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Is It Confidential If The Employee Told Us About It?

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Most employers understand that employee medical information should be given confidential treatment so as to prevent potential claims under the Americans with Disabilities Act (ADA), Health Insurance Portability and Accountability Act (HIPAA) and various state law privacy protections. But what happens when the employee is voluntarily disclosing his or her medical information? A recent federal district court case brought by the federal Equal Employment Opportunity Commission (EEOC) sheds light on a covered employer's obligations under the ADA and serves as a helpful reminder why "name, rank and serial number" is the appropriate response to an inquiry on one of your former employees.

In *EEOC v. Thrivent Financial for Lutherans*, 2011 WL 2444060 (E.D.Wis. June 15, 2011), Gary Messier was employed as a temporary programmer by Omni Resources, Inc. Omni assigned Messier to work at Thrivent pursuant to a contract between Thrivent and Omni. On November 1, 2006, Messier did not report for work at Thrivent, which caused Thrivent to contact Omni. Messier's supervisor at Omni e-mailed Messier:

> *Gary,*
>
> *Give us a call, and give [your Thrivent supervisor] a call. We need to know what's going on. [Thrivent] called here looking for you.*

Later that same day Messier sent a lengthy e-mail response to Omni and Thrivent stating that he had been "in bed all day with a severe migraine" and detailing various medical issues and treatment arising out of a major car accident in 1984. Messier quit his job with Omni on December 4, 2006, and began looking for other work. Messier suspected his former supervisor at Thrivent was providing a negative reference, causing Messier to hire a reference checking agency. A representative of this agency called Messier's supervisor at Thrivent, who disclosed information about Messier's migraine condition to the representative.

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The EEOC filed suit against Thrivent, alleging the disclosure of Messier's medical information to potential employers violated the ADA. Section 102(d)(4)(A) of the ADA prohibits employers from making disability-related inquiries "unless such . . . inquiry is shown to be job-related and consistent with business necessity." Medical information obtained from such inquiries is subject to the ADA's confidentiality protections. Most courts have concluded that the ADA's confidentiality requirements do not protect medical information that is voluntarily disclosed by the employee because it's not acquired as a result of a medical inquiry.

The EEOC contended that if the employer initiates the inquiry—even if the inquiry doesn't expressly ask for medical information—then any employee response containing medical information is entitled to protection. The district court disagreed, and entered judgment in favor of Thrivent. As the court explained, "an employee's disclosure is voluntary [and therefore not protected under the ADA] if the disclosure is not preceded by any request or demand for medical information by the employer. Which party initiates the conversation that leads to a disclosure is not relevant; which party initiates or requests the employee's actual disclosure of medical information is determinative."

Lesson: The *Thrivent* case helps employers distinguish between what is and what is not protected confidential information under the ADA. It is important to note that while Thrivent appears to have escaped liability under the ADA, it still faces potential liability under state privacy laws given the unauthorized disclosure to a third-party potential employer. Had Thrivent simply followed a strict policy of no response or limited response (name, dates of employment, positions held) to the reference checking agency, it could have avoided paying thousands of dollars in attorneys' fees defending against the EEOC's lawsuit and possibly those yet to come.

With the adoption of the recent amendments to the ADA, the federal EEOC has commenced a series of lawsuits seeking to expand the boundaries of the ADA. Employers need to be especially vigilant in maintaining the confidentiality of employee medical information and adopting and following a policy as to who will respond to inquiries on former employees and how they will respond. The remedies available to a prevailing employee under the ADA are significant. An ounce of prevention in this regard will literally save pounds of headaches, attorneys' fees and potential damage awards.

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