JARDINE LOGAN & O'BRIEN P.L.L.P.
ATTORNEYS AT LAW

651.290.6500
8519 Eagle Point Boulevard, Suite 100
Lake Elmo, Minnesota 55042
info@jlolaw.com

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Long-term COVID May Rise to the Level of Disability under the ADA: Employers' Duty to Accommodate

By: Maya Ortiz

The U.S. Department of Health & Human Services (DHHS) and the Civil Rights Division of the Department of Justice (DOJ) have recently published guidance on "Long COVID" as a disability under the Rehabilitation Act of 1973 § 504 and the American Disabilities Act § 1557[1]. Generally, individuals diagnosed with COVID-19 get better within weeks, whereas some people continue to experience symptoms that can last months after their initial infection date. The Centers for Disease Control and Prevention (CDC) found more than 79 million Americans have been diagnosed with COVID-19, however, studies have found that globally roughly 43% of people with confirmed COVID-19 have experienced COVID-19 symptoms for at least 28 days after infection.[2] Post-COVID symptoms which last four or more weeks have been classified as a condition called "long COVID."[3]

According to the CDC, long COVID can include a range of new or ongoing symptoms that can last weeks, or months after someone is infected with the virus that causes COVID-19 and symptoms can worsen with physical and mental activity. Symptoms of long COVID mimic those of COVID-19 such as fatigue, difficulty thinking or concentrating, shortness of breath, dizziness, heart palpitations, chest pain, joint and muscle pain, and loss of taste or smell. Also, these symptoms may lead to other complications such as damage to organs including the heart, lungs, kidneys, skin, and brain.

Long COVID can be a disability under the ADA if it substantially limits one or more major life activities. According to 42 U.S.C.A. § 12102 (1), an individual has a disability under the ADA if they have: "(a) a physical or mental impairment that substantially limits one or more major life activities of such individual; (b) a record of such an impairment; or (c) being regarded as having such an impairment… ." An individualized assessment must still be conducted on persons affected by long COVID in order to qualify as a disabled person under the ADA.

People whose long COVID qualifies as a disability are entitled to the same protections from discrimination as any other person with a disability under the ADA. This means that employers have a duty to accommodate these individuals when an accommodation is requested. However, caselaw has established a shared responsibility between employers and employees to resolve accommodation requests. According to *Cannice v. Norwest Bank Iowa N.A.*, a disabled employee must initiate the accommodation-seeking process by making their employer aware of the need for an accommodation. 189 F.3d 723, 726 (8th Cir. 1999). Additionally, the employee must provide relevant details of their disability and, if not obvious, the reason that their disability requires an accommodation. Once the employer is made aware of the legitimate need for an accommodation, the employer must "make a reasonable effort to determine the appropriate accommodation." *Cannice,* 189 F.3d at 727. This means that the "employer should first analyze the relevant job and the specific limitations imposed by the disability and then, in consultation with the individual, identify potential effective accommodations." *Id.* Ultimately, employers are required to "make a good-faith effort to seek accommodations." *Fjellestad v. Pizza Hut of Am.*, Inc., 188 F.3d 944, 954 (8th Cir. 1999).

The DHHS and DOJ guidance stated some reasonable accommodations for people whose long COVID qualifies as a disability include allowing a person with dizziness to be accompanied by their service animal, providing additional time on a test for a

student with difficulty concentrating, and pumping gas for a customer with joint or muscle pain. Here, there is no precise test for what constitutes a reasonable accommodation, but an accommodation is unreasonable if it requires the employer to eliminate an essential function of the job. *Dropinski v. Douglas County, Neb.*, 298 F.3d 704, 709 (8th Cir. 2002). Whether an accommodation is reasonable is a question of fact to be decided by a jury. *Fjellestad*, 188 F.3d at 957.

[1]Office for Civil Rights. "Guidance on 'Long Covid' as a Disability under the Ada, Section 504, and Section 1557." HHS.gov, 11 Aug. 2021, https://www.hhs.gov/civil-rights/for-providers/civil-rights-covid19/guidance-long-covid-disability/index.html

[2]Chen, Chen, et al. "Global Prevalence of Post-Acute Sequelae of COVID-19 (PASC) or Long COVID: A Meta-Analysis and Systematic Review." MedRxiv, Cold Spring Harbor Laboratory Press, 1 Jan. 2021, https://www.medrxiv.org/content/10.1101/2021.11.15.21266377v1

[3]"Post-Covid Conditions." Centers for Disease Control and Prevention, Centers for Disease Control and Prevention, https://www.cdc.gov/coronavirus/2019-ncov/long-term-effects/index.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Flong-term-effects.html

