certified nursing assistant, to pursue a disability discrimination claim against her former employer. In June 2020, roughly nine months into Brown's employment at a rehabilitation and healthcare center in eastern Alabama, she began to feel ill, suffering from a range of symptoms including brain fog, fever, difficulty breathing, and severe fatigue. On July 1, 2020, she tested positive for COVID-19. Her employer had a policy requiring her to isolate for 14 days, which was in line with the CDC guidelines at that time. According to Brown, during that 14-day isolation period, she was contacted several times by her supervisor who instructed her to return to work and be tested -- all of which Brown refused. Brown then claims that the former employer terminated her on the 13th day of her isolation period for "voluntarily quitting" her position. Brown then filed her suit for disability discrimination. In order to maintain her lawsuit for violation of the ADA, Brown's COVID-19 had to qualify as a "disability." The ADA statutory definition of "disability" may include (a) actually having a disability, or a physical or mental impairment that substantially limits at least one major life activity, (b) having a record of a disability, or (c) being regarded as having a disability. The federal judge found Brown had sufficiently pled the type and severity of her particular COVID symptoms to fit into the first category of "actually disabled."

This ruling is adding to the growing body of law on whether COVID is a disability. The Office for Civil Rights of the Department of Health and Human Services and the Civil Rights Division of the Department of Justice issued joint guidance in July 2021 that said "long haul COVID" may be a disability under the public accommodations and state/local government provisions of the ADA. More recently in December 2021, the EEOC released guidance that says "depending on the specific facts involved in an individual employee's condition" a person with COVID has an "actual disability if the person's medical condition or any of its symptoms is a 'physical or mental' impairment that 'substantially limits one or more major life activities.'" This was the agency's first recognition that COVID may qualify and, unlike the older DOJ and DHHR joint guidance, did not specifically limit itself to "long haul COVID."

As the recent decision in the Brown case shows, whether COVID is a disability under the ADA is a growing and evolving area of law, one that is subject to change as the symptoms and infection of COVID also changes. Employers should be aware that COVID could potentially be a disability under the ADA, if the individual's symptoms are severe enough to warrant statutory protection. If this is the case, employers would be legally required to engage in the usual reasonable accommodation process. Traditionally, that process has found things like job restructuring of nonessential job functions, use of accrued leave, modified or part time schedules, and reassignment to vacant positions are reasonable accommodations, absent an undue hardship to the employer. Employers are therefore encouraged to review their ADA, leave, and COVID policies with counsel and consistently train management to ensure that, moving forward, the employer can make an informed decision about what to do when an employees has COVID. --- Chelsea E. Thompson

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A Florida Security Contractor Fired a Worker via Signal Chat 10 Minutes After They Raised Concerns About COVID-19 Safety, Lawsuit Says

"The DOL found the company had violated the Occupational Safety and Health Act."

Why this is important: The Department of Labor ("DOL") has filed suit on behalf of a worker terminated in August 2020 after raising safety concerns to his employer, a security contractor. According to the suit, the worker sent a group chat message to his supervisors asking about COVID-19 policies and firearm storage, both connected to the worker's recent relocation to temporary housing. Less than 10 minutes later, his employer fired him. After the worker filed a complaint with the DOL, the DOL investigated and found that the employer violated Section 11(c) of the Occupational Safety and Health Act of 1970. The DOL has since filed suit against the employer in mid-February 2022, seeking an injunction against the employer and compensatory and punitive damages on behalf of the employee, among other things. If the allegations in the lawsuit are true, then this apparent rash decision by the employer likely will prove quite costly. Click here to read the complaint. It's a short and interesting read. --- James E. Simon

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Blue Cross of Minnesota Lawsuit Alleges 'Profiteering' by Lab in COVID-19 Testing

"Blue Cross and Blue Shield of Minnesota filed a lawsuit alleging that a Nebraska-based lab with COVID-19 testing centers in the Twin Cities engaged in fraudulent billing practices that overcharged the Eagan-based health insurer millions of dollars for thousands of tests."

Why this is important: Over the course of the pandemic, allegations of price gouging and profiteering have been levied against a wide variety of sellers and service providers. Insurance companies have begun filing lawsuits claiming that private COVID-19 testing centers and laboratories inflated the prices of COVID-19 tests and defrauded insurers. One such case was filed recently by Blue Cross Blue Shield of Minnesota against GS Labs. Federal law requires that health insurers provide certain forms of COVID-19 testing to their insureds at no cost, and Blue Cross asserts that GS Labs misrepresented the prices it actually charged to consumers to deceive Blue Cross into paying higher rates. GS Labs, on the other hand, claims that the lawsuit "represents more strong-arm gamesmanship by 'big insurance'" to avoid paying for COVID-19 tests provided to its members. As insurers and labs continue to negotiate the amounts owed for COVID-19 testing, we likely will see similar cases filed across the country. --- Joseph A. (Jay) Ford

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COVID-19 Patent Challenges Mount as Moderna Faces New Vaccine Lawsuit

"A U.S. appeals court in December rejected Moderna's challenge to a tribunal's decision that upheld parts of two of the patents at issue in the new lawsuit."

Why this is important: This recently filed lawsuit serves as another example of the duality between the need to rapidly develop tools to combat the COVID-19 pandemic and the requirement to recognize and respect intellectual property rights. In this case, the challenge is raised that Moderna was able to so rapidly produce its COVID-19 vaccine because of its misuse of the plaintiffs' mRNA delivering technology. This and other lawsuits against both Moderna and its rival, Pfizer Inc., highlight the pressure that the U.S. and other governments, as well as society at large, placed upon companies to create and distribute these vaccines as fast as possible. Of course, these pressures do not serve as carte blanche to ignore other entities' intellectual property. However, it will be interesting and informative to follow these cases to see how the critical public health needs and factors such as Operation Warp Speed may play a role in decision making by both the parties and the courts as this and other such cases progress. --- Brandon M. Hartman

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Sioux Falls Lender Sues Small Business Administration Over COVID-19 Loan Forgiveness

"But five days later, SBA adopted a rule that imposed an exclusion on lending institutions, meaning the company will have to repay the loan while others are forgiven."

Why this is important: Expansion Capital Group ("ECG") filed a lawsuit in the United States District Court for the District of South Dakota against the Small Business Administration ("SBA"), among others, alleging a bait-and-switch occurrence concerning its PPP loan. ECG is a lender for established small businesses and was approved for a PPP loan in April 2020. ECG received $874,000 to assist with the problems that hit many small businesses during the COVID-19 pandemic, i.e., to pay wages to employees, rents, and mortgages. Five days after ECG received approval, the SBA adopted a rule that imposed an exclusion on lending institutions, meaning ECG will have to repay the loan while others are forgiven. More than a year after ECG received approval, the SBA determined it was not eligible for forgiveness and declined an appeal. ECG challenges this decision by stating that COVID-19 affected lending institutions similarly to all institutions. Congress recognized this fact, and allowed businesses that tend to be ineligible for other SBA programs to be eligible for the PPP program, and the SBA rule to exclude institutions like ECG effectively picks 'winners and losers' in the PPP. --- Victoria L. Creta

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