NO. 89635-6

SUPREME COURT OF THE STATE OF WASHINGTON
[Court of Appeals No. 69295-0-1]

TIMOTHY P. MERRIMAN

Petitioner,

v.

WHATCOM COUNTY,

Respondent.

REPLY TO ANSWER TO AMENDED PETITION FOR REVIEW

Timothy P. Merriman
4214 State Route 9
Sedro-Woolley, WA 98284
Phone & FAX (360) 399-1750
timothy.p.merriman@gmail.com
Pro Se Petitioner

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I. IDENTITY OF REPLYING PARTY

This reply is by Timothy P. Merriman, the Petitioner who is Pro Se, and who asks this Court to accept review of the Court of Appeals decision and denial of reconsideration designated in Part II.

II. COURT OF APPEALS DECISION

Merriman v. Whatcom County, No. 69295-0-I (Wash. Ct. App. Sep 9, 2013) *Recons. Denied* Oct 22, 2013. (App. A and B to Pet.)

III. ISSUES PRESENTED FOR REVIEW

"A party may file a reply brief to the opposing party's answer to a petition for review only if the answer has raised new issues not addressed in the original petition. RAP 13.4 (d)." Chevron U.S.A., Inc. v. Cent. Puget Sound Growth Mgmt. Hearings Bd., 156 Wn.2d 131, 139 Fn 6 (2005). In Blaney v. Int'l Ass'n of Machinists & Aerospace Workers, Dist. No. 160, 151 Wn.2d 203, 210 at Fn. 3 (2004) an issue was raised by a footnote to Ms. Blaney's answer. Mention of an issue in the answer is enough to raise it. See Staats v. Brown, 139 Wn.2d 757, 785 (2000) Here the County raises two issues in the body of its answer that Merriman should be given an opportunity to address and state their significance to the decision.

1. Whether Merriman has a "rather strained and novel interpretation" of Unrepresented Resolution ("A Resolution in the Matter of Adopting a Salary Schedule and Policies for Unrepresented Whatcom County Employees for the Year 2006") (App. D to Pet., CP 398-413) Sec. 6.9 (App. D to Pet., CP 407), and whether the Court inferred a medical documentation requirement for unpaid leave as suggested by the County. (Ans. to Pet. for Rev. pg. 3)

2. The quality of the statements of facts in the opinion of the Court of Appeals is raised as a new issue by the County, who characterizes them as "excellent". (Ans. to Pet. for Rev. pg. 1) Merriman says many of the crucial statements of facts were not based on the evidence, which resulted in the making of a faulty decision.

IV. STATEMENT OF THE CASE

Merriman incorporates herein the statement of the case in his "Petition for Review".

V. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. Merriman does not have a "rather strained and novel interpretation" of Unrepresented Resolution ("A Resolution in the Matter of Adopting a Salary Schedule and Policies for Unrepresented Whatcom County Employees for the Year 2006") (App. D to Pet., CP 398-413) Sec. 6.9 (App. D to Pet., CP 407), and the Court did not infer a medical documentation requirement for unpaid leave, as suggested by the County. (Ans. to Pet. for Rev. pg. 3)

Respondent's attorney Dan Gibson did the legal review of the Unrepresented Resolution for the County Council before it was passed (CP 398), and was in position to shape its language. Regarding the alleged

"rather strained and novel interpretation" by Merriman he says, "There is no suggestion in the County's policy that a person could qualify for up to one year's leave simply by requesting it and stating without any confirmation that it was medically justified." (Ans. to Pet. for Rev. pg. 3) Merriman never interpreted it that way, the County didn't apply it that way, nor does the policy referred to say that. Unrepresented Resolution Sec. 6.9 "Leave for Illness or Injury" (App. D to Pet., CP 407) says:

> 6.9 Leave for Illness or Injury. Non-represented employees may request leave for major illness or injury utilizing Family/Medical Leave, accrued leaves, and unpaid leaves, as appropriate. Total time for the leave, which will include all time away from work, may be extended up to a maximum of twelve (12) months with the mutual consent of the department head and the Executive's Office. An employee who returns to work will be credited for length of return time within the twelve (12) month limit if the employee must go back on disability for the same illness/injury.

