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Briefly

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THE ADA AND REASONABLE ACCOMMODATION ISSUES REGARDING SERVICE ANIMALS

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"[A]n accommodation need not be related to the essential functions of the job, but also is to allow a person with a disability to enjoy the same benefits and privileges as an employee without a disability, [such as] the right to work without the burden and pain of PTSD."

A recent jury award in Arkansas is a timely reminder to employers of their legal requirements under the Americans with Disabilities Act (ADA) regarding employee requests to bring service animals to work. In July of 2021, after a five-day trial, a federal jury in Arkansas awarded $250,000 to Perry Hopman, finding that his employer failed to comply with the ADA when it refused his request to allow a service dog to accompany him at work.

Mr. Hopman was employed as a train conductor for Union Pacific Railroad, which often included overnight travel. Prior to going to work with Union Pacific in 2008, Mr. Hopman served in the U.S. Army and Arkansas National Guard. He was deployed to Iraq in 2006, and after returning from service was diagnosed with post-traumatic stress disorder (PTSD). In 2010, he took a five-year leave of absence from his employment with Union Pacific to again perform military service, during which he was deployed to Kosovo where he suffered a traumatic brain injury and aggravation of his PTSD. Mr. Hopman's medical team recommended that he get a service dog to help mitigate the flashbacks, anxiety, and migraine headaches he suffered, so in 2014, he acquired his dog, Atlas.

After he medically retired from the National Guard in 2015, Mr. Hopman resumed working as a conductor for Union Pacific. About one year later, Mr. Hopman requested that Union Pacific permit him to bring Atlas to work as a reasonable accommodation for his PTSD. Union Pacific denied this request because it determined that the accommodation would result in a direct threat to health and safety. However, it appeared that Union Pacific failed to engage in the interactive process with Mr. Hopman to discuss these concerns, as it failed to notify Mr. Hopman of any of its concerns until relaying its denial of his request. An EEOC charge was filed but dismissed, as Atlas had not yet completed his service dog training.

Once that training was completed in 2017, Mr. Hopman again requested to bring Atlas to work as an accommodation. Mr. Hopman completed an accommodation request form which addressed the concerns that Union Pacific had expressed in denying his accommodation request in 2016. It was undisputed that Mr. Hopman was able to perform the essential functions of his job, but he claimed that Atlas would assist him by:

- "Grounding," or sensing his anxiety levels and placing pressure on his body;
- Reminding him to take his medications;
- "Hovering," or walking in circles around him in a crowd to keep the crowd at bay;
- Notifying him of when a migraine is coming;
- Blocking anyone from approaching him from behind;
- Finding the closest exit in a building;
- Picking up and retrieving items;
- Waking him up from nightmares;
- Forcing him to get out of the house; and
- Helping him during flashbacks.

Mr. Hopman also noted that Union Pacific had previously allowed an engineer to bring his service dog to work with him, including aboard trains.

Union Pacific asserted that it offered Mr. Hopman alternative accommodations, including another job offer. Mr. Hopman accepted an alternative job as a yard conductor for a short period of time, but claimed this job was not

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LONG-COVID MAY CONSTITUTE A DISABILITY

Mary C. Moffatt

"[W]here an individual's lingering COVID symptoms rise to the level of a disability under the ADA (or similar law), employers must then take steps to engage in the interactive process to identify potential reasonable accommodations …"

On July 26, 2021, the Department of Health and Human Services ("HHS") and the Department of Justice ("DOJ") issued a joint publication entitled "*Guidance on Long COVID as a Disability under the ADA, Section 504 (of the Rehabilitation Act of 1973) and Section 1557 (of PPACA)*" ("the HHS/DOJ Guidance:). https://www.ada.gov/long_covid_joint_guidance.pdf. The Guidance was issued to address how these federal laws are implicated when an individual suffers from the symptoms of "long COVID."

