

Can a Documented COVID-19 Infection Lead to a Disability Claim Under the NJLAD?

The analysis will have to be addressed on a case-by-case basis, with the focus not on the employee's infection with the COVID-19 virus, but rather how the corresponding symptoms have affected that individual.

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The COVID-19 pandemic has presented a myriad of issues for employers. From vaccination mandates and mask requirements to remote work policies, employers have been forced to make decisions on how to best keep their employees, customers, and patients safe during the continuing pandemic. Against this backdrop come novel issues in employment litigation—namely, whether the COVID-19 virus constitutes a disability within the meaning of the New Jersey Law Against Discrimination (NJLAD).

The COVID-19 Pandemic and Its Interplay With NJLAD

While the NJLAD is often considered broader than the Americans with Disabilities Act (ADA), it is not all encompassing. The New Jersey Law Against Discrimination, at N.J.S.A. 10:5-5(q), defines disability as follows:

'Disability' means physical disability, infirmity, malformation or disfigurement which is caused by bodily injury, birth defect or illness including epilepsy and other seizure disorders, and which shall include, but not be limited to, any degree of paralysis, amputation, lack of physical coordination, blindness or visual impediment,

deafness or hearing impediment, muteness or speech impediment or physical reliance on a service or guide dog, wheelchair, or other remedial appliance or device, or any mental, psychological or developmental disability, including autism spectrum disorders, resulting from anatomical, psychological or neurological conditions which prevent the normal exercise of any bodily or mental functions or is demonstrable, medically or psychologically, by accepted clinical or laboratory diagnostic techniques. Disability shall also mean SIDS or HIV infection.

In order to establish a claim of disability discrimination under the NJLAD, a plaintiff must establish: "(1) he or she is disabled within the meaning of the LAD; (2) he or she was performing her job at a level that met her employer's legitimate expectations; (3) he or she was discharged; and (4) the employer sought someone else to perform the same work after she left." *Grande v. St. Clare's Health Sys.*, 230 N.J. 1, 17-18 (2017).

The NJLAD further recognizes a cause of action for a "perceived disability" in situations where

an employer “believes” or “perceives” an employee to be disabled. In order to establish a claim of perceived disability discrimination under the NJLAD, a plaintiff must establish the following elements: “(1) a disability or the employer’s perception that the employee was disabled; (2) the employee remains qualified to perform the essential functions of the job and was performing at a level that met the employer’s expectations; (3) an adverse employment action because of the disability or perceived disability; and (4) the employer thereafter sought a similarly qualified individual.” *Wild v. Carriage Funeral Holdings*, 458 N.J. Super. 416, 429 (App. Div. 2019), *aff’d* but criticized, 241 N.J. 285, 227 (2020) (citing *Grande v. St. Clare’s Health Sys.*, 230 N.J. 1, 17-18 (2017)).

There is no published New Jersey regulation or appellate decision definitively addressing whether COVID is a disability. However, the court’s treatment of disability cases involving the flu and viruses are persuasive. Courts have held that the flu or other virus-related ailments do not qualify as a disability. For example, in *Riconda v. U.S. Foods*, the District of New Jersey considered claims of disability discrimination and perceived disability discrimination under the NJLAD. See No. CV 19-111, (KM), 2019 WL 4254389 (D.N.J. Sept. 9, 2019). The plaintiff in *Riconda* brought a perceived disability claim under the LAD after becoming ill during his shift at work, after which he was diagnosed with a virus. He was out of available sick days, and was subsequently terminated for his absences. In response, plaintiff filed a disability discrimination claim under the NJLAD. The *Riconda* court, in dismissing the claim, found that the plaintiff failed to establish a prima facie claim of disability discrimination, reasoning, in relevant part:

The ‘perceived’ disability is alleged here as a legal conclusion, without supporting facts. The Complaint does not state that the employer mistakenly believed that this stomach bug was indicative of a more serious condition. It does not allege that the employer jumped to the conclusion, for example, that the plaintiff would be out of work for an extended period of time Stomach flu is not a condition, such as epilepsy, that trails behind it a history of myths, misconceptions, or prejudices. Indeed, virtually everyone has suffered from something similar at one time or another.

The complaint pled, does not contain enough factual material to establish that this ordinary ailment, was or was perceived as, a disability within the meaning of the NJLAD. The plaintiff may have perceived his dismissal as unfair or arbitrary, but I cannot find that he has successfully alleged that it resulted from disability discrimination.

