COVID-19 AND THE AMERICANS WITH DISABILITIES ACT: WHEN MIGHT THE DISEASE BE CONSIDERED A DISABILITY FOR WHICH EMPLOYEES HAVE LEGAL PROTECTIONS IN THE WORKPLACE?

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ABSTRACT

Since the coronavirus pandemic began in the United States in early 2020, employers, legal practitioners, federal and state agencies, and the courts have wrangled with whether and in what circumstances workers impacted by COVID-19 (COVID) may have legal protections at work. Because the virus is novel, case law and other legal authorities are scarce. However, these questions are likely to persist well into the future as the virus continues to evolve and the pandemic rages on.

This Article explores whether and in what circumstances courts in the Tenth Circuit are likely to treat COVID as a "disability" under the Americans with Disabilities Act of 1990 (ADA),[1] thereby affording workers impacted by the illness some legal protections at work. Analogizing to judicial treatment of Human Immunodeficincy Virus (HIV) infections in the employment context, this Article argues that, despite the often temporary nature of COVID illness, there are some circumstances in which courts are likely to deem the illness a disability under the ADA. This Article also explores whether workers who are not ill themselves, but who are associated with a person suffering from COVID, may enjoy some legal protections at work. Finally, this Article examines whether employers may be prohibited from retaliating against workers who engage in protected activity for COVID-related issues.

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1. 42 U.S.C. §§ 12101–12213 (as amended).

INTRODUCTION

This Article is intended to provide guidance to practitioners and individuals alike on how Tenth Circuit courts may treat disability claims related to COVID-19 (COVID) in the employment context. As of this Article's drafting in November 2021, the Tenth Circuit has not yet addressed whether COVID is a disability entitled to the protections of the ADA. As this virus continues to evolve and different variants emerge, it seems only a matter of time before courts will be forced to reckon with such a question. The authors hope that this Article—which reviews pertinent statutes, guidance from administrative agencies, other circuits' COVID-related case law, and Tenth Circuit case law on a comparable virus—will provide readers with a greater understanding of employment law in the disability context and how it may impact individuals affected by COVID.

I. OVERVIEW OF TITLE I OF THE ADA[2]

In July 1990, the Americans with Disabilities Act (ADA) was signed into law.[3] For the first time in U.S. history, federal law broadly prohibited discrimination against individuals with disabilities in the workplace.[4] In passing the law, Congress recognized that:

> [P]hysical or mental disabilities in no way diminish a person's right to fully participate in all aspects of society, yet many people with physical or mental disabilities have been precluded from doing so because of discrimination; others who have a record of a disability or are regarded as having a disability also have been subjected to discrimination[.][5]

The ADA was designed to level the playing field for disabled Americans, ensuring that they have equal access to employment opportunities by prohibiting "discriminat[ion] against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment."[6]

Its protections apply to both private and public employers who are engaged in an industry affecting commerce and who employ at least fifteen individuals,[7] with limited exceptions.[8] In order to qualify for the protections of the ADA, an individual must be able to "perform the essential functions of the employment position that such individual holds or desires" either "with or without reasonable accommodation."[9]

A. What Qualifies as a Disability?

In the nearly two decades after its passage, courts interpreted the ADA much more narrowly than Congress intended and established a high bar for a condition to qualify as a disability.[10] Specifically, the U.S. Supreme Court held that the ADA should be interpreted to create a

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2. This Article focuses primarily on disability discrimination and retaliation claims arising under Title I of the ADA and evaluates COVID issues specifically in that context. Although courts generally interpret other statutes prohibiting disability discrimination and retaliation in the employment context consistently with the ADA, Aubrey v. Koppes, 975 F.3d 995, 1004 n.4 (10th Cir. 2020), this Article does not examine those statutes. Specifically, this Article does not address claims arising under Title V of the Rehabilitation Act of 1973, 29 U.S.C. §§ 790–794, which prohibits disability discrimination in employment by federal government employers and private employers who receive federal funds, or state laws that prohibit disability discrimination and retaliation in the employment context, such as the Colorado Anti-Discrimination Act, COLO. REV. STAT. §§ 24-34-401–06 (2021).

3. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (1990).

4. The protections afforded by the ADA are not limited to the employment context, but protections outside of that context are beyond the scope of this Article.

5. 42 U.S.C. § 12101(a)(1).

6. *Id.* § 12112(a).

7. *Id.* § 12111(5)(A); 29 C.F.R. § 1630.2(e)(1) (2021).

8. 42 U.S.C. § 12111(5)(B).

9. *Id.* § 12111(8).

10. *See* ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2(a)(1)–(8), 122 Stat. 3553 (2008).

"demanding standard for qualifying as disabled[,]" and that to be disabled, an individual's impairment must "prevent[] or severely restrict[] the individual from doing activities that are of central importance to most people's daily lives."[11] Applying this standard, the Court held that temporary conditions did not qualify as disabilities.[12] The Court further declared that the determination of whether a condition was a disability required consideration of ameliorative (mitigating) measures.[13]

In many cases, this demanding standard operated to deny disabled individuals equal employment opportunities that the law was designed to afford them, leaving them without legal recourse for discrimination.[14] Congress took note of this trend and, in response, enacted the ADA Amendments Act (ADAAA) in 2008.[15] Among other important clarifications of congressional intent regarding the breadth of the ADA's protections for disabled individuals, the ADAAA expressly rejected the narrow interpretation that the Supreme Court had adopted to determine who was a "qualified individual" with a disability.[16]

As amended and implemented, an individual now qualifies as disabled within the meaning of the ADA if, among other things, they:

> (i) [have] [a] physical or mental impairment that substantially limits one or more of the major life activities of such individual [the "actual disability" prong];
> (ii) [have] [a] record of such an impairment [the "history of disability" prong]; or
> (iii) [are] regarded as having such an impairment [the "regarded as" prong].[17]

Although not every impairment will be deemed a disability, in keeping with the spirit and the letter of the ADAAA, the regulations provide that meeting the definition of a disability should *not* be demanding, and that the law should be interpreted in a manner designed to afford broad coverage to disabled individuals.[18] In particular, "[a]n impairment need not prevent, or significantly or severely restrict, the individual from performing a major life activity in order to be considered substantially limiting."[19] Instead, an impairment is a disability if it substantially limits "the ability of an individual to perform a major life activity as compared to

11. Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184, 197–98 (2002), *superseded by statute*, ADA Amendments Act, *as stated in* Carter v. Pathfinder Energy Servs., 662 F.3d 1134, 1143 (10th Cir. 2011).

12. *See id.* at 198 ("The impairment's impact must also be permanent or long-term.").

13. Sutton v. United Airlines, Inc., 527 U.S. 471, 475 (1999), *superseded by statute*, ADA Amendments Act, *as stated in Carter*, 662 F.3d at 1144 ("[W]e hold that the determination of whether an individual is disabled should be made with reference to measures that mitigate the individual's impairment.").

14. *See* ADA Amendments Act § 2(a)(1)–(8).

15. *Id.*

16. *Id.* § 2(a)(4).

17. 29 C.F.R. § 1630.2(g)(1)(i)–(iii).

18. *Id.* § 1630.2(j)(1)(i)–(viii).