In a separate publication from the Centers for Disease Control ("CDC"), the CDC has stated that people with long COVID have a range of symptoms which include tiredness/fatigue, difficulty thinking or concentrating ("brain fog"), shortness of breath, headaches, chest pain, depression, or anxiety, and/or loss of taste or smell. https://www.cdc.gov/coronavirus/2019-ncov/long-term-effects.html. Although, the CDC's list is not exhaustive, these are the symptoms most commonly reported in connection with long COVID. Studies estimate that approximately 10-13% of those who have been diagnosed with COVID-19 could experience symptoms of COVID for longer than 12 weeks from the initial onset. While there is no set definition for long COVID, symptoms can persist for months and can range from mild to incapacitating. The British National Institute for Health and Care Excellence considers long COVID to be present where "signs and symptoms that develop during or after an infection consistent with COVID-19, continue for more than 12 weeks and are not explained by an alternative diagnosis."

The HHS/DOJ Guidance makes it clear that where an individual's lingering COVID symptoms rise to the level of a disability under the ADA (or similar law), employers must then take steps to engage in the interactive process to identify potential reasonable accommodations (subject to undue hardship), as well as ensure the individual is protected from discrimination, harassment, and retaliation in the workplace. In diagnosing "long COVID," health care providers may use various phrases and terms such as post-COVID-19 syndrome, post-acute sequelae of COVID (PASC), chronic COVID syndrome, or long-haul COVID.

Two recent court cases illustrate how these issues might be presented to employers.

In the case of *Edelman v. Aristocrat Plastic Surgery, P.C., et al.*, ("APS") (U.S. Dist. Ct., E. D. NY 2021), the plaintiff has sued his employer for violations of federal and state disability laws, and in the Complaint, he includes the following allegations: The plaintiff, Edelman, worked as Vice President of Business Affairs and General Counsel for the defendant. In March 2020, the plaintiff contracted COVID and within a matter of days, he was admitted to a hospital. Within a few days, he was discharged but shortly afterwards, his conditions returned, worsened and he was readmitted. During his second hospital stay, while "lying in a hospital bed, barely able to breathe, and afraid for his life," Edelman received a text message from his employer, stating that he had been "temporarily laid off" from his employment, along with other APS employees. Within a few days, APS cut off Edelman's access to all of its systems, including email. A few weeks later in May 2020, APS informed Edelman that he would not be brought back to staff but would be terminated for good. However, just a month later in June, APS allegedly brought back all of its staff to work, except for Edelman.

Plaintiff Edelman alleges that at no time did APS engage in any form of interactive process to discuss possible accommodations that might have allowed Edelman to return to work. Plaintiff alleges his employer, APS, failed to provide him with a reasonable accommodation and took adverse employment action against him because it regarded him as disabled.

The defendant, APS, recently submitted a request to the Judge for leave to file a Motion to Dismiss, arguing that at the time of the Edelman's termination in May 2020 "no one in the world understood COVID-19 to be anything more than a transitory, albeit serious illness" and that, at that time, no reasonable accommodation was required of APS. As explained below, this defense is likely to be more complicated and difficult to establish than it might appear.

The ADA defines disability as "a physical or mental impairment that substantially limits one or more major life activities (or)…a record of such an impairment, or being regarded as having such an impairment." 42 U.S.C. §12102(1). The ADA, as amended by the ADAAA in 2008, does provide that an impairment which is "transitory and minor" would not be considered a disability under the "regarded as" definition of a disability; however, while the term "transitory" is defined to be of "an actual or expected duration of six months or less," the statute does not define the term "minor." 42 U.S.C. § 12102(3)(B).

Thus, when faced with a long-COVID issue, employers should not readily embrace the "transitory" argument for two reasons: (1) What a difference a year makes, right? It is risky to assume that a Judge or jury in 2021 would agree that a case of COVID-19 is transitory and/or minor; (2) Also, it's a position that is not likely to be a slam-dunk, as numerous courts have held that an impairment that is severe enough, even though "temporary," can constitute a disability under the ADA.