The federal FMLA and Washington's Family Leave Chapter 49.78 RCW each allow medical certifications for the first twelve weeks regardless of the type of leave used, and the County required them. (See Unrepresented Resolution 6.7 "Family Leave" (App. D to Pet., CP 407)) The County can and did require "medical documentation" for the use of accrued sick leave under Unrepresented Resolution Sec. 6.1.3 (App. D to Pet., CP 404), which is one form of accrued leave. Other forms of accrued leave are Unrepresented Resolution 6.2 "Vacation" (App. D to Pet., CP 405) and Unrepresented Resolution 6.3.1 "Personal Holiday" (App. D to Pet., CP 406), which require no medical certification for their use.

Therefore, not stating that medical documentation is required in Unrepresented Resolution 6.9 (App. D to Pet., CP 407) was an intended omission and to be expected. In the case of unpaid leave, the discretion of the department head and the Executive's Office was clearly thought to be sufficient, as no other section of the Unrepresented Resolution refers to unpaid leave.

Merriman submitted medical documentation during the FMLA /Family Leave and sick leave portions of his leave. (CP 694-695 on Mar 19, CP 575 on Apr 23) He voluntarily submitted medical documentation on Jun 4 (CP 595) because he wasn't sure that his sick leave had been exhausted. Those documents stated his need for the leave he was seeking, which would include several workdays of unpaid leave. The County did not ask for medical documentation while he was using vacation leave, from Jun 3 to Sep 22, when HR Rep Keeley misrepresented that he had run out of accrued leaves including vacation. (COA Op. pg. 2) (Original msg in CP 606) The County's actions were consistent with the plain language of Unrepresented Resolution 6.9 (App. D to Pet., CP 407) up to that point.

HR Rep Keeley only deviated from the plain language of Unrepresented Resolution 6.9 (App. D to Pet., CP 407) for the several days of unpaid leave Merriman requested. She demanded medical documentation including Merriman's diagnoses. (CP 711, CP 604, form example at CP 575 with the diagnosis redacted)

The Court of Appeals explicitly said "it was the County's standard practice to require medical documentation to justify unpaid leave" (COA Op. pg. 11); which is in direct contradiction with the plain language of Unrepresented Resolution 6.9 (App. D to Pet., CP 407) as passed by the County Council. All personnel policies must be approved by the County Council and are published in resolutions. (App. C to Pet., WCC (Whatcom County Code) 3.04.040(M)(2) Personnel System - "Authority and functions")

The Court could have and should have easily determined from the plain language of Unrepresented Resolution 6.9 (App. D to Pet., CP 407), that it absolutely fails to mention medical documentation. In fact, HR Rep Keeley herself testified that no medical information was required by Unrepresented Resolution 6.9. (CP 730, lines 16-17) When medical documentation is required, it is specified in the Unrepresented Resolution section, such as in Sec. 6.1.3. (App. D to Pet., CP 404) "Where statutory language is plain and unambiguous, the statute's meaning must be derived from the wording of the statute itself." [*Citation ommitted*] Rozner v. Bellevue, 116 Wn.2d 342, 347 (1991)

In brief, all Merriman asked the County to do in his Sep 22 demand for an answer (CP 607-608) to his Aug 25 unpaid leave request (Original msg in CP 572) was to follow the letter of Unrepresented Resolution 6.9 (App. D to Pet., CP 407) and present his request for unpaid leave to his department head and the Executive's Office without medical

documentation. Merriman had stated the duration of the leave requested, of combined paid and unpaid leave, as 6 weeks leave from Aug 28. (Original msg in CP 572) Only several workdays were to be unpaid; based on the misrepresentation of Keeley that his AWOL date was Sep 22 (COA Op. pg. 2) (Original msg in CP 606), or his actual Sep 28 AWOL date and his Oct 9 return date. (See 2006 calendar, App. B to this reply.)