Riconda, 2019 WL 4254389, at *4.

Similarly, in *Procopio v. Castrol Industries North America*, an unpublished opinion out of the Eastern District of Pennsylvania, the court found no prima facie disability claim in the context of the flu virus, recognizing that “[a] brief period of flu-like symptoms does not meet the statutory requirements of either a ‘disability’ or a ‘serious medical condition.’” *Procopio*, No. CIV.A. 96-5234, 1996 WL 684244, at *1 (E.D. Pa. Nov. 21, 1996).

Within the context of a COVID-19 illness, is the analysis any different, i.e., does the nature of the physical (or mental) effects of a COVID-19 infection meet the statutory definition of “disability”? The answer to this question likely depends upon whether the employee is classified as suffering, or having suffered from “long term” or “short term” COVID.

‘Long Term’ and ‘Short Term’ COVID-19 Should Be Treated Differently Under NJLAD

Although many people with COVID-19 get better within weeks, some people continue to experience symptoms that can last months after first being infected, or may have new or recurring symptoms at a later time. This can happen to anyone who has had COVID-19, even if the initial illness was mild. People with this condition are sometimes called “long-haulers.” This condition is known as “long COVID.” According to the CDC, people with long COVID have a range of new or ongoing symptoms that can last weeks or months after they are infected, and that can worsen with physical or mental activity. See www.ada.gov/long_covid_joint_guidance.pdf.

It is possible that “long COVID” could be considered a disability under the NJLAD provided the ongoing symptoms, as set forth by the CDC, satisfy the statutory definition of the law. However, long COVID might not always be considered a disability. As such, an individual assessment should be required.

Conversely, short term COVID-19, where an employee tests positive for the virus but substantially recovers after a brief illness, would not come within the definition of disability under the statute. While the impacts of the pandemic cannot be downplayed, fortunately, most individuals who contract the virus

experience mild symptoms and make a full recovery.

The NJLAD itself makes clear that there can be no perceived disability discrimination or disability discrimination without an underlying disability. There is currently no case law supporting the proposition that COVID-19 is a disability under the NJLAD pursuant to this portion of the New Jersey Administrative Code

New Jersey courts have dismissed perceived disability claims where there is no underlying disability upon which such claim is based. For example, in *Dickinson v. Community Bus Lines*, the New Jersey Appellate Division dismissed a perceived disability claim where the alleged disability—obesity—was found to not fit within the statutory definition of a disability under the NJLAD. The court held that this requires “a perceived characteristic that, if genuine, would qualify a person for the protections of the LAD.” *Dickson v. Cmty. Bus Lines*, 458 N.J. Super. 522, 532 (App. Div. 2019) (citing *Cowher v. Carson & Roberts*, 425 N.J. Super. 285, 296 (2012)).

State of New Jersey COVID-19 Emergency Regulations

In response to the COVID-19 pandemic, the State issued emergency regulations that prohibit an employer from terminating or penalizing an employee for requesting or taking time off from work if the employee’s absence or request was: (1) on the recommendation of the employee’s medical care provider; and (2) is because the employee has or is likely to have an infectious disease, like COVID, which may infect others at the employee’s workplace. N.J.A.C. §12:70-1.1.

The Code provides for specific administrative remedies for any violations of these regula-

tions. The Code further provides that “[n]o employer shall discharge or in any way retaliate against or penalize any employee because such employee requests or takes protected leave.”

N.J.A.C. §12:70-1 et. seq. does not, however, establish that COVID-19 is a disability under the NJLAD, nor does any case law interpreting the Code find it to be. Notably absent from this guidance, or any New Jersey appellate rulings at this time, is a finding that COVID-19 constitutes a disability within the statutory framework of the NJLAD.

In conclusion, the analysis as to whether the NJLAD covers employees infected with or who are experiencing COVID-like symptoms will have to be addressed on a case-by-case basis. The focus is not on the employee’s infection with the virus but rather how the correspond-

ing symptoms have affected that individual. Long COVID cases “may” come within the statutory definition of “disability” depending upon the nature of the symptoms and any resulting “disability.” Short term cases will almost never come within the NJLAD as, by definition, the infected person has recovered and, after a brief illness, is no longer physically or mentally impacted. As more cases work their way through the court system it is expected practitioners will have more guidance as to whether the effects of COVID-19 exposures manifest as true disabilities.



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