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"LONG-COVID MAY CONSTITUTE A DISABILITY"

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In another case filed in March 2021, plaintiff Kathleen Hamada, sued her employer also based on disability discrimination claims. In Hamada's case, she contracted COVID-19 in April 2020. Her healthcare provider placed her on medical leave for six weeks and she returned to work in June 2020. However, she suffered from the effects of the coronavirus and was considered to be a "long-haul COVID-19" patient. When she requested additional leave to address the continuing symptoms, her supervisor told her "*you better not*," -- allegedly referring to plaintiff's request for leave. Based on this comment, the plaintiff chose not to seek medical leave and consequently she experienced absences from work due to the illness and effects of COVID-19. As a result of the absences, her employer issued disciplinary action, and in October 2020, after 33 years of employment with the defendant, the plaintiff was terminated based on her employer's attendance policy. The plaintiff alleged the employer's failure to accommodate her and discrimination in terminating her violated the California state law, which is modeled after the Americans with Disabilities Act. *Hamada v. Community Hospitals of Central Cali.*, (21CECG00808; CA Superior Court, County of Fresno, 2021).

Although both of these cases are in the early stages, they serve to illustrate the risks to employers of failing to consider the compliance issues associated with long COVID.

Considering that an impairment can include any physiological disorder or condition that affects one or more body systems, such as a neurological, respiratory, cardiovascular, and circulatory systems, as well as a mental or psychological disorder, such as emotional or mental illness, long COVID could constitute a physical or mental impairment under the ADA and thus, trigger the need to engage in the interactive process and potentially provide a reasonable accommodation, subject to undue hardship. Of course, an employer is not required to eliminate an essential job function as a reasonable accommodation. With COVID cases continuing across the country, employers are advised to be alert to potential cases of long COVID, to evaluate such cases for ADA-related compliance in the same manner as other potential disabilities and accommodation needs, and to seek advice of employment counsel where needed. The attorneys at Wimberly Lawson are ready to assist when such issues arise in the workplace.

"THE ADA AND SERVICE ANIMALS"

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a reasonable accommodation as it presented additional stress in working in a more dangerous environment, so he went back to the road conductor position. Union Pacific continued to deny Mr. Hopman's request to bring Atlas to work with him, citing safety issues.

Mr. Hopman then filed another EEOC charge, claiming that Union Pacific failed to properly engage in the interactive process and failed to provide him with the required reasonable accommodation requested. After obtaining a right-to-sue letter, Mr. Hopson filed his lawsuit in Federal Court, claiming that Union Pacific:

- Never met with him in person to discuss his request for accommodation;
- Never requested any information regarding PTSD or service dogs, and
- Never conducted an individualized assessment of his accommodation request.

Mr. Hopson further claimed that the accommodation he sought was reasonable, and that it would allow him to enjoy equal access to the benefits and privileges of employment by preventing the worst symptoms of his PTSD. After the lawsuit was filed, Mr. Hopson was promoted to an engineer position, but there continued to be disputes over Atlas' presence during his training and in the workplace.

Union Pacific sought to have the case dismissed on summary judgment, claiming that Mr. Hopson was not a qualified individual with a disability because he was able to perform the essential functions of his job. The court disagreed, noting that an accommodation need not be related to the essential functions of the job but also is to allow a person with a disability to enjoy the same benefits and privileges as an employee without a disability, which Mr. Hopson contends includes the right to work without the burden and pain of PTSD. Thus, the trial court denied Union Pacific's motion for summary judgment in 2020.

The trial in July of 2021 followed, with the jury finding that Mr. Hopman made a valid request under the ADA, and that his request to allow a service animal in the workplace would not present an "undue hardship." Further, the jury found that Union Pacific did not satisfy its obligations of the required interactive process to help Mr. Hopman accommodate his disability or find another potential accommodation. While the jury awarded compensatory damages of $250,000, it declined to award punitive damages.