Congratulations

Congratulations to **Patrick S. Collins** and **Joseph E. Flynn** who successfully obtained dismissal of all claims for their clients in *Hunter v. City of Crosby, et al.*! Plaintiff James Hunter alleged thirty-one claims of defamation against the former Crosby Chief of Police Kim Coughlin, former Crosby Lieutenant Kevin Randolph and the City of Crosby. Pursuant to the Defendants' motion to dismiss, the district court dismissed all thirty-one of Plaintiff's claims. The Plaintiff appealed and the Minnesota Court of Appeals held that only two of Plaintiff's claims could survive dismissal. Plaintiff's two remaining claims were sent back to the district court. At the end of discovery, Plaintiff elected to voluntarily dismiss his two remaining claims instead of face motions for summary judgment and sanctions. At the end of this long battle, Patrick and Joe successfully obtained dismissal of all claims with prejudice.

Joseph E. Flynn and **Vicki A. Hruby** obtained an order dismissing a § 1983 suit arising out of the alleged failure to disclose Brady material to a criminal defendant. Plaintiff Clarence Lozoya alleged that the Carlton County Attorney's Office failed to disclose Brady material on the arresting police officer prior to entering into a plea agreement with Lozoya. The U.S. District Court found that the U.S. Constitution does not require the government to disclose material impeachment evidence prior to entering a plea agreement with a criminal defendant. As a result, Plaintiff's § 1983 claims failed as a matter of law. *Lozoya v. City of Cloquet, et. al*, 21-cv-0990 (ECT/LIB), 2022 WL 37460 (D. Minn. Jan. 4, 2022).

Data Practices Act Compliance: Data with Dual Public/Private Classifications or Changing Classification

By: Trevor S. Johnson

The Minnesota Government Data Practices Act ("MGDPA") attempts to balance multiple competing interests: that of the public in government transparency, that of individuals in their privacy, and that of the government itself in being able to function effectively. Reflecting the importance of each of these goals (with special emphasis on the first two), the MGDPA imposes significant responsibilities on the government entities to which it applies, which span the spectrum from statewide agencies to local park boards to private parties contracted to perform certain governmental functions. The Act regulates the ways in which government entities create, collect, retain, manage, store, secure and provide access to data and, further, provides for civil actions, administrative sanctions, and even criminal penalties against both government entities and individual personnel in case of violations (see, e.g., Minn. Stat. §§ 13.08, 13.09). Notably, the Act explicitly waives the State's immunity to actions brought under the MGDPA (Minn. Stat. § 13.08, subd. 1).

The MGDPA has competing goals of ensuring extensive public access to certain government data, while requiring robust protection of other government data, which can make compliance difficult. When analyzing a request for data and deciding what must be redacted, it is generally not possible to "play it safe" in either direction, as withholding data in the name of individual privacy and over-disclosing in the name of transparency might equally violate the MGDPA. Additionally, the classification of any particular piece of data is not inherent to the data itself, but rather depends on the timing of the request, the way the data is stored, the identity of the requester, and even the purposes for which the data is kept. Accordingly, data can shift from one classification to another over time or even fall into multiple classifications simultaneously. Successful handling of MGDPA responsibilities requires crafting, and then adhering to, a robust, clearly defined data retention policy and conducting a careful, fact-based analysis of each data request.

A recent advisory opinion (No. 21-002; January 13, 2021) from the Commissioner of Administration illustrates how a seemingly simple request related to a routine proceeding can end up being more difficult than expected, and also illustrates the importance of a data retention policy. In this example, someone made a MGDPA request for a recording of the public comment portion of the ISD 197 school board meeting. A record of a school board meeting is classified as public data (Minn. Stat. § 13D.05, subd. 1(c)). However, the school district declined to release the recording, having decided it was private personnel data because the public comment section included "allegations against district employees." Personnel data is information about an individual "maintained because the individual is or was an employee…of a government entity" (Minn. Stat. § 13.43, subd. 1).

In its analysis, the Commissioner relied on the Minnesota Supreme Court's 2016 decision in *KSTP TV v. Metropolitan Council*, 884 NW 2d 342. In *KSTP*, the TV station sought video recordings from two different Metro Transit busses that included depictions of the bus drivers' conduct as well as that of passengers, pedestrians and other traffic. One of the busses had driven off of the road and crashed, and the driver of the other had gotten into an altercation with a cyclist. In each case, the Council copied the incident video onto DVDs and used it to evaluate the conduct of the drivers. Like the school district, the Council believed the video was private personnel data and declined to release it.