19. *Id.* § 1630.2(j)(1)(ii).

most people in the general population."[20] The activity need not be of central importance to daily life to qualify as a major life activity.[21]

Major life activities include both activities and bodily functions, such as:

> (i) Caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, sitting, reaching, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, interacting with others, and working; and
> (ii) The operation of a major bodily function, including functions of the immune system, special sense organs and skin; normal cell growth; and digestive, genitourinary, bowel, bladder, neurological, brain, respiratory, circulatory, cardiovascular, endocrine, hemic, lymphatic, musculoskeletal, and reproductive functions. The operation of a major bodily function includes the operation of an individual organ within a body system.[22]

Notably, the regulations provide examples of a number of conditions that will virtually always qualify as substantially limiting one or more major life activities:

> Deafness substantially limits hearing; blindness substantially limits seeing; an intellectual disability (formerly termed mental retardation) substantially limits brain function; partially or completely missing limbs or mobility impairments requiring the use of a wheelchair substantially limit musculoskeletal function; autism substantially limits brain function; cancer substantially limits normal cell growth; cerebral palsy substantially limits brain function; diabetes substantially limits endocrine function; epilepsy substantially limits neurological function; Human Immunodeficiency Virus (HIV) infection substantially limits immune function; multiple sclerosis substantially limits neurological function; muscular dystrophy substantially limits neurological function; and major depressive disorder, bipolar disorder, post-traumatic stress disorder, obsessive compulsive disorder, and schizophrenia substantially limit brain function.[23]

i. Temporary Impairments *Can* Qualify as Disabilities

Prior to 2008, courts routinely rejected the notion that temporary conditions could qualify as disabilities under the ADA.[24] Indeed, in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*,[25] the U.S. Supreme

20. *Id.*
21. *See id.*
22. *Id.* § 1630.2(i)(1)(i)–(ii).
23. *Id.* § 1630.2(j)(3)(iii).
24. *See, e.g.*, Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184, 198 (2002); *see also* Austin v Child.'s Hosp. Colo., No. 17-cv-02491-KLM, 2018 U.S. Dist. LEXIS 209939, at *20–21 (D. Colo. Dec. 13, 2018) (collecting cases).
25. 534 U.S. 184 (2002).

Court held that a temporary impairment could not qualify as a disability under the Act.[26]

With passage of the ADAAA, Congress expressly abrogated *Toyota*'s narrow construction of the term "disability" and made clear that temporary conditions may indeed qualify as disabilities, at least with respect to the "actual disability" and "history of disability" categories of claims.[27] The implementing regulations to the ADAAA provide that "[t]he effects of an impairment lasting or expected to last fewer than six months *can* be substantially limiting" for purposes of an actual disability claim or a history of disability claim.[28] Courts in the Tenth Circuit and elsewhere have relied on this language to deem temporary impairments disabilities where the facts demonstrate that the impairments are substantially limiting.[29]

Thus, in evaluating whether temporary conditions such as COVID qualify as disabilities in the context of actual and history of disability claims, the temporary nature of a condition alone is not dispositive.[30] Rather, whether a temporary condition qualifies as a disability turns on the same inquiry that conditions of a longer duration turn on—namely, whether the condition substantially limits one or more major life activities.[31]

However, it is important to note that the temporary nature of a condition is relevant in the context of "regarded as" disabled claims involving an actual or perceived impairment.[32] In that context, if the actual or perceived condition is both transitory (i.e., has an expected duration of six months or less) and minor, it will likely not rise to the level for which the ADA will afford workplace protections.[33]

ii. Whether a Condition is a Disability Must Be Evaluated *Without* Regard to Ameliorative Effects

Before 2008, courts held that whether a condition qualified as a disability was to be determined after considering the effects of mitigating measures, such as corrective devices, on the condition.[34] Since the passage of the ADAAA, that is no longer the law, and pre-ADAAA case law on

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26. *Id.* at 198.

27. *See* Summers v. Altarum Inst., Corp., 740 F.3d 325, 329 (4th Cir. 2014) (explaining history of ADAAA and its impact on *Toyota* and its progeny).

28. 29 C.F.R. § 1630.2(j)(1)(ix) (2012) (emphasis added).

29. *See, e.g.*, *Austin*, 2018 U.S. Dist. LEXIS 209939, at *25.

30. *See id.* Because there are nearly two decades of case law predating the ADAAA, it is not unusual to see pre-ADAAA authority cited for a proposition that is no longer good law. Practitioners should always evaluate whether the cases on which they intend to rely for purposes of establishing disability status pre-date the ADAAA and, if so, evaluate whether those authorities are still good law.

31. 29 C.F.R. § 1630.2(g)(1)(i) (2012); *see also* ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (2008).

32. 29 C.F.R. § 1630.2(g)(1)(iii) (2012).

33. *See id.*

34. *See* Sutton v. United Airlines, Inc., 527 U.S. 471, 475 (1999).

this issue has been overruled.[35] Instead, with the exception of corrective lenses in cases involving visual impairments, whether a disability is substantially limiting must be evaluated without regard for ameliorative measures.[36] In other words, in its untreated state, would the individual's condition substantially limit one or more major life activities?[37] If the answer is yes, then the condition is most likely a disability under the ADA.[38]

B. Who Is a "Qualified" Individual?

In addition to demonstrating that an employee has a disability, the person must also be a "qualified individual" to receive ADA protections.[39] This requires the individual to first demonstrate that they have "the requisite skill, experience, education and other job-related requirements of the employment position."[40] Second, they must be able to establish that they could perform the essential functions of the job held or desired with or without reasonable accommodations.[41]

C. What Is "Discrimination"?

The ADA defines discrimination on account of disability in various ways.[42] The three forms of discrimination most relevant to this Article include (1) disparate treatment,[43] (2) failure to accommodate,[44] and (3) associational discrimination.[45] The legal framework against which the courts analyze whether an individual has suffered unlawful discrimination in violation of the ADA differs in important ways for each of these discrete types of discrimination.

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35. Carter v. Pathfinder Energy Servs., 662 F.3d 1144 (10th Cir. 2011); *see also* ADA Amendments Act.

36. *Sutton*, 527 U.S. at 475; *see also* Yinger v. Postal Presort, Inc., 693 Fed. App'x 768, 772 (10th Cir. 2017) (citing 42 U.S.C. § 12102(4)(E)). *See generally* ADA Amendments Act.

37. 29 C.F.R. § 1630.2(j)(1)(vii) ("An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active."); *see also* ADA Amendments Act.

38. 29 C.F.R. § 1630.2(j)(1)(vii); *see also* ADA Amendments Act.

39. 42 U.S.C. § 12111(8).

40. Tate v. Farmland Indus., 268 F.3d 989, 993 (10th Cir. 2001).

41. Lincoln v. BNSF Ry. Co., 900 F.3d 1166, 1192 (10th Cir. 2018) (citing *Tate*, 268 F.3d at 993); *see also* discussion *infra* Section I.C.ii (Failure to Accommodate).

42. The ADA also prohibits an employer's participation in a contractual or other arrangement or relationship that has the effect of subjecting a disabled individual to prohibited discrimination; utilizing standards, criteria, or methods of administration that have a discriminatory impact on disabled individuals; using employment tests and qualification standards that are not job-related and consistent with business necessity and that tend to screen out disabled individuals; and failing to administer employment tests in a non-discriminatory manner to ensure that the results accurately reflects a disabled individual's qualifications. 42 U.S.C. § 12112(b)(2)–(3), (6)–(7). In-depth discussion of these forms of discrimination and the related claims that can arise as a result of such discrimination is beyond the scope of this Article.

43. 42 U.S.C. § 12112(b)(1); Sorenson v. Campbell Cty. Sch. Dist., 769 Fed. App'x 578, 583 (10th Cir. 2019).

44. 42 U.S.C. § 12112(b)(5)(A); *Sorenson*, 769 Fed. App'x at 583.

