Labor & Employment Issues
In Focus

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For Clients and Friends
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FEDERAL COURTS PROVE POSITIVE ON COVID DISCRIMINATION CLAIMS

Federal district courts, one in Montgomery, Alabama and the other in Miami, Florida, have each recognized causes of action for discrimination based on COVID-19. *Brown v. Roanoke Rehab. & Healthcare Ctr*., No. 3:21-cv-00590-RAH (M.D. Ala. Feb. 22, 2022) and *Guerrero v. Summit Aerospace, Inc*., No. 21-cv-24006 (S.D. Fla., Feb. 25, 2022). These two cases appear to be among the first, but certainly will not be the last of their kind.

In *Brown*, the plaintiff employee was diagnosed with severe COVID-19 in June and July 2020 and quarantined for 14 days despite her employer's insistence she return to work. The employer terminated Brown on day 13 and moved to dismiss Brown's complaint of disability discrimination under the Americans with Disabilities Act of 1990 ("ADA"). U.S. District Court Judge R. Austin Huffaker, Jr., denied the motion. First, citing Equal Employment Opportunity Commission ("EEOC") guidance, Judge Huffaker held that Brown sufficiently alleged an ADA disability substantially limiting her life functions by detailing her symptoms of fatigue, brain fog, high blood pressure, cough, difficulty breathing and fever, all of which could substantially limit the major life activities of caring for oneself, working, bending, breathing, thinking and communicating. Second, even if Brown did not actually suffer a true ADA disability, she could sue since she alleged her employer regarded her as so disabled and therefore discharged her. The employer argued that Brown could not be "regarded as" disabled because the ADA specifically excludes impairments that are "transitory and minor" from "regarded as" liability, and COVID-19 has an "expected duration of six months or less." However, Judge Huffaker disagreed, calling the exception an affirmative defense for the employer to prove, noting that COVID-19 was certainly not "minor," and that whether or not "transitory" turned on the specific individual's experience, whether as a passing cold or as a "long-hauler." Since these fact questions required a detailed record, the employer's motion to dismiss failed.

The court in *Guerrero* also sustained a complaint of "regarded as" disability due to COVID-19. In that case, Guerraro believed he had been exposed to COVID-19 and returned to work without symptoms after 14 days and testing negative. Nevertheless, Guerrero was required to sanitize his desk four times daily, was "chastised and ridiculed," and was kept away from co-workers, ending in Summit's decision to discharge him just two weeks after returning to work. U.S. District Court Judge Beth Bloom denied Summit's motion to dismiss, ruling that the "regarded as" cause of action did not require Guerrero to actually have COVID-19 so long as the employer believed he did as the complaint alleged. As in *Brown*, whether Guerrero's condition was transitory and minor was a question of fact defeating dismissal.

These two decisions place COVID-19 litigation squarely within the legal analytical framework for all ADA disabilities. In light of the pleading standards outlined by Judges Huffaker and Bloom, early dismissal of such claims will be difficult for employers. Given the prevalence of COVID-19 since March 2020, employers may see a spike in just such claims.

SECOND CIRCUIT REVERSES DISTRICT COURT'S DENIAL OF PBA'S MOTION TO INTERVENE IN SUMMER 2020 PROTEST LITIGATION

After the murder of George Floyd in May 2020, protests, which occasionally deteriorated into violence and looting, erupted across the country including in the City of New York ("City"). Due to the resultant clashes between protesters and law enforcement in the City, a number of individual plaintiffs initiated civil actions against, *inter alia*, the City, the New York City Police Department ("NYPD"), former Mayor Bill de Blasio, and a number of uniformed employees of the NYPD. Further, the State of New York, through the Office of the Attorney General ("OAG"), joined the fray by bringing an action against the City and the NYPD. All of these matters, which are venued in the United States District Court for the Southern District of New York ("SDNY") were assigned to Judge Colleen McMahon, who consolidated them into *In re: New York City Policing During Summer 2020 Demonstrations*, 20-CV-8924 (CM)(GWG). Judge McMahon denied attempts by certain police unions to intervene, but the United States Court of Appeals for the Second Circuit ("Second Circuit") reversed the SDNY decision in part and required the Patrolmen's Benevolent Association of the City of New York ("PBA") to be granted Intervenor-Defendant status as to non-monetary relief. *See In re: New York City Policing During Summer 2020 Demonstrations*, No. 21-1316.

