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Employment Policies and Doctor's Note Requirement

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This column discusses recent trends and developments in ordinances and policies. Earlier this year, the U.S. Court of Appeals for the Sixth Circuit looked at a local government policy that required city employees using sick leave to provide a doctor's note, in the context of disability laws.

Directive 3.07 § III(H)(1)(c), adopted by the City of Columbus, Ohio set out the procedures for an employee who sought to take sick leave prior to the start of his or her shift. If more than three days of sick leave were used for illness, if more than two days' leave was taken due to illness in the employee's immediate family, if an employee was placed on restricted duty, or if the employee's supervisor had requested it, the employee was to submit a physician's note to his or her immediate supervisor. Further, in most cases, the note had to specify the "nature of the illness" and confirm that the employee was capable of returning to regular duty (in the case of family illness, the note had to state the nature of the family member's illness and that the employee had been required to care for the family member).

Two groups of City of Columbus police division employees brought a class action lawsuit, claiming that the Directive, due to the mandatory disclosure, and the funneling of confidential medical information and a diagnosis through immediate supervisors, violated the Rehabilitation Act, 29 U.S.C. § 791, *et seq.*, and the privacy provisions of the First, Fifth, and Fourteenth Amendments.

On the parties' cross motions for summary judgment, the district court held that the plaintiff classes were entitled to a preliminary injunction under the Rehabilitation Act, as they were substantially likely to succeed on the merits of their request for permanent injunctive relief. Since the Rehabilitation Act incorporated the limitations on disclosure of medical information contained within the Americans with Disabilities Act (ADA), 42 U.S.C. § 12112(d) *et seq.*, the court relied on the ADA's confidentiality provision, § 12112(d)(4)(A) ("a covered entity shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity"). The Rehabilitation Act encompassed these ADA provisions because "the limited disclosure protection [provided by these ADA provisions] further[ed] the anti-discrimination thrust of both statutory schemes."

A plaintiff did not need to show that he or she was disabled to challenge a medical inquiry or examination under § 12112(d)(4)(A), and, citing *Conroy v. New York State Dep't of Correctional Serv.*, 333 F.3d 88 (2d Cir. 2003), the court held the fact that the Directive required a general diagnosis was sufficient to trigger the protections of the ADA, in that general diagnoses might expose individuals with disabilities to employer stereotypes. The Directive improperly provided supervisors with confidential medical information even when they had no reason to possess such knowledge, particularly in light of the fact that the City had a human resources department. Addressing the defense of "business necessity," the district court held that the City had to establish that its examination or inquiry genuinely served the asserted business necessity and was no broader or more intrusive than necessary. In the absence of evidence as to the costs of sick leave usage or alleged abuse, however, the City failed to show that the Directive served the business necessity of tracking, deterring, and saving the cost of sick leave abuse.

On appeal, the Sixth Circuit reversed, in *Lee v. City of Columbus, Ohio,* 636 F.3d 245 (6th Cir. 2011). It agreed with the district court (and other courts) that the ADA's limitations on the disclosure of medical information in § 12112(d) were incorporated by reference into the Rehabilitation Act, but disagreed on what constituted a "disability-related inquiry" under that section. Critically, the Rehabilitation Act, unlike the ADA, permitted an employer to make a decision because of a handicap if the handicap was not the *sole* reason for the decision. Referring to an EEOC enforcement guidance, EEOC Notice 915.002, the court held that "the requirement that an employee provide a general diagnosis—or in this case, an even less specific statement regarding the 'nature' of an employee's illness," was not tantamount to an inquiry as to whether such employee was an individual with a disability or as to the nature or severity of the disability under § 12112(d)(4)(A). "The mere fact that an employer, pursuant to a sick leave policy, requests a general diagnosis that may tend to lead to information about disabilities falls far short of the requisite proof that the employer is discriminating solely on the basis of disability." Because the inquiry was "not ipso facto a prohibited inquiry," and absent evidence that the inquiry was intended to reveal, or necessitated revealing, a disability, the Directive did not trigger the protections of § 12112(d)(4)(A).

Even assuming this was not the case, however, the Enforcement Guidance clearly permitted an employer to ask an employee to provide a doctor's note or other explanation, as long as it had

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term disability verification, or other policies that may require employees to present medical or family health information.