This case is an important reminder to employers of the necessity of discussing the requested accommodation, concerns thereto and suggested alternative accommodations

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with the employee seeking the accommodation, before making a final decision. Also, this case demonstrates the principle that allowing an employee with a disability to bring their service dog to work may constitute a reasonable accommodation under the ADA.

What does the ADA require regarding service animals?

The requirements vary depending on the nature of the covered entity. The ADA is divided into five sections called "titles," and each title covers a different area. Title I prohibits discrimination against qualified individuals with disabilities in employment and applies to private employers with 15 or more employees, state and local governments, employment agencies, and labor unions. Title II prohibits discrimination based on disability in all programs, activities and services of public entities, including state and local governments and their departments and agencies. Title III prohibits disability discrimination in public accommodations and commercial facilities.

In 2010, the Department of Justice issued revised final regulations for Title II and III of the ADA, clarifying that only dogs are recognized as service animals under Title II and III (not Title I). "Service animal" is defined as a dog that is individually trained to do work or perform tasks for a person with a disability. The 2010 regulations also contain a separate provision about miniature horses that have been individually trained to do work or perform tasks for people with disabilities. Entities covered by the ADA are required to modify their policies to permit miniature horses where reasonable, and four assessment factors are enumerated in the 2010 regulations.

Generally, Title II and III entities must permit service animals to accompany people with disabilities in all public areas. However, "service animals" as defined by the ADA do not include emotional support or comfort dogs. Entities subject to Title II and III are limited in the scope of the inquiries which may be made of individuals wishing to have a service animal accompany them: 1) is the dog a service animal and required because of a disability; and 2) what work or task has the dog been trained to perform? Entities covered by Title II and III must allow the service animal regardless of whether other customers or employees are afraid of the service animal or have allergies. Businesses which sell or prepare food must generally allow service animals in public areas even if state of local health codes prohibit animals on the premises. Persons with service animals cannot be isolated, treated less favorably or charged any additional fees. Covered entitles may not require the owner of the service animal to provide any type of certification or proof of training, and self-training of service animals is permissible.

Businesses subject to Title II or III do not have to provide food for, care for, or supervise the service animal. Businesses may also exclude the service animal if the animal is out of control, not housebroken, or allowing the animal on premises would "fundamentally alter the nature of the goods, services, programs, or activities provided to the public." This is an incredibly high standard to meet.

A different analysis applies to Title I of the ADA, applicable to employment situations. Under Title I, employers are required to provide reasonable accommodations to employees and applicants with disabilities. One example of a reasonable accommodation may be allowing an employee to bring a service animal to work. However, Title I does not contain the same definition of "service animal" that is contained in Title II and Title III. There is no limitation allowing only dogs to qualify as service animals. What is required of employers is reasonable accommodation. Therefore, employers may be required, as a reasonable accommodation, to allow employees with disabilities to bring emotional support and/or comfort animals (other than dogs) to work.

Under Title I of the ADA, employers are required to engage in an interactive process to find the right/best accommodation available to enable the employee to work. Part of this process may include requiring the employee to provide documentation regarding their disability and how the service animal would relate to the employee's ability to perform the duties of the job. In addition to documentation regarding the employee's need for the animal, documentation can be requested of the animal's training and duties, the animal's good behavior, and how the employee will care for the animal at work (where the animal will be and how the animal's needs will be met). An employer can certainly require that the animal not disrupt the workplace, and any animal must be kept under control and well-behaved. Finally, as with service animal accommodation under Title II and III, objections of co-workers due to fear or allergies are not sufficient to establish undue hardship in an employment setting.

Service animals often allow individuals with disabilities to fully participate in all aspects of life, including employment. Requests for accommodation of service animals need to be carefully and fully considered by employers, and legal assistance is often required to ensure that all legal obligations are met under the ADA. Care should be taken to avoid making assumptions regarding safety without completing a required individualized assessment. One-on-one discussions between the employee and the employer should be conducted regarding concerns and potential accommodations before any final decision is made.