45. 42 U.S.C. § 12112(b)(4).

i. Disparate Treatment

Disparate treatment is perhaps the most obvious form of discrimination against disabled individuals in the workplace. The relevant provision of the ADA provides that an employer may not "limit[], segregate[e], or classify[] a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee."[46] In other words, disparate treatment discrimination occurs when the employer intentionally treats the disabled employee differently than their nondisabled counterparts because of their disability.[47]

a. Proving Disparate Treatment Claims

A plaintiff can establish intentional disability discrimination by direct or indirect evidence.[48] Direct evidence of discrimination is evidence that tends to prove that the decisionmaker acted out of discriminatory bias, such as "an employer's express adoption of a discriminatory policy."[49]

Where there is no direct evidence of discrimination, proof of discrimination by indirect— or circumstantial—evidence follows the burden-shifting framework discussed by the Court in *McDonnell Douglas Corporation v. Green*,[50] which requires a plaintiff to first establish a prima facie case with evidence that (1) they are disabled within the meaning of the ADA, (2) they are qualified for the job held or desired, and (3) they were discriminated against because of their disability.[51]

The first two elements of the prima facie case—that the individual is both disabled and qualified under the ADA—are discussed above.[52] With respect to the third element, demonstrating that the individual was "discriminated against" because of their disability in a disparate treatment case requires presenting some evidence that gives rise to an inference that the employee suffered an adverse employment action because of their disability.[53] Although this element "requires the plaintiff to present some affirmative evidence that disability was a determining factor in the employer's decision[,]" the employee's burden at this stage is not onerous.[54] Evidence

46. *Id.* § 12112(b)(1).

47. *Sorenson*, 769 Fed. App'x at 583.

48. Jones v. UPS, Inc., 502 F.3d 1176, 1188 n.6 (10th Cir. 2007), *superseded by statute on other grounds as stated in* Marsh v. Terra Int'l (Okla.), Inc., 122 F. Supp. 3d 1267, 1283 n.9 (N.D. Okla. 2015).

49. *Id.*; *see also* Ramsey v. Denver, 907 F.2d 1004, 1007 (10th Cir. 1990).

50. 411 U.S. 792 (1973); *see also* EEOC v. C.R. England, Inc., 644 F.3d 1028, 1037–38 (10th Cir. 2011).

51. *C.R. England*, 644 F.3d at 1037–38.

52. *See* sources cited *supra* notes 10–41.

53. Lincoln v. BNSF Ry. Co., 900 F.3d 1166, 1192–93 (10th Cir. 2018) ("[O]ur inquiry focuses on whether the circumstances surrounding the adverse employment action 'give rise to an inference that the [action] was based on [the plaintiff's] disability.'") (alterations in original).

54. Morgan v. Hilti, Inc., 108 F.3d 1319, 1323 (10th Cir. 1997); *see also* Plotke v. White, 405 F.3d 1092, 1100 (10th Cir. 2005) (establishing an inference of discrimination for purposes of stating

of disparate treatment discrimination includes, for example, "actions or remarks made by decisionmakers that could be viewed as reflecting a discriminatory animus" and "preferential treatment given to employees outside the protected class."[55]

Once the plaintiff has established a prima facie case, "the burden shifts to the employer to articulate a legitimate nondiscriminatory reason" for its employment decision.[56] If the employer articulates such a reason, the burden shifts back to the plaintiff to show that the employer's proffered reason is pretextual.[57] An employee can show pretext "by revealing weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action, [such] that a reasonable factfinder could rationally find them unworthy of credence."[58] Evidence of pretext can include, for example, "prior treatment of plaintiff; the employer's policy and practice regarding minority employment (including statistical data); disturbing procedural irregularities (*e.g.*, falsifying or manipulating . . . criteria); and the use of subjective criteria."[59]

ii. Failure to Accommodate

In addition to disparate treatment, an employer can also violate the ADA by failing to make "reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless [it] can demonstrate that the accommodation would impose an undue hardship on [its] business . . . ."[60] Reasonable accommodations can include, but are not limited to:

> (A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and
> (B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.[61]

Temporary leave from work may also be a reasonable accommodation.[62]

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a *prima facie* case is a flexible standard) ("[T]he fourth element of a prima facie case is a flexible one that can be satisfied differently in varying scenarios.").

55. *Plotke*, 405 F.3d at 1101.

56. *Lincoln*, 900 F.3d at 1193 (internal quotation marks omitted).

57. *Id.*

58. Garrett v. Hewlett-Packard Co., 305 F.3d 1210, 1217 (10th Cir. 2002) (alteration in original) (internal quotation marks omitted).

59. *Id.* (quoting Simms v. Oklahoma, 165 F.3d 1321, 1328 (10th Cir. 2020).

60. 42 U.S.C. § 12112(b)(5)(A).

61. 42 U.S.C. § 12111(9)(A)–(B); *see also* Smith v. Midland Brake, Inc., 180 F.3d 1154, 1161–62 (10th Cir. 1999).

62. Smith v. Diffee Ford-Lincoln-Mercury, Inc., 298 F.3d 955, 967 (10th Cir. 2002) (citing Rascon v. US West Commc'ns, Inc., 143 F.3d 1324, 1333–34 (10th Cir. 1998)).

When an employer has notice that an employee may need a reasonable accommodation for a disability,[63] the law requires the employer and employee to engage in an interactive process to identify possible accommodations that would allow the employee to keep their job.[64] The interactive process demands the participation of both the employer and employee and requires that all parties participate in good faith.[65] Whether a proposed accommodation is reasonable must be determined on a case-by-case basis.[66] Absent a showing of undue hardship or direct threat, the employer must provide reasonable accommodations.[67]

a. Proving Failure to Accommodate Claims

Like disparate treatment claims—absent direct evidence—failure to accommodate claims proceed under the *McDonnell Douglas* burden-shifting framework with one important difference.[68] Specifically, as the Tenth Circuit Court of Appeals recently made clear, unlike disparate treatment claims, "an ADA failure-to-accommodate claim does *not* contain an adverse-employment-action requirement."[69] This is because evidence that the individual was discriminated against because of their disability "is satisfied in a failure-to-accommodate claim *as soon as* the employer, with adequate notice of the disabled employee's request for some accommodation, fails to provide a reasonable accommodation."[70] In other words, "once plaintiffs have established their employers' failure to reasonably accommodate their disability, they need not go further and establish that they have suffered an adverse employment action."[71] The import of this is that plaintiffs do not need to establish an employer's discriminatory intent in a failure to accommodate case, since the failure to accommodate itself is discriminatory as a matter of law.[72]

63. Because failure to accommodate claims require that there be an actual disability for which the employee requires an accommodation, this claim is not available in the context of "regarded as" disabled claims. *See* 42 U.S.C. § 12201(h).

64. *Midland Brake*, 180 F.3d at 1171–72.

65. *Id.*; *see also* Aubrey v. Koppes, 975 F.3d 995, 1009 (10th Cir. 2020) ("[T]he ADA contemplates a much more collaborative interactive process when a disabled employee seeks an accommodation that will enable the employee to continue performing the essential functions of her job. The ADA contemplates an affirmative obligation to undertake a good faith back-and-forth process between the employer and the employee, with the goal of identifying the employee's precise limitations and attempting to find a reasonable accommodation for those limitations.").

66. Mason v. Avaya Commc'ns, Inc., 357 F.3d 1114, 1124 (10th Cir. 2004); *see also Midland Brake*, 180 F.3d at 1173.

67. 29 C.F.R. § 1630.2(o)(4), (r).

68. *See* Exby-Stolley v. Bd. of Cnty. Comm'rs, 979 F.3d 784, 792 (10th Cir. 2020) (en banc) (discussing modified framework applicable to failure to accommodate claims proceeding based on circumstantial evidence).

69. *Id.* at 795 (emphasis added).

