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Recent Seventh Circuit Decision Spotlights Some Limitations on Prohibitions Over Discussing Medical Information

By Lynn Urkov Thorpe

The Americans with Disabilities Act ("ADA") protects employees' confidential medical information from disclosure. However, as a recent decision by the United States Court of Appeals for the Seventh Circuit (covering Illinois, Indiana and Wisconsin) points out, there are limits to that protection.

In *Equal Employment Opportunity Commission v. Thrivent Financial for Lutherans*, 700 F.3d 1044 (7th Cir. 2012), the EEOC filed suit against Thrivent Financial for Lutherans ("Thrivent"), alleging that its disclosure of medical information about a former employee, Gary Messier, violated the ADA. Mr. Messier had been placed into a temporary programmer position at Thrivent through a technology consulting company, Omni Resources, Inc. ("Omni"). Several months into that assignment, Mr. Messier failed to report to work and had not notified anyone at Thrivent about his absence. Mr. Messier's department head at Thrivent called Omni to see if it had information about his absence, but they did not.

Mr. Messier's account manager at Omni emailed Mr. Messier, asking Mr. Messier to call him or the department head at Thrivent and stating that they needed to know what was going on and that Thrivent was looking for him. Later in the day, Mr. Messier responded in an email to both Thrivent and Omni, stating that he had been in bed all day with a severe migraine and that he had not had one that severe in six years. He described the medication he was taking and apologized for the late notice, but he said that when he gets a migraine that severe, he is bed ridden until he can get it to a level where he

can function. He also revealed that the migraines were the result of a major car accident he had been involved in years prior.

After this absence, Mr. Messier returned to work. One month later, he quit the job and sought new employment. However, Mr. Messier soon started to suspect that Thrivent was saying something negative about him in response to reference checks because three different prospective employers lost interest in him after the reference check process. He hired an on-line reference checking agency to find out what Thrivent was saying about him. The agency posed as a potential employer, and in the course of its conversation with Thrivent, Mr. Messier's former boss said that Mr. Messier "has medical conditions where he gets migraines. I had no issue with that. But he would not call us. It was the letting us know."

The EEOC filed suit against Thrivent, alleging it had violated the ADA by informing prospective employers about Mr. Messier's confidential medical information obtained from a medical inquiry under 42 U.S.C. § 12112(d). That section of the ADA addresses confidentiality of medical examinations and inquiries, and it regulates what may be disclosed and to whom (for example, it is permissible to tell supervisors and managers of necessary restrictions on work duties or necessary accommodations). The court determined that the first step in the inquiry was to decide whether Thrivent even received the medical information through a medical inquiry because if it did not, then this provision did not apply.

The EEOC argued that the disclosure of Mr. Messier's migraine headaches was "done in the context of a medical inquiry of Mr. Messier by Thrivent," an argument the court rejected. Instead, the court found that Thrivent learned of Mr. Messier's medical condition through an email, and it seemed "unreasonable to assume that an employer checking in on his absent employee has the intent to request or acquire medical information."

On appeal, the EEOC pressed another argument - that the confidentiality requirements under the ADA protect all medical information revealed through "job-related" inquiries. The court rejected that argument too, noting that the broad definition of "inquiry" urged by the EEOC - any generalized inquiry - was not supported by the statute. Rather, the statute addresses "medical examinations and inquiries," which, as opposed to the broad definition pressed by the EEOC, meant only inquiries and examinations related to a medical condition. In addition, there was no evidence here that either Thrivent or Omni knew that Mr. Messier had a medical condition or that his absence was due to a medical condition when they inquired about his absence. Because the email to Mr. Messier was not a medical inquiry, Thrivent was not required to treat the medical information that Mr. Messier disclosed in the response as a confidential medical record. Thus, there was no ADA violation.

This decision points out the importance of carefully reviewing the language in the ADA to determine the nature and extent of your obligations as an employer. While there was no ADA violation here, employers must be

vigilant about maintaining the confidentiality of employee medical information regardless of how the employer comes to learn of the information. Careless disclosure may not only give rise to a claim under the ADA, but may result in HIPAA violations and potential liability under privacy torts. The decision also underscores the need for manager training. With reference policies put into place, and guidelines provided to managers addressing what information should and should not be disclosed in response to a job reference inquiry, companies may be able to avoid the time and expense of litigating this type of claim.

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