

# COVID-19 Employment Cases – What is the Positivity Rate?



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# COVID-19 Employment Cases

## Positivity Rate

- I could explain it this way....



sensitivity, recall, hit rate, or true positive rate (TPR)

$$TPR = \frac{TP}{P} = \frac{TP}{TP + FN} = 1 - FNR$$

specificity, selectivity or true negative rate (TNR)

$$TNR = \frac{TN}{N} = \frac{TN}{TN + FP} = 1 - FPR$$

precision or positive predictive value (PPV)

$$PPV = \frac{TP}{TP + FP} = 1 - FDR$$

negative predictive value (NPV)

$$NPV = \frac{TN}{TN + FN} = 1 - FOR$$

miss rate or false negative rate (FNR)

$$FNR = \frac{FN}{P} = \frac{FN}{FN + TP} = 1 - TPR$$

fall-out or false positive rate (FPR)

$$FPR = \frac{FP}{N} = \frac{FP}{FP + TN} = 1 - TNR$$

false discovery rate (FDR)

$$FDR = \frac{FP}{FP + TP} = 1 - PPV$$

false omission rate (FOR)

$$FOR = \frac{FN}{FN + TN} = 1 - NPV$$

Threat score (TS) or Critical Success Index (CSI)

$$TS = \frac{TP}{TP + FN + FP}$$

But instead, I have found this  
RANDOM cast of characters



# Since ADA claims are the most common... What is the ADA?

- Americans with Disabilities Act
- Prohibits discrimination against individuals with a disability
- Disability defined as “a physical or mental impairment that substantially limits one or more major life activities”



*Is COVID-19 a “disability”?*

# Protected under the ADA?



- This is Bart.
- Bart was diagnosed with COVID-19.
- Bart received supplemental oxygen for breathing difficulties.
- Bart now has shortness of breath, associated fatigue, and other virus-related effects that last, or are expected to last several months.

**Does Bart have a disability?**



# Protected under the ADA?



- This is Lorne
- Lorne is diagnosed with COVID-19.
- Lorne is asymptomatic.

Does Lorne have a disability?



# *Peeples v. Clinical Support Options, 3:20-cv-30144-KAR (D. Mass. Sep. 16, 2020).*



- This is Davenport.
- Davenport has moderate asthma.
- Davenport has not been diagnosed with COVID-19.
- Davenport's doctor says that he has a higher risk of severe health problems from COVID-19.

**Does Davenport have a disability?**



# Protected under the ADA?



- This is Dustin.
- Dustin is diagnosed with COVID-19.
- Dustin experiences congestion, sore throat, fever, headaches, and gastrointestinal discomfort.

Does Dustin have a disability?





# *Parker v. Cenlar FSB*, No. CV 20-02175, 2021 WL 22828 (E.D. Pa. Jan. 4, 2021).

- This is Brenden.
- Brenden is Dustin's roommate.
- Remember: Dustin is diagnosed with COVID-19.
- Brenden has been exposed to COVID-19.



**Does Brenden have a disability?**

# *Matias v. Terrapin House, Inc.*, No. 5:21-CV-02288, 2021 WL 4206759 (E.D. Pa. Sept. 16, 2021)



- This is Babs.
- Babs texts her supervisor that she is feeling ill and had lost her sense of taste and smell.
- Babs is diagnosed with COVID-19.

**Does Babs have a disability?**

- Babs is terminated because she is “not a good fit.”

**Does Babs have a claim under the ADA?**



# Courts are relying heavily on Administrative Guidance



- What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws
- Guidance on “Long COVID” as a Disability Under the ADA, Section 504, and Section 1557



# Back to the ADA

- The ADA requires an employer to provide a reasonable accommodation unless it poses an undue hardship.
- Requires an interactive process.

*How does COVID-19 fit in?*



# *Peeples v. Clinical Support Options, 3:20-cv-30144-KAR (D. Mass. Sep. 16, 2020).*



- Remember Davenport with moderate asthma?
- Davenport’s employer says “all managers get back to work”
- Davenport asks to continue telework.
- Employer says no, here are some masks.

**Does Davenport have a claim under the ADA?**



# *EEOC v. ISS Facility Services, Inc., No. 1:21-CV-3708 (N.D. Ga. 2021), filed 9/7/21*



- This is Scott and Charlie.
- Scott has COPD and hypertension.
- Scott and Charlie’s employer says “return to work.”
- Charlie gets to continue telework.
- Scott asks to continue telework 2 days per week. **YOU’RE FIRED!**

**UH OH...**



# *EEOC v. ISS Facility Services, Inc.*, No. 1:21-CV-3708 (N.D. Ga. 2021), filed 9/7/21

- First ADA accommodation suit filed by the EEOC
- I sure hope the defendant has a good attorney...



# Lessons from these cases?

- COVID-19 may be a disability under the ADA
  - Long COVID and “regarded as” claims
  - Watch for administrative guidance
- Telework may be a reasonable accommodation under the ADA
  - Treat employees equally





# Thank you,



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# Telework: Pre-2020

- “most jobs require the kind of teamwork, personal interaction, and supervision that simply cannot be had in a home office situation.”
  - *EEOC v. Ford Motor Co.*, 782 F.3d 753 (6th Cir. 2015).
- One’s attendance at work is a “rather common-sense idea.”
  - *Semper v. Provident St. Vincent Med. Ctr.*, 675 F.3d 1233 (9th Cir. 2012).



# COVID-19 employment lawsuits

- 4,689 Federal and State cases filed
- 2 surges in 2021
- Texas - 193 cases filed (6<sup>th</sup>)
- Small employers (<50) sued more often

Nature of Case*	Federal	State
Discrimination	987	1,288
Retaliation	870	1,295
Leaves of Absence	832	415
W/H	357	670
Other Civil Litigation	336	873
Workplace Safety	285	767
Constitutional Claims	217	76
(Unspecified)	111	119
Privacy Rights	59	38
Labor Relations	58	46
ERISA	26	1
WARN	21	3
Arbitration	17	5



<https://www.littler.com/publication-press/publication/covid-19-labor-employment-litigation-tracker>