70. *Id.*

71. *Id.*

72. Punt v. Kelly Servs., 862 F.3d 1040, 1048 (10th Cir. 2017).

iii. Associational Discrimination

Finally, the ADA's prohibition on disability discrimination includes discrimination against an individual "because of the known disability of an individual with whom the qualified individual is known to have a relationship or association."[73] Unlike failure-to-accommodate claims, associational discrimination claims do not require the employer to provide the employee with reasonable accommodations.[74] There are three primary ways an employer engages in associational discrimination in violation of the ADA.[75] First, an employer discriminates by association when it takes an adverse action against an employee because the employee's relative has a disability that is costly to the employer (i.e., the relative is covered by the company's health plan).[76] Second, an employer violates the ADA's prohibition on associational discrimination when it takes an adverse action against an employee because their relative or associate has a disability—such as Human Immunodeficincy Virus (HIV)—that the employer fears could be introduced into the workplace by the plaintiff.[77] Finally, an employer can engage in associational disability discrimination by taking an adverse action against an employee because it anticipates that the employee may not be as attentive to work because their spouse or child has a disability that requires their attention.[78]

a. Proving Associational Discrimination Claims

As with the other types of discrimination claims under the ADA, absent direct evidence, the *McDonnell Douglas* burden-shifting framework applies, whereby the employee must first establish a prima facie case of discrimination and must demonstrate pretext in response to an employer's production of a legitimate, non-discriminatory rationale for the adverse employment action.[79] The prima facie elements in associational discrimination claims require the employee to demonstrate that they were (1) "'qualified' for the job at the time of the adverse employment action;" (2) "subjected to an adverse employment action;" (3) they were known by their "employer at the time to have a relative or an associate with a disability;" and (4) "the adverse employment action occurred under circumstances raising a reasonable inference that the disability of the relative or associate was a determining factor in the employer's decision."[80]

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73. Trujillo v. PacifiCorp, 524 F.3d 1149, 1154 (10th Cir. 2008) (citing 42 U.S.C. § 12112(b)(4)); *see also* 29 C.F.R. § 1630.8.
74. Den Hartog v. Wasatch Acad., 129 F.3d 1076, 1083–84 (10th Cir. 1997).
75. *Id.* at 1084 n.6 (citing 29 C.F.R. § 1630.8).
76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.* at 1085.
80. *Id.*

II. HOW MIGHT COVID PRESENT AS A DISABILITY?[81]

Applying the foregoing principles, practitioners can better hypothesize how and in what circumstances those impacted by COVID may qualify as disabled and, as a result, be entitled to employment protections.

Whether an individual diagnosed with COVID has a disability ultimately turns on whether the condition substantially limits the individual's performance of a major life activity.[82] Symptoms of COVID can vary extremely among individuals.[83] Thus, it is difficult to predict how the courts within the Tenth Circuit will treat the condition under the ADA, and the determination will ultimately need to be made on a case-by-case basis. That being said, some predictions can be made based on how federal courts have treated different manifestations of the virus under the ADA considering the severity, duration, and nature of each individual's unique set of symptoms. For purposes of this Article, those manifestations are broadly grouped into the following categories: (1) mild symptoms, quick recovery; (2) severe symptoms, quick recovery; (3) post-COVID syndrome; (4) COVID+; and (5) other manifestations, such as COVID-induced anxiety and potential virus exposure.

A. Mild Symptoms, Quick Recovery

The Centers for Disease Control (CDC) estimates that symptoms of COVID appear approximately two to fourteen days after an individual is first exposed to the virus.[84] Around 80% of those infected with COVID will experience only moderate symptoms.[85] These symptoms include fever, chills, shortness of breath, nausea, headache, vomiting, and loss of taste or smell.[86] In most infected people, symptoms disappear and they recover after a couple of weeks.[87] The greatest danger posed by mild COVID is generally not to those infected but rather to those whom they may infect before they begin experiencing symptoms or before they recognize they have the virus and self-quarantine.[88]

Mild cases of COVID are highly unlikely to qualify as disabilities under the ADA, though employers are still urged to accommodate

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81. This Article's authors are not medical doctors. The medical analysis involved in this Article is intended for illustrative purposes only and does not constitute medical advice.

82. 29 C.F.R. § 1630.2(g)(1)(i) (2020).

83. Saeed Samadizadeh, Maha Masoudi, Mostafa Rastegar, Vahid Salimi, Mahsa Bataghva Shahbaz, & Alireza Tahamtan, *COVID-19: Why Does Disease Severity Vary Among Individuals?*, 180 RESPIRATORY MED. 1, 1 (2021).

84. *Symptoms of COVID-19*, CDC (Feb. 22, 2021), https://www.cdc.gov/coronavirus/2019-ncov/symptoms-testing/symptoms.html.

85. Julia Ries, *What It's Like to Have a 'Mild' Case of COVID-19*, HEALTHLINE (Feb. 2, 2021), https://www.healthline.com/health-news/what-its-like-to-survive-covid-19.

86. *Symptoms of COVID-19*, *supra* note 84.

87. *See* Ries, *supra* note 85.

88. *See id.*

reasonable requests that would prevent further spread of the disease.[89] While Tenth Circuit courts have not yet addressed this question, Eleventh Circuit courts have. In *Champion v. Mannington Mills, Inc.*,[90] the court held that the plaintiff's disability discrimination claim based on her association with her brother, who tested positive for COVID, failed because the plaintiff had not established her brother was disabled under the law.[91] In that case, the plaintiff's employer discharged her after she neglected to tell her employer that she had been in "close contact" (as defined by the CDC) with her brother, who worked for the same employer, in the hours before he tested positive.[92] The court ruled in favor of the employer, concluding that the plaintiff failed to establish that her brother was disabled within the meaning of the ADA.[93] The plaintiff's broad allegations that her brother was substantially limited in his ability to work simply because he missed several days of work when he began experiencing mild COVID symptoms and needed to see a doctor immediately did not suffice.[94] The court noted that the plaintiff failed to demonstrate that this alone prevented her brother from working.[95] For example, the court noted there was no evidence that he could not work from home, that he was unable to work any job, or even that any such limitation was due to COVID complications specifically.[96] The court's reasoning also took into account the relatively mild nature of the brother's symptoms.[97]

Notably, however, under the ADAAA, the temporary nature of the illness is not dispositive.[98] Instead, it is the combination of mild symptoms and the transitory nature of the illness that, together, will likely preclude this manifestation of COVID from being deemed a disability under the ADA.

B. Severe Symptoms, Quick Recovery

In contrast, individuals who are temporarily but severely incapacitated by COVID may be disabled under the ADA despite the brevity of their illness.[99] As discussed herein, the ADAAA made clear that temporary impairments that substantially limit a major life activity still qualify as

89. *See, e.g.*, *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*, EEOC, D.1 (Nov. 17, 2021), https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws.

90. No. 21-cv-00012, 2021 U.S. Dist. LEXIS 89381 (M.D. Ga. May 10, 2021).

91. *Id.* at *1, *14–15.

92. *Id.* at *1–4.

93. *Id.* at *14–15.

94. *Id.* at *10–11.

95. *Id.* Practitioners should plead with particularity any claim that an impairment substantially limits a major life activity. Here, the court ruled for the defendant in part because the plaintiff asserted that her brother was substantially limited in the major life activities of working and communicating without providing a detailed explanation for why that was. *Id.*

96. *Id.* at *11.

97. *See id.* at *11–12.

98. *See, e.g.*, Summers v. Altarum Ins., Corp., 740 F.3d 325, 332 (4th Cir. 2014).

99. *See* Qusair Mohamedbhai & Iris Halpern, *Q&A: What Are My Rights During COVID-19?*, DENV. POST (May 3, 2020, 9:07 AM), https://www.denverpost.com/2020/05/03/qa-what-are-my-rights-during-covid-19.

disabilities sufficient to allege an actual disability claim, a history of disability claim, or both.[100] In its worst form, COVID can require an individual to be placed on a ventilator and monitored around the clock.[101] None could argue that ventilated individuals are not substantially limited in at least one major life activity. Indeed, ventilated individuals are unable to breathe on their own.[102]

Despite the relatively short duration of these symptoms for those that recover,[103] those with severe illness from COVID are likely to be considered disabled.[104] As such, employers would be wise to treat workers with severe illness from COVID as disabled and to ensure that they are not discriminated against because of their actual disability or their history of disability.