The County did not follow the letter of Unrepresented Resolution 6.9 (App. D to Pet., CP 407) regarding unpaid leave. It never processed Merriman's Aug 25 request for unpaid leave (Original msg in CP 572) at all because he didn't provide medical documentation. ((CP 307, lines 7-9; CP 597, lines 17-18; CP 730, lines 11-15), Yet HR Rep Keeley testified that no medical information was required by Unrepresented Resolution 6.9. (CP 730, lines 16-17)

By not recognizing that Merriman had provided the required and volunteered proofs that he needed leave, and not following Unrepresented Resolution 6.9 (App. D to Pet., CP 407), and relying on the County's misrepresentation that medical information was required for unpaid leave (COA Op. pg. 11); the Court of Appeals concluded that upholding dismissal of the claim of failure to accommodate with leave was appropriate solely because "He fails to articulate why his disability limited him from providing further medical information and why such an accommodation was medically necessary for his disability." (COA Op. pg. 13, fn 2)

2. The quality of the statements of facts in the opinion of the Court of Appeals is raised as a new issue by the County who characterizes them as "excellent". (Ans. to Pet. for Rev. pg. 1) Merriman says many of the Court's crucial statements of facts were not based on the evidence which resulted in the making of a faulty decision.

The Court of Appeals adopted the County's position and says, "The County explained that the only act that occurred within the statute of limitations was a September 22, 2006, e-mail from [HR Rep] Keeley attempting to clarify Merriman's disability status and asking him to specify the number of days he was requesting as unpaid leave." (COA Op. pg. 3-4) The communication referred to is item 2 below. The County's explanation is patently inaccurate; and the Court of Appeals adoption of it in its statement of the facts explains a lot about the opinion. There were many acts that occurred on and after Sep 22, 2006 which are not time-barred.

Those acts were as follows, with their significance:

1. Merriman's Sep 22, 2006 email to the County asking, in short, the County to follow the letter of the unpaid leave provisions in Unrepresented Resolution 6.9 "Leave for illness or injury" (App. D to Pet., CP 407) and present his Aug 25 request for unpaid leave (Original msg in CP 572) to his department head and the Executive's Office without medical documentation, as they should have done in Aug when the request

was made. He also asked that the decision be immediate, stating that "time was critical" and that he wanted an answer "now". (CP 607-608)

2. HR Rep Keeley's Sep 22 response (CP 609) was that at some indeterminate time in the future ("We hope to respond to him by next Thursday, September 28."), "We ... will review it [Merriman's request for an immediate decision above] in light of our policies and procedures for managing extended leaves of absence." This communication also feigned that the County was unaware of how much unpaid leave Merriman was requesting. In addition the communication indicated that their usual "policies and procedures for managing extended leaves of absence" were to use unpaid leave from Employee Handbook ("Whatcom County Employee's Personnel Handbook") (App. E to Pet., CP 414-482) Sec. 113.2 "Disability Leave" (App. E to Pet., CP 454-455); which left little hope that they would act properly and apply the unpaid leave provisions of Unrepresented Resolution Sec. 6.9. (App. D to Pet., CP 407). (CP 609)

The employee handbook is a fallback document when the Unrepresented Resolution fails to make provision for a matter. (Preamble to Unrepresented Resolution at (App. D to Pet., CP 399)) Since Un-represented Resolution 6.9 (App. D to Pet., CP 407) makes provision for the unpaid medical leave of unrepresented employees, the employee handbook does not apply to Merriman's request for unpaid leave because he was an unrepresented employee. The County's AWOL (Absent without

leave) policy applied to Merriman because the Unrepresented Resolution has no provision that supersedes it.