The "safe harbor" language provides employers with protection from liability in the event of the inadvertent receipt of genetic information. However, if genetic information is inadvertently obtained, the employer must ensure that the information is maintained as confidential and not improperly used or disclosed.

Workplace discussions. Another risk area is management inadvertently becoming aware of family medical information through workplace discussion. Such "water cooler" talk regularly includes discussions of health issues, including family history. Technically, this is genetic information under GINA II, and when a supervisor hears such information, that supervisor's knowledge is imputed to the employer.

GINA II recognizes that casual conversations in the workplace are both common and generally outside the control of the employer. Therefore, it recognizes that a supervisor's innocent question, "How is your family?" to an employee is *not* a request for genetic information and does not violate GINA, even if the employee launches into a litany of how sick everyone in the family has been (for four generations!). Casual conversation does not trigger the law, nor does voluntary conversation or revelations. Talk about issues of common knowledge (i.e., "I hear Betty's mom is in the hospital for lumbago") does not trigger the law.

Then how *can* casual conversation morph into a GINA II violation? At times, social conversations which include an employee's genetic information can proceed to become a matter of ongoing discussion among the employee's managers. It can take on a life and significance: a supervisor may make a note of the conversation, and that note may find its way into the employee's file (or, more commonly, into an email to other managers). At this point, the information is no longer part of casual conversation and is now a part of the company *records*; it may be viewed as information used by the employer in making work-related decisions.

Supervisors can also run afoul of GINA II through follow-up questioning. Certain managers want to engage in further conversation about a family member's medical problems and may, for purely sympathetic motives, probe for details and more family history. Managers may even share stories of their own family members' similar medical traumas to show compassion. Nonetheless, it is a supervisory probe into genetic information. Even if the employee seems engaged and appreciative of the supervisor's caring inquiries, things can change. When that employee later receives a poor evaluation, is disciplined, is not given a promotion or is discharged, that conversation may be re-characterized as "invasive" and an "improper interrogation about genetic information." In short, be sympathetic, but don't probe.

Unfortunately, some employers have used genetic information to discriminate. There are numerous Americans With Disabilities Act cases in which casual pieces of office conversation led management to perceive that an employee is disabled and should not be doing a particular job. Often, these have been erroneous perceptions that resulted in adverse action. The courts are sensitive to this issue and it was one of the reasons leading to the passage of GINA II.

It is important to note that the rules regarding discovery of electronic communication force the revelation of all notes, emails and records when there is litigation. Once a supervisor's notes and emails about an employee's family medical situation surface, there may be a legal presumption that management was "keeping track" of, or "giving significant weight to," the genetic information. It may be difficult to prove that the genetic information did not play a role in the negative decisions made about that employee.

Inadvertent disclosure. Many other laws require confidentiality of medical, financial, personal identity and other sensitive information (e.g., ADA, HIPAA, FMLA, Rehabilitation Act). GINA II is similar. Any information must be carefully and securely kept, and shared only on a proper need-to-know basis. Confidentiality is inadvertently breached in the same way many other laws are violated (carelessness, loose talk, lax care of records, a supervisor in a small town discussing workplace concerns at home, followed by her 11-year-old spreading the medical information all over school and church).

Pay attention to the line between sympathy and improper probing, and avoid creating improper documentation. Emphasize supervisory confidentiality, and the need to avoid careless conversation and emails about sensitive information. Provide training for management and administrative staff about GINA II and other confidentiality laws in which inadvertent use and disclosure of information create liability.

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a policy or practice of requiring all employees to do so. The Directive was, in fact, a "universal sick-leave policy applicable across the board" to all employees, disabled or not, who used sick leave. There was, moreover, no requirement in either the ADA or the Rehabilitation Act that differentiated between employers based on the existence of a separate human resources department.

What guidance is available to employers from this ruling? First, make sure your doctor's note/medical documentation policy is, in fact, universally applicable to employees. Consider implementing a standard form that the doctor's office can fill out, so as to reduce the likelihood that disclosure goes beyond the employer's need for verification. Further, some commentators note that asking whether the employee is able to perform essential job functions makes it more likely that the inquiry will be seen as a job-related business necessity. ML