C. Post-COVID Syndrome

Long COVID, or "post-COVID syndrome," is a term used to describe the phenomenon that a small but significant number of COVID sufferers experience in which chronic health problems persist for more than four weeks after initial COVID diagnosis.[105] "Long haulers," as those with persistent symptoms are called, test negative for COVID even though the virus continues to debilitate them.[106] Perhaps surprisingly, it is difficult to predict who will be effected by long COVID; it impacts those who were severely symptomatic and mildly symptomatic during the initial infection, alike.[107]

Symptoms of post-COVID syndrome include tiredness or fatigue, difficulty thinking or concentrating (brain fog), headache, loss of smell or taste, dizziness upon standing, heart palpitations, chest pain, difficulty breathing, cough, joint or muscle pain, depression or anxiety, fever, or other symptoms that get worse with mental or physical activities.[108] The disease may also impede the functioning of the body's heart, lungs,

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100. *See Summers*, 740 F.3d at 332.

101. Carrie MacMillan, *Ventilators and COVID-19: What You Need to Know*, YALE MED. (June 2, 2020), https://www.yalemedicine.org/news/ventilators-covid-19.

102. *Id.*

103. *See* Howard Saft, Jared J. Eddy, Carrie A. Horn, & Shannon H. Kasperbauer, *Recovering from COVID-19 (Coronavirus)*, NAT'L JEWISH HEALTH (July 2020), https://www.nationaljewish.org/patients-visitors/patient-info/important-updates/coronavirus-information-and-resources/health-tips/when-you-are-sick/recovering-from-covid-19-coronavirus (noting that average recovery time for severe illness is 3-6 weeks).

104. *See* Mohamedbhai & Halpern, *supra* note 99.

105. *Post-COVID Conditions*, CDC (Sept. 16, 2021), https://www.cdc.gov/coronavirus/2019-ncov/long-term-effects.html; Mayo Clinic Staff, *COVID-19 (Coronavirus): Long-term Effects*, MAYO CLINIC (Oct. 22, 2021), https://www.mayoclinic.org/diseases-conditions/coronavirus/in-depth/coronavirus-long-term-effects/art-20490351.

106. *See* Tae Chung, Megan Hosey Mastalerz, Amanda Kole Morrow, Arun Venkatesan, & Emily Pfeil Brigham, *COVID 'Long Haulers': Long-Term Effects of COVID-19*, JOHNS HOPKINS MED. (Apr. 1, 2021), https://www.hopkinsmedicine.org/health/conditions-and-diseases/coronavirus/covid-long-haulers-long- term-effects-of-covid19.

107. *Id.*

108. *See Post-COVID Conditions*, *supra* note 105.

kidneys, and brain and cause inflammation and autoimmune problems.[109] Trouble breathing is one of the most common signs of long COVID as the initial COVID infection may have caused lung scarring or persistent shortness of breath.[110] Other long haulers report trouble sleeping, a phenomenon termed "COVID-somnia."[111]

Although, as of November 2021, no courts have yet ruled on whether post-COVID syndrome qualifies as a disability under the ADA, it will likely so qualify.[112] Post-COVID syndrome lasts for weeks, months, or possibly even years beyond the initial virus infection.[113] It often substantially impacts one's ability to breath normally, an activity which has been recognized as a major life activity under the ADA framework.[114] It has also been shown to impede one's ability to concentrate, think, and sleep, and it may substantially limit the functioning of major bodily systems, such as kidney and liver systems, all of which qualify as major life activities.[115]

The Civil Rights Division of the U.S. Department of Justice and the Office for Civil Rights of the Department of Health and Human Services recently published guidance stating that long COVID may be a disability under Titles II (state and local government) and III (public accommodations) of the ADA.[116] While the guidance stops short of examining long COVID in the employment context,[117] it is especially persuasive authority considering that the ADA's definition of disability is the same throughout the entire ADA.[118] Acknowledging that long COVID may not always qualify as a disability, the guidance lists examples of circumstances that would warrant such classification.[119] For instance, a person with long COVID who experiences memory lapses and brain fog is substantially limited in brain function, concentrating, thinking, or all three.[120]

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109. *Id.*

110. *See* Chung et al., *supra* note 106.

111. *Id.*

112. *See* Jeffrey Rhodes, *COVID-19 is Not a Disability Under the ADA but COVID-19 Long-Haulers Likely are Protected* SHRM (Sept. 14, 2021) https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/court-report-coronavirus-ada-disability.aspx (noting that while merely catching COVID was not sufficient to have a claim under the ADA, long-term effects or further complications may permit qualification under the ADA).

113. To the extent that post-COVID syndrome lasts less than six months, it will likely need to be more severe in terms of symptomology to qualify as a disability. *See, e.g.*, Austin v Child.'s Hosp. Colo., No. 17-cv-02491-KLM, 2018 U.S. Dist. LEXIS 209939, at *25 (D. Colo. Dec. 13, 2018).

114. 42 U.S.C. § 12102(2)(A).

115. *Id.* § 12102(2)(A)–(B).

116. *Guidance on "Long COVID" as a Disability Under the ADA, Section 504, and Section 1557*, HHS (July 26, 2021), https://www.hhs.gov/civil-rights/for-providers/civil-rights-covid19/guidance-long-covid-disability/index.html.

117. The EEOC issues guidance on employment-related ADA matters. At the time of this writing, however, the agency has not issued such guidance on long COVID.

118. 42 U.S.C. §§ 12102(1), 12131(2), 12182(a)–(b)(1)(i).

119. *See Guidance on "Long COVID"*, *supra* note 116.

120. *Id.*

D. "COVID+" (Comorbidity Issues)

While few courts have considered the issue of whether COVID infection alone qualifies as a disability, many have addressed the question of how to treat those individuals with underlying problems[121] that put them at greater risk of contracting or suffering complications from the virus.[122] It is well-documented that, "compared to nondisabled people, people with disabilities experience disparities in exposure to the virus, inequities in susceptibility to contracting the virus, and barriers in accessing treatment and testing."[123] In a win for disability rights advocates, multiple circuits have held that an impairment that would not otherwise qualify as a disability under the ADA can so qualify where it places an individual at greater risk of contracting COVID or of experiencing complications if infected.[124]

Some courts have even temporarily modified the test to determine whether an impairment qualifies as a disability given the exigent circumstances posed by the pandemic. In July 2020, the U.S. District Court for the Western District of Louisiana held that "[d]uring the COVID pandemic, whether a plaintiff has a disability should be judged by the totality of the circumstances, *including the heightened risks of an impairment caused by the pandemic*."[125] Multiple courts have already held that moderate asthma, an impairment that was generally not considered a disability prior to the COVID pandemic, can be classified as a disability during these unprecedented times.[126] For example, in *Peeples v. Clinical Support Options, Inc.*,[127] the plaintiff successfully pled that their asthma qualified as a disability after showing that, among other things, they had frequent asthma attacks that substantially limited the major life activity of breathing, and their asthma placed them at a greater risk for serious illness or death if they were to contract the virus.[128] In another case, prisoners whose age and various preexisting illnesses placed them at greater risk of contracting and faring worse from COVID were considered disabled under the ADA.[129]

While the Tenth Circuit has not yet addressed the issue of whether heightened susceptibility to COVID can elevate an impairment to an ADA

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121. Conditions that may increase the risk of serious illness from COVID include diabetes, high blood pressure, chronic lung diseases, diseases that weaken the immune system such as HIV, and cancer. *See Coronavirus Disease 2019 (COVID-19)*, MAYO CLINIC, https://www.mayoclinic.org/ diseases-conditions/coronavirus/symptoms-causes/syc-20479963 (last visited Dec. 2, 2021).