Keeley did not place Merriman in any authorized leave status, such as unpaid administrative leave, until the indeterminate time in the future. Merriman was left in an AWOL status. The County says leaving him in an AWOL status accommodated him. (Ans. to Pet. for Rev. pg. 6)

As for the feigned inability to determine how many unpaid days Merriman had requested: He asked for six weeks of leave using paid and unpaid leaves to commence on Aug 28, 2006. (Original msg in CP 572) The number of unpaid days would simply be Sep 22, 2006, the day Keeley misrepresented he went AWOL (COA Op. pg. 2) (Original msg in CP 606), until the end of the six weeks on Oct 9, 2006.

Her statement that Merriman had expressed interest in an ADA accommodation leave in his Sep 22 demand (CP 607-608) is contrived. Merriman's only references to the ADA were "I understand that the ADA is applicable to my unpaid leave request", "as I read the ADA it [diagnoses] would also be prohibited there" and "I don't see why a decision can't be made now unless you ask for permitted ADA medical info." These references clearly referred to his Aug 25 request for unpaid leave (Original msg in CP 572). See "Sick Leave Policies Requiring Medical Certification Violate the ADA and Rehabilitation Act: Why the Second Circuit Got It

Right and the Sixth Circuit Got It Wrong", 23 Geo. Mason U. C.R. L.J. 365 (2012-2013). (Appendix C to this reply.)

3. Ongoing failure of HR to submit Merriman's Aug 25 request for unpaid leave (Original msg in CP 572) at any time to his department head or the Executive's office for approval, as required by Unrepresented Resolution 6.9. (App. D to Pet., CP 407) The County did not process Merriman's Aug 25 request for unpaid leave (original msg in CP 572) at all, according to HR manager Goens' declarations because he didn't provide new medical documentation. (CP 307, lines 7-9; CP 597, lines 17-18) HR Rep Keeley testified, "Had he provided current medical information and allowed us to process his request for unpaid leave ... we just never got the [medical] information we needed to process his request." (CP 730, lines 11-15) Yet, Keeley testified that no medical information was required by Unrepresented Resolution 6.9. (CP 730, lines 16-17)

4. Agreement, on Sep 24, of Merriman's psychiatric care provider Margaret Rose, ARNP, to sign a fit for duty for Oct 9 which the County required for him to return to work on Oct 9. (CP 581, lines 9 - 22) Merriman had everything in place to return to work on Oct 9 except for the authorized leave from the County.

5. The County's Sep 26 internal e-mail that proves the County

misrepresented to Merriman that his AWOL date was Sep 22 (COA Op. pg. 2) (Original msg in CP 606), although he was actually on paid and authorized leave on Sep 26 and for some time thereafter. (CP 610)

The phrase "Leave without pay" in the e-mail is County-speak for AWOL. See it used in Employee Handbook 114.0 (T), "Absence from work other than on authorized leave." (App. E to Pet., CP 458)

The Court said "Human Resources (HR) Representative Melissa Keeley informed Merriman that his vacation accruals would end on September 22, 2006." (COA Op. pg. 2) Keeley's Sep 20 notice was an e-mail that actually spoke of accruals/paid leave, not just vacation pay. (Original msg in CP 606) Her misrepresentation was that he would be AWOL starting Sep 22 unless authorized leave was granted.

6. Merriman's Sep 26 resignation (CP 611), submitted while trusting the County's misrepresentation that his AWOL date was Sep 22. (COA Op. pg. 2) (Original msg in CP 606) It cited the discriminatory behavior of the County as its basis, specifying with particularity "I am convinced that Whatcom County will continue to impose artificial barriers to benefits that are available to me" and "that Whatcom County will interfere with my use of the benefits" that he needed due to his conditions. (CP 607-608) In addition, Merriman's resignation specifically stated, "That is but a summary and I don't claim it to be inclusive," making it inclusive of all

discriminatory acts whether listed or not. (CP 611) It wouldn't have been submitted if the County had told him he was actually on paid authorized leave and could remain so until Sep 28.