At the nascent stages of this litigation, several unions representing uniformed employees of the NYPD, including the PBA, which represents rank-and-file police officers in the City, filed motions to intervene, in order to protect their respective memberships' interests, which can diverge from the interests of the named-defendants, especially when it comes to officer safety protocols. However, Chief Judge McMahon denied the motions to intervene, based largely on *Floyd v. City of New York*, 770 F.3d 1051 (2d Cir. 2014), which stemmed from civil actions resulting in policy reforms related to the NYPD's stop-and-frisk practices. The PBA appealed the SDNY's denial of its motion to intervene.

The Second Circuit determined that the PBA should have been permitted to intervene, as of right under Rule 24(a) of the Federal Rules of Civil Procedure ("FRCP"), only in the specific actions where the plaintiffs were seeking declaratory and/or injunctive relief (inclusive of the case initiated by the OAG), because said relief "would likely be influenced by the circumstances shown in discovery." *Id.* at 18. According to the Second Circuit, the PBA presented valid interests that necessitated the PBA's intervention, such as the safety of PBA members. The PBA also demonstrated that said interest would not be adequately protected by the existing parties because the approach used by the City and NYPD during these protests resulted in injuries to PBA members; the City and former Mayor agreed with the OAG that reforms were needed; and the caveat contained the New

York State General Municipal Law § 50-k allowing the City to refuse indemnification and representation of PBA members, "are of discounted importance." *See id.* at 20.

In refusing to apply *Floyd* to this case, the Second Circuit highlighted several factors. First, the fact that the police unions waited until after the settlement and remedial stage in that case was too long to seek intervention because "the full scope of these case and the potential reform measures were readily apparent from years of extensive public filings and intense media coverage." *Id.* at 17 (*quoting Floyd*, at 1058). Second, the Second Circuit acknowledged that "it was not evident that the City ever adequately protected the interests of NYPD officers." *Id.* at 19 (*quoting Floyd*, at 1059). Third, the Second Circuit stated that, in this case, the "plaintiffs in the consolidated actions seek to change those polices to be more protective of the protesters and correspondingly less focused on the safety interest of the front-line officers." *Id.* at 16. Under these circumstances, held the Court of Appeals, police unions could intervene as of right to protect their members.

MAYOR ADAMS ENDS MOST KEY TO NYC REQUIREMENTS

On March 7, 2022, after nearly two years of COVID-19 related safety rules and six months of the Key to NYC regulations, Mayor Eric Adams suspended most of the "Key" limitations. As New York City and the surrounding area is currently experiencing a precipitous drop in COVID-19 cases and positivity rates, the Administration believed that the time was ripe to take a further big step back to "normalcy." But normalcy has not yet returned to work as the City's employment vaccination mandate remains in effect.

Under the suspension of the Key to NYC rules, indoor venues like restaurants and bars, fitness centers and gyms, and entertainment venues will no longer be required to check for proof of vaccination. This does not prevent an individual venue or business from still requiring proof of vaccination or masks for patrons. K-12 students at the City's public schools will also no longer be required to wear masks. Students under five years of age will still be required to mask up due to the unavailability of vaccines for that age group. Schools will continue with daily screenings, distribution of test kits, and maximizing ventilation.

The existing private employer mandate will remain in effect. Thus, while customers, guests, or visitors may not be required to be vaccinated, the employees of the establishments are still mandated to be vaccinated, unless the given employee has been granted a reasonable accommodation. Moreover, masks are still required on public transit which impacts the increasing number of employees commuting to offices as the virus recedes. Certain large assemblies, such as Broadway theaters, must also still require masks.

In addition, the City released a four-color coding system to track COVID-19 status. The code will run from low, Green, to Red, very high, with Yellow and Orange in between. At the Green level, the City will encourage routine precautions against COVID-19 like hand washing and basic hygiene, as well getting tested if you show symptoms, getting

vaccinated and boosted, and masking when in sensitive areas like hospitals, nursing homes, and other health care facilities. At the medium, Yellow level, the City will encourage people to avoid crowds and the government may reinstitute masking and social distancing requirements. At the higher, Orange level, the City will seek to protect the healthcare system from being overwhelmed and will likely reinstitute masking and testing requirements. Finally, in the unlikely event of a return to early COVID-19 conditions, the Red level would see the City go into "lockdown" mode, with a ban on all "nonessential" activities, maximum social distancing, and sheltering in place.

Health Commissioner Dr. Dave A. Chokshi stated: "Our new COVID-19 Alert system gives New Yorkers a roadmap for how to reduce their own risk in the event that we see another surge or increase in transmission. COVID-19 Alert will keep New Yorkers informed, including about actions to expect from city government. As we look to the months ahead, we must continue to do all we can to prevent unnecessary suffering due to COVID-19."

The City's new approach comes in response to the federal Centers for Disease Control and Prevention release of new guidance saying vaccinated people can stop wearing masks in public if they choose to do so.

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