122. *See* Thakker v. Doll, 541 F. Supp. 3d 358, 362 (M.D. Pa. 2020).

123. Robyn M. Powell, *Applying the Health Justice Framework to Address Health and Health Care Inequities Experienced by People with Disabilities During and After COVID-19*, 96 WASH. L. REV. 93, 95–96 (2021).

124. *See, e.g.*, Peeples v. Clinical Support Options, Inc., 487 F. Supp. 3d 56 (D. Mass. 2020).

125. *Id.* at 63 (discussing the holding in Silver v. City of Alexandria, 470 F. Supp. 3d 616, 621–22 (W.D. La. July 6, 2020)) (emphasis added).

126. *See, e.g.*, *Peeples*, 487 F. Supp. 3d at 60–62.

127. *Id.*

128. *Id.* at 63.

129. Valentine v. Collier, 490 F. Supp. 3d 1121, 1171–72 (S.D. Tex. 2020). Note that while this case dealt with Title II of the ADA, again, the definition of disability is the same throughout the ADA.

disability, it will likely answer in the affirmative based on the U.S. Equal Employment Opportunity Commission's (EEOC) guidance and precedent from other circuits. What types of accommodations will be considered reasonable for these individuals remains to be seen. Compared to those without disabilities, people with disabilities tend to be concentrated in lower paying jobs in the food and service industries—jobs that, by their nature, are unable to be performed remotely.[130] Ultimately, the question of whether an impairment causing heightened susceptibility to COVID constitutes a disability—and, if so, how to accommodate such a disability—is a complicated one that employers should not rush to pass judgment on.

E. COVID-Induced Anxiety

Individuals with severe anxiety about contracting COVID may have a disability under the ADA when that anxiety is more than a generalized worry about the pandemic.[131] COVID-induced anxiety may implicate the ADA when an individual is anxious about contracting the disease because an underlying disability places them at greater risk.[132] Alternatively, the pandemic has induced anxiety and other mental health disorders in some individuals who did not previously experience such conditions.[133] Where an employee has no underlying condition that suggests they are more at risk during the pandemic but are experiencing anxiety nonetheless, that anxiety may be a disability if it is debilitating to the individual.[134] Because an impairment must "substantially limit" a major life activity to be considered a disability under the ADA, courts recognize anxiety as an ADA-protected disability only where it permeates virtually every aspect of a person's life.[135]

Still, according to the EEOC, even individuals who do not have a disability but for whom an underlying psychological impairment was exacerbated by the pandemic may be deserving of reasonable accommodations.[136] Anxious employees requesting reasonable accommodations should bear in mind their employers' possible "undue hardship" defenses.[137] For example, while many with pandemic-induced anxiety may

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130. Michelle Lee Maroto, David Pettinicchio, & Martin Lukk, *Working Differently or Not at All: COVID-19's Effects on Employment Among People with Disabilities and Chronic Health Conditions*, SOCIO. PERSPS. 1, 4 (2021).

131. Allen Smith, *When is Fear a Protected Reason for Not Coming to Work?*, SHRM (May 26, 2020), https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/coronavirus-when-is-fear-a-protected-reason.aspx.

132. *Id.*

133. *See* Nirmita Panchal, Rabah Kamal, Cynthia Cox, & Rachel Garfield, *The Implications of COVID-19 for Mental Health and Substance Use*, KAISER FAM. FOUND. (Feb. 10, 2021), https://www.kff.org/coronavirus-covid-19/issue-brief/the-implications-of-covid-19-for-mental-health-and-substance-use/ ("During the pandemic, about 4 in 10 adults in the U.S. have reported symptoms of anxiety or depressive disorder . . . .").

134. *Id.*

135. *See* McGuinness v. Univ. of N.M. Sch. of Med., 170 F.3d 974, 978 (10th Cir. 1998) (anxiety was not substantially limiting where it arose only in certain—in this case, academic—settings).

136. *See What You Should Know*, *supra* note 89, at D.2.

137. Batson v. Salvation Army, 897 F.3d 1320, 1326 (11th Cir. 2018).

desire to work from home to avoid exposure, this is not reasonable if it impedes an essential function of the employee's job.[138]

F. Possible Exposure to COVID

Possible exposure to COVID does not qualify as a disability under the ADA.[139] As those who are only suspected of exposure to COVID have, axiomatically, not been diagnosed with the illness, discrimination based on such exposure could only be brought under and regarded as disabled theory.[140] To succeed on a regarded as claim when there is no actual impairment, "a plaintiff must show that . . . the employer mistakenly believe[d] [that they] ha[d] a physical or mental impairment that substantially limits a major life activity . . . ."[141] However, mere exposure is not a physical or mental impairment that substantially limits one or more major life activities and, as such, the protections of the ADA most likely will not attach.[142]

III. ANALOGIZING COVID AND HIV

As of November 2021, the Tenth Circuit has yet to address the issue of whether any iteration of COVID qualifies as a disability under the ADA.[143] While looking to other circuits is helpful, it is also useful to examine Tenth Circuit precedent regarding the treatment of a comparable virus—HIV. This section will first examine the many similarities between COVID and HIV before examining the ADA's coverage of HIV-positive (HIV+) individuals and the direct threat defense.

A. The Viruses Are Similar

HIV and COVID are the only worldwide pandemics of their scale in the past fifty years.[144] While at first glance they may appear vastly different, the two viruses share important things in common.[145] Both are RNA viruses that use similar molecular mechanisms to reach the human population from animals—HIV from chimpanzees and COVID from bats.[146]

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138. *See* Smith, *supra* note 131.

139. Parker v. Cenlar FSB, No. 20-02175, 2021 U.S. Dist. LEXIS 143, at *15 (E.D. Pa. Jan. 4, 2021).

140. *See* Frank Griffin, *COVID-19 and Public Accommodations Under the Americans with Disabilities Act: Getting Americans Safely Back to Restaurants, Theaters, Gyms, and "Normal,"* 65 ST. LOUIS U. L. J. 251, 253, 289 (2021).

141. Detterline v. Salazar, 320 F. App'x 853, 856 (10th Cir. 2009) (citing Justice v. Crown Cork & Seal Co., 527 F.3d 1080, 1086 (10th Cir. 2008).

142. *See Parker*, 2021 U.S. Dist. LEXIS 143, at *15.

143. Erin Mulvaney, *When is Covid a Disability? Courts Tackle Issue in Bias Cases*, BLOOMBERG L. (Sept. 23, 2021, 3:19 AM), https://news.bloomberglaw.com/daily-labor-report/when-is-covid-a-disability-courts-tackle-issue-in-bias-cases.

144. Francisco Illanes-Álvarez, Denisse Márquez-Ruiz, Mercedes Márquez-Coello, Sara Cuesta-Sancho, & José Antonio Girón-González, *Similarities and Differences Between HIV and SARS-CoV-2*, 18 INT. J. MED. SCI. 846, 846 (2021).