7. The County's Sep 27 letter (CP 617-619) indicating Merriman could withdraw his resignation if he accepted one of several methods falsely represented to be ways to remove his misrepresented AWOL status and complete his unpaid leave request which ended Oct. 9. This letter also repeated the false statement that Merriman had been AWOL since Sep 22 (CP 617), even though item 5 above proves the County knew otherwise on Sep 26. (See App. A to this reply for a table discussing the how the specific offers to remove his misrepresented AWOL status were illusory.)

8. The County's Oct 5 letter (CP 620) indicating Merriman could withdraw his resignation if he accepted one of several methods; falsely representing ways to remove his then actual AWOL status and complete his unpaid leave request which ended Oct 9. (See App. A to this reply for a table discussing the how the specific offers to remove his misrepresented AWOL status were illusory.)

Items 7 and 8 above, even though they occurred after Merriman's resignation, can be considered on liability for failure to accommodate with leave, and constructive discharge because the County purported to have the expectation that Merriman might withdraw his resignation. Martini v.

Boeing Co., 88 Wn. App. 442, 448 and 454 (1997), *aff'd on other grounds* 137 Wn.2d 358 (1999). They can be considered on the element of deliberateness for constructive discharge liability because the County introduced them. Bulaich vs. AT & T Information Systems, 113 Wn.2d 254, 263 *Recons. denied* Nov. 8, 1989. In addition, the Court of Appeals considered them to exonerate the County. (COA Op. pg. 3)

The Court of Appeals was arbitrary when on its own initiative it falsely and prejudicially concluded that Merriman was using an outdated employee handbook. (COA Op. pg. 10) Merriman and the County used the same employee handbook throughout his employment and throughout this case. The County never raised an issue over the date of the employee handbook Merriman used, and even cited CP 454 (RB page 6) and CP 458 (RB page 7) from the employee handbook Merriman was given when he started his employment on Nov 1, 1989 (App. E to Pet., CP 414-482). That handbook was adopted by resolution of the County Council and went un-amended during the term of his employment.

The Court of Appeals consequently relied on the County's representation that "the two leave clauses [Employee Handbook 113.2 "Disability Leave" (App. E to Pet., CP 454-455) and Unrepresented Resolution 6.9 "Leave for Illness or Injury" (App. D to Pet., CP 407)] are not separate and distinct." (RB 7) This caused it to completely discount that there was a genuine issue regarding whether the County had

deliberately attempted to misapply its personnel policies to Merriman's unpaid leave request to his detriment, and thereby contributed to the intolerable terms and conditions of his employment.

The opinion says, "Merriman believed that he would be fired when his paid leave status expired" (COA Op. pg. 10) and "Merriman believed the County wished to fire him when his paid leave expired. As a result, he resigned on September 26, 2006." (COA Op. pg. 3) Those could not have been the reasons Merriman resigned on Sep 26. He believed and trusted in Keeley's misrepresentation that his paid leave status had already expired on Sep 22. (COA Op. pg. 2) (Original msg in CP 606) Since the County would not place him in any authorized leave status thereafter (CP 609), he was misrepresented to be AWOL starting Sep 22. (Employee Handbook 114.0 (T), "Absence from work other than on authorized leave." (App. E to Pet., CP 458))

The Court of Appeals says that "On September 22, 2006, Merriman e-mailed HR staff expressing his concerns that employee handbook provisions meant his employment would terminate when he exhausted his paid leave." (COA Op. pg. 7) Regarding the employee handbook, he only noted that it had no application to his Aug 25 unpaid leave request because he was an unrepresented employee (CP 607-608) and that the request hadn't been acted on, other than by trying to wrongfully switch him to Employee Handbook 113.2. (App. E to Pet., CP

454-455). (CP 607-608) Nowhere in that e-mail does Merriman express concern over being terminated because his authorized leave was misrepresented to be expiring. He only asked that the correct unpaid leave without medical documentation be approved. (CP 607-608)