The supreme court's analysis of this data classification question hinged on the statutory phrase "maintained *because*..." Was the data maintained strictly for the purpose of evaluating employee performance? In that case, it could be private personnel data. Or were there also non-personnel-related reasons, such as public safety, for maintaining the video? In that case it would be public. Complicating the matter, the court determined that the Council may have had different reasons for maintaining the video at different points in time. Each bus contained a hard drive that recorded video on a continuous loop, storing 330 hours of video before recording over the oldest data. If the Council wanted to preserve the video beyond that time period for any reason, such as to evaluate an employee's performance, the Council needed to copy the relevant

video to a DVD. The court observed that the Council may have had a "variety of reasons" for maintaining the last 330 hours of video from each bus, whereas video of an incident copied to a DVD may have been maintained "exclusively for a personnel purpose." Therefore, if the data was requested within the 330-hour window when it still existed on the bus's hard drive, it was probably public, but if the data was requested after it had been automatically recorded over on the hard drive, and now only existed on a DVD used for evaluating the driver's performance, it was probably private personnel data.

Returning to the 2021 advisory opinion regarding the school board meeting, the Commissioner of Administration noted an additional issue – the possibility that the district maintained multiple copies of the recording. If the district maintained a copy in an employee's personnel file for evaluation or discipline purposes, and maintained another copy simply as a record of the open meeting, the personnel copy would be private and the other public. As the supreme court has observed, "it may seem anomalous to have data classified as public for one purpose and confidential for another purpose. But we see nothing in the text of the MGDPA that prohibits this outcome" (*Harlow v. State Dept. of Human Services*, 883 N.W.2d 561, 568). Ultimately, the Commissioner concluded that it did not have enough information to determine whether the District properly responded to the request.

In 2016, Justice Lillehaug, joined by Chief Justice Gildea, dissented in the court's decision in *KSTP-TV*, noting that the holding allowed "public data – images of events that occurred in public… – [to] morph into private data, and thereby become inaccessible to the public." *KSTP-TV* at 351. Justice Lillehaug went on to speculate that "today's decision will be taken by some government entities as a free pass to conceal that which should be public. If government data…might show misconduct, and disclosure might cause embarrassment or worse, then today's decision enhances the temptation of the entity to stash the data in an employee's personnel file. What is public becomes private—perhaps forever." *Id.*, at 354. Notably, the decision in *KSTP-TV* was 3-2, as Justices Chutich and Hudson took no part.

Justice Lillehaug focused on a potential negative impact to government transparency. However, the decision and dissent in *KSTP-TV*, as well as the recent advisory opinion with the school district, highlight an important positive takeaway for government entities: your data retention policy matters. Government entities should be mindful that the way they internally classify and store data, and the way their policies describe the purposes for which data is maintained, will play a significant role in determining the ultimate classification of the data by a court. Many types of data are not inherently public or private but take on those labels because of how they are used. A data retention policy is much more than just a deletion schedule. When properly designed, the data retention policy should identify *why* data is being maintained. In the examples cited above, the confusion, and litigation in the cases of *KSTP-TV* and *Harlow*, arose because of a lack of clarity within the governmental organization about why the data was being maintained. As a result, the data's classification was called into question. The MGDPA is complex and confusing. A strong data retention policy can be a powerful tool to ensure that individuals' private data is protected, government transparency is promoted, and problematic litigation is prevented – allowing the government entity to function effectively.

About the Authors

Maya Ortiz
Law Clerk
mortiz@jlolaw.com
651-290-6533

Maya Ortiz is a Law Clerk at Jardine, Logan & O'Brien, P.L.L.P. She is in her second year of law school at the University of St. Thomas School of Law, Minneapolis, Minnesota. Her focus areas are employment law, health law, and government liability.

Trevor Johnson
Associate
tjohnson@jlolaw.com
651-290-6534

Trevor is an Associate Attorney at Jardine, Logan & O'Brien, P.L.L.P. He received his J.D. from the University of St. Thomas School of Law, Minneapolis, Minnesota. Trevor's practice is focused on Civil Litigation.

About the Firm

Jardine, Logan & O'Brien, P.L.L.P., is a mid-sized civil litigation law firm that has handled some of the region's largest and most difficult disputes with outstanding results for clients. Litigation has always been our primary focus. With trial attorneys admitted in Minnesota, Wisconsin, North Dakota, South Dakota, and Iowa our firm has the ability and expertise to manage cases of any size or complexity. We are trial lawyers dedicated to finding litigation solutions for our clients.

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