145. *Id.*

146. *Id.*; *see also* Paul M. Sharp & Beatrice H. Hahn, *Origins of HIV and the AIDS Pandemic*, COLD SPRING HARBOR PERSP. IN MED., 1 (2011); Yong-Zhen Zhang & Edward C. Holmes, *A*

Both HIV and COVID have "incubation periods"—a period of time between when the individual is infected and first displays symptoms of the virus.[147] Like those with mild cases of COVID, HIV-positive individuals may not notice their symptoms at first.[148] As a result, both viruses can be easily transmitted (though by different means) by infected but ignorant individuals.[149]

Once infected, a person cannot be "cured" of either virus,[150] although there are somewhat effective treatments. HIV is treated using antiretroviral therapy, which involves a combination of medicines to reduce the likelihood of HIV transmission and help HIV+ individuals live longer.[151] Scientists' initial attempts to treat COVID with a drug used to help HIV+ individuals were unsuccessful.[152] However, since then, multiple vaccines have been distributed to prevent the transmission and minimize the severity of COVID.[153] Both viruses have generated significant fear and social stigma.[154] Each can affect anyone regardless of social status, race, age, and gender, and especially in the case of COVID, fear of contagion is elevated by how relatively little is known about the virus.[155] It is predictable that

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Genomic Perspective on the Origin and Emergence of SARS-CoV-2, 181 CELL 223, 225–26 (2020) ("Although bats are likely the reservoir hosts for [SARS-CoV-2], their general ecological separation from humans makes it probable that other mammalian species act as 'intermediate' or 'amplifying' hosts . . . .").

147. *See* Illanes-Álvarez et al., *supra* note 144, at 847–48.

148. *Id.*

149. *See id.*; *HIV and AIDS – Basic Facts*, UN AIDS, https://www.unaids.org/en/frequently-asked-questions-about-hiv-and-aids (last visited Dec. 2, 2021).

150. Although individuals with COVID generally recover in ways that HIV+ persons do not, as it stands, once infected no drug can rid the body of the virus. *See* Paul Gisbert Auwaerter & Arturo Casadevall, *Is the Coronavirus Treatable?*, JOHNS HOPKINS MED., https://www.hopkinsmedicine.org/health/conditions-and-diseases/coronavirus/coronavirus-treatment-whats-in-development, (Nov. 23, 2021). The best "treatment" for COVID is vaccination to prevent infection in the first place. *See Benefits of Getting a COVID-19 Vaccine*, CDC (Aug. 16, 2021), https://www.cdc.gov/coronavirus/2019-ncov/vaccines/vaccine-benefits.html (explaining that vaccination continues to reduce a person's risk of contracting the virus that causes COVID).

151. *HIV Treatment: The Basics*, NAT'L INS. OF HEALTH (Aug. 16, 2021), https://hivinfo.nih.gov/understanding-hiv/fact-sheets/hiv-treatment-basics.

152. B. Cao, Y. Wang, D. Wen, W. Liu, Jingli Wang, G. Fan, L. Ruan, B. Song, Y. Cai, M. Wei, X. Li, J. Xia, N. Chen, J. Xiang, T. Yu, T. Bai, X. Xie, L. Zhang, C. Li, Y. Yuan, H. Chen, Huadong Li, H. Huang, S. Tu, F. Gong, Y. Liu, Y. Wei, C. Dong, F. Zhou, X. Gu, J. Xu, Z. Liu, Y. Zhang, Hui Li, L. Shang, K. Wang, K. Li, X. Zhou, X. Dong, Z. Qu, S. Lu, X. Hu, S. Ruan, S. Luo, J. Wu, L. Peng, F. Cheng, L. Pan, J. Zou, C. Jia, Juan Wang, X. Liu, S. Wang, X. Wu, Q. Ge, J. He, H. Zhan, F. Qiu, L. Guo, C. Huang, T. Jaki, F.G. Hayden, P.W. Horby, D. Zhang, & C. Wang, *A Trial of Lopinavir-Ritonavir in Adults Hospitalized with Severe Covid-19*, 382 NEW ENG. J. MED. 1787, 1787–88 (2020).

153. *Understanding How COVID-19 Vaccines Work*, CDC, https://www.cdc.gov/coronavirus/2019-ncov/vaccines/different-vaccines/how-they-work.html, (Nov. 24, 2021).

154. Carmen H. Logie, *Lessons Learned from HIV Can Inform Our Approach to COVID-19 Stigma*, 23 J. INT. AIDS SOC. 1, 1–2 (2020).

155. *See* Illanes-Álvarez et al., *supra* note 144, at 849.

those infected by COVID could experience similar levels of discrimination as people with HIV[156] due to this fear and stigma.[157]

B. HIV Is a Protected Disability, Which Suggests That COVID May Be as Well

According to the ADAAA's implementing regulations, HIV is a textbook example of a disability that "substantially limits immune function," a major life activity.[158] The U.S. Supreme Court has also recognized that HIV, even when in its asymptomatic form, is a disability under 42 U.S.C. § 12102(2)(A).[159] The Tenth Circuit has recognized HIV as a disability as well.[160]

Like HIV, COVID can substantially limit the functioning of the body's immune system, among other things.[161] Similar to HIV+ individuals, COVID long haulers are faced with devastating symptoms for extended periods of time.[162] Due to the novelty of COVID, it is not yet clear whether every individual that survives infection will ever fully recover.[163] Finally, as previously discussed, HIV+ individuals and those infected with COVID may experience social stigma and ostracization.[164] This is precisely what the ADA, as amended by the ADAAA, was enacted to address, further supporting classification of COVID as a disability.[165]

C. Direct Threat Exception

Even if employers agree HIV and COVID are disabilities, many may fear it is too risky to accommodate persons infected with these viruses, as they could infect other workers.[166] The ADA recognizes a narrow exception to the general prohibition on disability discrimination where an

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156. For reference, between 2018 and 2020, the EEOC filed an average of 560 charges of discrimination on behalf of HIV+ individuals alleging disability discrimination by their employers. *ADA Charge Data by Impairments/Bases – Resolutions (Charges filed with EEOC) FY 1997 – FY 2020*, EEOC, https://www.eeoc.gov/statistics/ada-charge-data-impairmentsbases-resolutions-charges-filed-eeoc-fy-1997-fy-2020 (last visited Dec. 2, 2021).

157. *See* Logie, *supra* note 154, at 1–2; *see also* Illanes Álvarez et al., *supra* note 144, at 849.

158. 29 C.F.R. § 1630.2(j)(3)(iii) (2012).

159. Bragdon v. Abbott, 524 U.S. 624, 626, 647 (1998).

160. *See, e.g.*, Jarvis v. Potter, 500 F.3d 1113, 1122 (10th Cir. 2007) (discussing *Bragdon*, 524 U.S. at 648).

161. *See* Liz Szabo, *Coronavirus Deranges the Immune System in Complex and Deadly Ways*, KAISER HEALTH NEWS (Mar. 4, 2021), https://khn.org/news/article/covid-autoimmune-virus-rogue-antibodies-cytokine-storm-severe-disease/.

162. *See, e.g.*, *Post COVID Conditions*, *supra* note 105.

163. Jessica Norris, *More Than a Quarter of People with COVID-19 Not Fully Recovered After 6-8 Months*, MED. NEWS TODAY (July 19, 2021), https://www.medicalnewstoday.com/articles/more-than-a-quarter-of-people-with-covid-19-not-fully-recovered-after-6-8-months.

164. *Social Stigma Associated with COVID-19*, WORLD HEALTH ORG. (Feb. 24, 2020), https://www.who.int/docs/default-source/coronaviruse/covid19-stigma-guide.pdf; *see also* Logie, *supra* note 154, at 1.

165. *See* ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2(a)–(b), 122 Stat. 3553 (2008).

