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COVID-19 infection may not be disability, says San Diego federal judge

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As a Hertz management associate in National City, Michelle Roman's responsibilities included screening employees for COVID-19 symptoms. Hertz's policy required that an employee who answered "yes" to any question about recognized symptoms be sent home. The employee could return to work if he or she was symptom-free seven days after the onset of symptoms or provided proof of a negative COVID-19 test result.

The afternoon of Sept. 1, 2020, a workday, Roman started experiencing what she called "super mild body aches." She also felt "super tired" when she left work. Roman attributed these symptoms to a busy work schedule and strenuous workouts, not COVID-19. To be certain, she scheduled a COVID-19 test for the next day, Sept. 2. When she reported to work that day, a colleague confirmed her temperature was normal.

Roman stayed home the next day because she was not feeling well, but was still convinced her symptoms were not bad enough to indicate she had COVID-19. On Sept. 4, Roman came to work, though she still had a headache. At 10 a.m., Roman learned she had tested positive for COVID-19. Roman reported the test result to Hertz's human resources office. Roman was quarantined at home with pay from Sept. 4 until Sept. 18, when she took another COVID-19 test that was negative.

Hertz terminated Roman at the end of September for violating company policy by coming to work while experiencing COVID-19 symptoms. Roman sued.

Was Roman's COVID-19 infection, without severe symptoms, a disability for which Hertz could not legally discharge her?

Not exactly, ruled San Diego federal judge Roger Benitez in summarily dismissing her case.

First-of-its-kind California ruling

Judge Benitez faced a question no other California state or federal court previously had addressed: Whether contracting COVID-19, with mild symptoms, is a disability under the California Fair Employment & Housing Act (FEHA), protecting the infected employee from adverse employer action.

Absent controlling legal authority, Judge Benitez examined other legal sources to evaluate Roman's argument that a COVID-19 infection, even with only mild symptoms, is a disability "because she was not allowed to work or engage in any social activities due to her malaise" in the days before she learned she was infected "and subsequently due to her positive test."

Judge Benitez quoted a regulation issued by the Department of Fair Employment & Housing (DFEH) that excluded from the definition of a disability under FEHA "mild conditions," such as the common cold, the seasonal flu, and non-migraine headaches. From this, the judge concluded "When it presents with temporary symptoms akin to the common cold or seasonal flu, COVID-19 will fall outside the FEHA definition of ailments considered a disability. ..."

Focusing on the facts of this case, the judge wrote: "Even typical symptoms of the common cold, one of the regulation's expressly excluded ailments, temporarily prevent millions of Americans from going to work each year. In comparison, that Roman felt well enough to work for three days, and only sick enough to stay home one, suggests that her COVID-19 infection was 'mild' under this regulation and therefore disqualified from the definition of disabled."

The judge acknowledged that long-haul COVID-19, with long-term or residual effects from the infection, may meet the definition of a disability under FEHA. Roman, however, made no claim of any such lasting effects from her infection.

Judge cites non-binding, COVID-19-specific state and federal agency guidance

Judge Benitez found further support for his ruling in non-binding, COVID-19-specific guidance on FEHA from the DFEH and recently updated guidance on the federal Americans with Disabilities Act from the U.S. Equal Employment Opportunity Commission. The guidance suggested that a COVID-19 infection accompanied only by seasonal flu-like symptoms that are resolved within weeks would not be considered a disability under FEHA or the ADA.

Hertz stay-home policy did not transform Roman's condition into a disability

"[A] condition cannot qualify as a disability unless the condition itself reduces the body's physical or mental capacity to perform activities," wrote the judge. "Here, Roman's positive COVID-19 test does not qualify as a disability under FEHA because the positive test did not make it physically difficult for her body to perform the functions needed for her work. Here, Roman's limitation on working was not caused by her illness but by Hertz's COVID-19 policy."

In fulfilling their duty to maintain a safe and healthful workplace, most employers have directed their employees to stay home if they are experiencing even mild COVID-19 symptoms. Judge Benitez's ruling, which Roman is expected to appeal, suggests employees who are fired for disobeying that directive may lack legal recourse.

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