What New York City Employers Need to Know About The First Court Rulings in Early COVID 19 Related Workplace Litigation

Insights
5.18.21

Of the more than 2,300 COVID-19-related employment lawsuits we have been tracking, many have at least one thing in common: they relate to employees who had (or suspect they had) the virus in late 2019 or early 2020 – before, for example, states even issued their initial shelter-in-place orders. And now that courts are beginning to issue rulings on such cases, we're starting to see the first few important decisions about what defenses will succeed and which will fail. An employer in New York recently failed to convince the court to dismiss a former employee's claim of disability discrimination (among other things) where the individual was allegedly terminated after taking several days of medical leave due to a respiratory disease that may have been caused by COVID-19. The case illustrates two important points: first, it is irrelevant to the success of their case whether employees can prove the illness they had was indeed COVID-19; and second, there are several arguments that will be wholly irrelevant to New York judges.

Velez's Allegations: Intentional Discrimination, Failure to Accommodate, and Retaliation After Absence for COVID-19-Related Illness

On July 21, 2020, Anthony Velez filed a lawsuit against his former employer, Girraphic LLC, in the Southern District of New York after he was allegedly terminated – the company argued he resigned – after missing several days of work in February and March of 2020 due to a respiratory infection. Velez says the condition may have been caused by COVID-19, but also says he was unable to obtain a COVID-19 test at that time.

Velez states that in January 2020, he had suggested the company make additional efforts to prevent the spread of the virus and alleges that as a result, his relationship with his supervisor "began to sour" because his supervisor considered Velez's concerns to be a sign of weakness and indicated he was not dedicated to his work. Velez became ill in February and alleges his request for medical leave in February and March was a request for a reasonable accommodation for a disability. He states his supervisor was angry with him for being ill and away from the office as well as for certain efforts he made to inform others about the seriousness of COVID-19. Velez further alleges he met with his supervisor and Human Resources in early March, was sent home "while the company decided what to do about his employment over the weekend," that it was clear he was going to lose his job, and that he thus emailed some colleagues "goodbye." Lastly, he states the company accepted this as his resignation and that the company emailed him regarding acts of misconduct, which he alleges are pretextual.

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Velez brought suit alleging claims of (among other things) intentional discrimination, failure to accommodate, and retaliation under the New York City Human Rights Law (NYCHRL).

Court Determines Employer Merely Offered Different Version of Facts and Rejects COVID-19-Related Arguments

The court determined Velez alleged sufficient facts to state a claim for intentional discrimination because he alleged he had a disability in the form of a serious respiratory virus that may have been COVID-19, and that the company knew he had a disability, was angry with him for being ill and missing work, and terminated him for taking leave. The court held that although the company offered its own version of the facts – arguing Velez was insubordinate and performed poorly – Velez's allegations must be taken as true for the purposes of deciding the motion to dismiss.

Moreover, the court rejected the company's argument that COVID-19 should not be considered a disability for "public policy" reasons. The employer failed to show that treating COVID-19 as a disability would be at odds with the text of the NYCHRL, as the law provides an expansive definition of "disability" to include a "physical . . . impairment," defined as "an impairment of any system of the body." The New York City Human Rights website supports the court's position: "underlying conditions that public health authorities have thus far identified as increasing complications from COVID-19 generally qualify as disabilities under the NYCHRL." Thus, the argument that COVID-19 or COVID-19-like illnesses are not "disabilities" under the NYCHRL is unlikely to succeed in front of a judge.

The court further held that, at this early stage, the employee's version of the facts regarding whether or not the company denied him a reasonable accommodation and retaliated against him for requesting one must be taken as true. The company's attempt to set forth a different version of the facts – by arguing it did not have the opportunity to engage in a discussion with Velez regarding an appropriate accommodation and that Velez was fired for cause – was once again not enough to succeed on a motion to dismiss.

Finally, the company argued that Velez's accommodation claims should fail because the virus was not yet a concern in the city at the time the facts of the case arose and because the governor had not yet declared a state of emergency. The court wholly rejected this argument, stating the prevalence of the virus and timing of the state of emergency are irrelevant. It reasoned that Velez admitted his respiratory disease may not have been COVID-19.

The Takeaways: What Employers Can Learn From *Velez*

1. Employees or former employees need not prove the illness they had was COVID-19. This issue is likely to come up again, as many individuals terminated in the early months of the pandemic may suspect they had COVID-19 but, like Velez, be unable to prove it because tests did not become more accessible until months later.

2. Relatedly, employers should not argue that employees with COVID-19 or COVID-19-related illnesses are not protected under the NYCHRL because such illnesses are likely to be considered "disabilities" under the NYCHRL.
3. How prevalent COVID-19 was at the time of an employee's termination (including whether the city was in a state of emergency) is likely irrelevant to whether an employee was discriminated or retaliated against or provided a reasonable accommodation. Courts are likely to look at the specific facts of a case – the actions of the employee and the employer – just as they would in a non-COVID-19 case. External factors, such as the changing rates of COVID-19, will most likely not help or hurt an employer, and employers should not focus their strategy around what was occurring in the world, state, or city at the time of termination.

Conclusion

For further information about COVID-19-related litigation being filed across the country, you can visit our COVID-19 Employment Litigation Tracker. Fisher Phillips will continue to monitor the rapidly developing COVID-19 situation and provide updates as appropriate. Make sure you are subscribed to Fisher Phillips' Insight System to get the most up-to-date information. For further information, contact your Fisher Phillips attorney.

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