166. *See* APRIL J. ANDERSON, CONG. RSCH. SERV., LSB10471, COVID-19 AND WORKPLACE LIABILITY: SELECTED ISSUES UNDER ANTIDISCRIMINATION LAWS 1–2 (2020) ("The ADA and Rehabilitation Act . . . protect people with substantially limiting conditions, including some conditions that put them at greater risk for severe COVID-19 illness, such as moderate to severe asthma, serious heart disease, and immunosuppression (including in HIV).").

employer can show that a disabled employee poses a direct threat to themselves or the workforce.[167] The EEOC has noted that this exception, known as the "direct threat defense," applies in pandemic situations.[168] The defense applies where an employee poses "a significant risk to the health or safety of others which cannot be eliminated by reasonable accommodation."[169] An employer may not base its decision that an employee poses a direct threat on speculation or stereotyping.[170] Instead, the decision must involve a fact-specific inquiry into existing medical knowledge and evidence about the particular disease.[171]

The Tenth Circuit has held that, where an employer proves that an employee's essential duties "implicate the safety of others" by, for instance, requiring them to regularly interact with the public, the employer is excused from providing an accommodation under the direct threat exception.[172] Thus, employers considering terminating or otherwise failing to accommodate employees with COVID should be certain that they actually pose a direct threat to others and are not merely suspected of doing so due to their infection status.

IV. RETALIATION PROTECTIONS[173]

A. ADA Protections

In addition to its anti-discrimination provisions, the ADA prohibits an employer from retaliating against any person who "has opposed any act or practice made unlawful by" the ADA or "made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing" under the ADA.[174] A plaintiff alleging unlawful retaliation in violation of the ADA makes out a prima facie case by demonstrating that (1) they engaged in protected activity, (2) they suffered an adverse employment action, and (3) a causal connection exists between the protected activity and the adverse employment action.[175]

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167. 42 U.S.C. § 12182(b)(3).

168. *Pandemic Preparedness in the Workplace and the Americans with Disabilities Act*, EEOC, https://www.eeoc.gov/laws/guidance/pandemic-preparedness-workplace-and-americans-disabilities-act (last visited Dec. 2, 2021).

169. 42 U.S.C. § 12113(e)(3).

170. *See Pandemic Preparedness*, *supra* note 168.

171. Jarod S. Gonzalez, *On the Edge: The ADA's Direct Threat Defense and the Objective Reasonableness Standard*, 103 MARQ. L. REV. 513, 516–17 (2019); *see also* Bragdon v. Abbott, 524 U.S. 624, 649 (1998) (asserting that petitioner dentist's belief, even if made in good faith, that HIV+ patient posed a direct threat was not justified where he had not examined "objective, scientific information available to him").

172. *See* Jarvis v. Potter, 500 F.3d 1113, 1122 (10th Cir. 2007).

173. Although this Article primarily addresses the ADA, practitioners should note that many states have enacted additional anti-retaliation protections. A Colorado law is included in this Part as an example.

174. 42 U.S.C. § 12203(a).

175. Jones v. UPS, Inc., 502 F.3d 1176, 1193 (10th Cir. 2007) (quoting Haynes v. Level 3 Commc'ns, LLC, 456 F.3d 1215, 1228 (10th Cir. 2006)).

An individual engages in protected activity by, *inter alia*, opposing unlawful disability discrimination, requesting a reasonable accommodation for a disability,[176] or both.[177] A complaint based on a good faith belief that the employer violated the ADA is sufficient to support a retaliation claim.[178] Similarly, the Tenth Circuit has held that a request for accommodation constitutes protected activity *even if the employee turns out not to be disabled*, as long as they held a good faith, objectively reasonable belief that they were disabled when they made the request.[179] This is because the ADA protects any individual from retaliation, not just a qualified individual with a disability.[180] An employee can bolster support for their assertion that they held a good faith, objectively reasonable belief that they were disabled by, *inter alia*, submitting contemporaneous supporting evidence from a doctor.[181]

Adverse employment actions include "acts that constitute a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits."[182] Close temporal proximity between the protected activity and subsequent adverse action may be sufficient to establish an inference of retaliatory motivation.[183]

Given how relatively little is still known about COVID, it is likely that at least some employees impacted by the virus could in good faith believe that they were disabled and therefore, may be protected from retaliation under the ADA even if they turn out to be wrong.

B. Colorado's Public Health Emergency Whistleblower Act (PHEW)

Recognizing the unique set of circumstances presented by the COVID pandemic, some states have implemented additional protections

176. Reasonable accommodations for COVID may include, but are not limited to, telework and personal protective equipment. *See Pandemic Preparedness*, *supra* note 168.

177. *See Jones*, 502 F.3d at 1193–94; Pittman v. Am. Airlines, Inc., 692 F. App'x 549, 552–53 (10th Cir. 2017); Selenke v. Med. Imaging of Colo., 248 F.3d 1249, 1265 (10th Cir. 2001); Butler v. City of Prairie Vill., 172 F.3d 736, 748–50 (10th Cir. 1999).

178. *See Jones*, 502 F.3d at 1194; Foster v. Mt. Coal. Co., LLC, 830 F.3d 1178, 1186 (10th Cir. 2016).

179. *Selenke*, 248 F.3d at 1264; *see also* Standard v. A.B.E.L Servs., Inc., 161 F.3d 1318, 1328 (11th Cir. 1998); Krouse v. Am. Sterilizer Co., 126 F.3d 494, 502 (3d Cir. 1997).

180. *Krouse*, 126 F.3d at 502.

181. *Compare Selenke*, 248 F.3d at 1264–65 (plaintiff submitted evidence that sinusitis caused breathing difficulties and case law showing similar disorders were ruled to be disabilities), *with Standard*, 161 F.3d at 1329 (the only evidence was a statement from employer's secretary, submitted *after* the request was made, showing that plaintiff may have been perceived as disabled).

182. Dick v. Phone Directories Co., 397 F.3d 1256, 1268 (10th Cir. 2005) (quoting Sanchez v Denver Pub. Schs., 164 F.3d 527, 532 (10th Cir. 1998)) (alterations and internal quotation marks omitted).

183. *See* Anderson v. Coors Brewing Co., 181 F.3d 1171, 1179 (10th Cir. 1999) (holding that a one-month period standing alone is enough for an inference of retaliation, but a three-month period is not).

against retaliation in employment. For example, on July 11, 2020, Colorado enacted House Bill 20-1415, the PHEW.[184] The PHEW states in part:

> A principal shall not discriminate, take adverse action, or retaliate against a worker based on the worker voluntarily wearing at the worker's workplace the worker's own personal protective equipment, such as a mask, faceguard, or gloves, if the personal protective equipment:
> (a) Provides a higher level of protection than the equipment provided by the principal;
> (b) Is recommended by a federal, state, or local public health agency with jurisdiction over the worker's workplace; and
> (c) Does not render the worker incapable of performing the worker's job or prevent a worker from fulfilling the duties of the worker's position.[185]

Thus, even if COVID is not an ADA-protected disability, in addition to the anti-retaliation provisions of the ADA, employers in Colorado are still prohibited from discriminating or retaliating against any worker who uses personal protective equipment, so long as doing so does not compromise their job performance.

CONCLUSION

There is not yet a definitive answer to the question of whether and when COVID may be considered a disability entitled to protection under the ADA. However, predictions can be made with some confidence based on current legislative guidance, enforcement agency directives, and existing and emerging case law. Although mild, short-lived COVID infections are unlikely to qualify as a disability under the ADA, infections that cause severe symptoms might. Impairments that previously might not have qualified as disabilities may now qualify if they place sufferers at a heightened risk of COVID infection during the pandemic. Further, COVID long haulers and, in certain circumstances, those with extreme COVID-related anxiety are likely entitled to protection as well. These conclusions are buttressed by the courts' treatment of HIV infection, which substantially limits, *inter alia*, immune function just as COVID does. However, while it can be analogized to other viruses, COVID is an unprecedented pandemic. As such, workers engaging in protected activity based on a good faith belief that COVID is a disability may be afforded protection from retaliation under the ADA, whether or not their good faith belief turns out to have been correct.

184. *See* H.B. 20-1415, 72d Colo. Gen. Assemb., 2d Reg. Sess. (Colo. 2020).
185. COLO. REV. STAT. § 8-14.4-102(3) (2021).