

## No ADA Protection For Termination Due To Fear Of Swine Flu

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Earlier this month, the U.S. District Court for the District of Minnesota rejected a former employee's "respectable argument" that his termination was unlawful under the Americans with Disabilities Act (ADA) because it was premised on the employer's fear the plaintiff had been exposed to the swine-flu virus while in Mexico. Specifically, in [Valdez v. Minnesota Quarries, Inc.](#), the District Court examined the "interesting question of whether someone who is regarded as having an impairment that...is no more serious than seasonal flu...is "disabled for purposes of the ADA..."

Plaintiff Francisco Valdez had worked at Minnesota Quarries, Inc., doing business as Mankato Kasota Stone, Inc. ("Kasota Stone") for approximately 14 years and appeared to have been a good employee. In 2009, while an employee, Valdez traveled to Mexico to visit his dying sister. Valdez, through his son, notified Kasota Stone that he would miss work due to a family emergency. Unfortunately, Valdez arrived in Mexico after his sister died. Valdez stayed for the funeral and returned home.

After arriving home, Valdez called his immediate supervisor about returning to work. Valdez's supervisor transferred him to the human resources director, who advised Valdez that he was terminated due to the company's fear that he had contracted swine flu while in Mexico. Valdez also was told he was fired for violating the company's no call/no show policy.

Valdez commenced litigation, alleging, among other things violation of the ADA. In analyzing the employer's motion for summary judgment, the District Court noted that Valdez's argument that Kasota Stone "regarded" him as disabled in violation of the ADA. Under the "regarded as" prong for purposes of the ADA, the plaintiff must only show that he was regarded as having an impairment; he need not prove that the impairment (if he had it) would have limited a major life activity. The District Court, however, noted a narrow affirmative defense to this claim: an employee is not "regarded as" disabled if the impairment he is regarded as having is both "transitory and minor." Thus, the crux of the District Court's decision was whether the impairment was "transitory and minor."

According to the District Court, an impairment is "transitory" if it has an actual or expected duration of 6 months or less. And, while the ADA offers no guidance as to what is considered "minor," the legislative history suggests it excludes "common ailments like the cold or flu" from being considered disabilities under the "regarded as" prong. Although Valdez argued that, in 2009, the swine flu was *perceived* to be more serious than seasonal flu, the District Court rejected that argument, stating it must look only at the *reality* and not the perception. Because the reality is that swine flu is objectively transitory and minor, the District Court refused to find Valdez was "regarded as" disabled in violation of the ADA.

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