What you say can and will be held against you: ADA confidentiality requirements extend beyond termination of employment

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The Americans with Disabilities Act (ADA) requires any information regarding employees obtained through a medical inquiry be kept confidential.[1] Such information must be recorded on separate forms and kept as a confidential medical record in a different location than general employee personnel documents. This confidentiality requirement extends beyond an employee's tenure with the employer, as highlighted by a recent federal circuit court case involving Thrivent Financial for Lutherans ("Thrivent").

Thrivent employed Gary Messier as a Business Analyst. During his employment with Thrivent, Messier consistently informed Thrivent any time he would be late to, or absent from, work. One morning, however, Messier did not arrive for work or call to discuss his absence with his supervisor. In response to a supervisor email requesting information about his absence, Messier volunteered that he had been in bed with a debilitating migraine all day, which prevented him from calling in, but that he would be back to work the next day. He returned the next morning, but, approximately one month later, quit his job with Thrivent.

As Messier's difficulty in finding his next position continued, he decided to hire a reference-checking agency. When the agency called Messier's former supervisor at Thrivent, it was told that "Messier has medical conditions where he gets migraines. [Thrivent] had no issue with that. But he would not call us. It was the letting us know."

Messier then filed a complaint with the Equal Employment Opportunity Commission (EEOC) against Thrivent. Following an investigation of Messier's disability discrimination charge, the EEOC sued Thrivent on Messier's behalf, arguing that Thrivent had violated the ADA by not treating information on Messier's migraines as a confidential medical record.[2]

Medical vs. job-related inquiries

The EEOC argued to the court that the term "inquiries" in the ADA confidentiality provisions should be liberally interpreted to include *any* job-related inquiry. The court disagreed. The court reasoned that the context surrounding the confidentiality provisions—which focused exclusively on medical inquiries—demonstrated that the plain meaning of the ADA limits its confidentiality provisions to inquiries requesting *medical* information.

The court distinguished other situations because they involved employers requesting information from employees "*with some preexisting knowledge that the employee was ill or physically incapacitated*." However, there was no evidence that Thrivent surmised that Messier's absence was due to a medical condition, or that it had any knowledge of Messier's medical condition when his supervisor emailed him to ask about his absence. The court held that because Thrivent did not learn of Messier's condition through a *medical* inquiry, it did not violate the ADA confidentiality provisions when it shared information about Messier's condition. The ADA confidentiality provisions did not apply to the information Thrivent obtained from Messier on that occasion, because it made a *job-related* inquiry without knowledge that Messier had a medical condition.

So how do you know if information was obtained through a job-related or medical inquiry? If you know that an employee has a medical condition, your inquiry is not solely job-related. Even if you don't ask about the employee's medical condition, you should assume that you are subject to ADA confidentiality requirements and must protect any employee medical information you receive based on your inquiry. Do not place your organization at risk for the EEOC or a court to conclude that your inquiry was made with the employee's medical condition in mind, or that you were actually asking about the employee's disability while wording your question around job-related issues.

ADA confidentiality for medical info

If information is obtained through medical inquiry, with whom can this information be shared? The ADA confidentiality requirements clarify that employee medical information can be shared in three situations:

(1) with supervisors or managers to establish medically based restrictions on work duties or to provide necessary accommodations for the employee;
(2) with first aid or safety personnel who might be required to provide emergency treatment to the employee; and
(3) with government officials investigating ADA compliance.

Importantly, *this list does not include any one calling for a reference check about a current or former employee!* ADA confidentiality requirements extend beyond the end of an individual's employment.

If the information that Thrivent shared with the reference-checking firm had been based on any *medical* inquiry Thrivent had made to Messier, it's likely the court would have ruled differently in this case. Employers should treat employee medical information as confidential and refrain from mentioning employee health conditions to anyone calling for a reference check.

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[1] 42 U.S.C.A. § 12112(d)(3)(B).

[2] *Equal Employment Opportunity Commission v. Thrivent Financial for Lutherans*, No. 11-2848, 2012 U.S. App. LEXIS 23821 (7th Cir., Nov. 20, 2012).