The opinion also said of that e-mail (CP 607-608), "He also stated his belief that the County had ulterior motives and hoped to fire him," (COA Op. pg. 8) which had nothing to do with the current exhaustion of all accruals/paid leave and his misrepresented AWOL status. (COA Op. pg. 2) (Original msg in CP 606) It had to do with HR trying, since Aug 30, to place him in an improper unpaid leave status under the Employee Handbook 113.2 (App. E to Pet., CP 454-455), which was shorter than the proper one: Unrepresented Resolution 6.9. (App. D to Pet., CP 407) If he were put on the wrong leave, Employee Handbook 113.2 would allow him to be fired earlier (in 89 days) if he continued to use unpaid leave than if the proper one was used, which had about six months available to him. It would also immediately cheat him of the ability to earn back used leave by periods of returning to work, provided for in Unrepresented Resolution 6.9, and cheated him of the employer-paid benefits provided for in Unrepresented Resolution 8.1.1 if he needed them. (App. D to Pet., CP 408)

Merriman could not have believed he was being set up to be fired as AWOL until the County replied to his Sep 22 request to be immediately

put on unpaid leave under Unrepresented Resolution 6.9 (App. D to Pet., CP 407). The reply that day (CP 609) indicated that the County had no intention of immediately placing him in any authorized leave status to remove his misrepresented AWOL status. (COA Op. pg. 2) (Original msg in CP 606) This caused Merriman to believe the County had changed tactics to fire him using his County-imposed AWOL status.

The Court of Appeals mischaracterized the Sep 22 reply (CP 609) as "the e-mail demonstrates the County's desire to accommodate Merriman's disability by providing the leave that he needed" (COA Op. pg. 8 and see pg. 10) and as "the only act that occurred within the statute of limitations". (COA Op. pg. 3-4) See the detailed description in item 2 above.

The opinion says, "Merriman explained in a deposition that "I resigned from Whatcom County 'cause I didn't want to get fired.' He believed he would be fired when his paid leave status expired. He claimed that '[e]verything up to this point had led me to believe that I was AWOL [(absent without leave)] starting on September 22nd.' The belief was based on his previous work experience and a dated employee handbook pro-vision" identified as the 89 day termination provision that was actually not applicable to Merriman as an unrepresented employee. (COA Op. pg. 10)

This is now speaking of Merriman's resignation (CP 611), which was three full workdays after his Sep 22 demand for the proper unpaid leave (CP 607-608), and the County had refused to put him in any authorized leave status. (CP 609) It wasn't the 89 day termination provision in a leave provision that was a problem then, since he was never on such a leave and no such paid leave exists. Rather it was the County's AWOL policy, Employee Handbook 114.0 (T), "Absence from work other than on authorized leave" (App. E, CP 458) that was the problem. It was the County misrepresentation that caused Merriman to believe he was AWOL starting Sep 22. (COA Op. pg. 2) (Original msg in CP 606)

Merriman's previous work experience included being fired by this County for cause in May 2005 by his department head without prior notice, based on inadequately investigated allegations of wrongdoing with no pre-termination Loudermill Rights (Cleveland Bd. of Ed. v. Loudermill, 470 US 532 (1985)) or other pre-termination due process, while receiving a lecture from the department head that he was an at-will employee entitled to no process before taking his job. Merriman's department head was a licensed attorney and court commissioner. Merriman was later reinstated after a name-clearing hearing, but it certainly indicated to Merriman that the County could not be counted on to give him notice prior to firing him for being AWOL.

In addition the County's AWOL policy, Employee Handbook 114.0 (T), "Absence from work other than on authorized leave" (App. E, CP 458) says an AWOL employee can be separated without a disciplinary process that would invoke Loudermill Rights or other due process rights. This statement was fully explained in Merriman's "Amended Petition for Review" at pages 7 to 9. The County's AWOL policy applied to Merriman because the Unrepresented Resolution has no provision that supersedes it.

The opinion says, "Merriman admitted that the County never told him or indicated that he would be fired if he failed to return to work by a certain date." (COA Op. pg. 10, see pg. 11) In view of the discussion above, this has no significance.

Merriman was never on a paid leave that resulted in termination at the end of 89 days. The only leaves that expire in 89 days are unpaid leaves which result in automatic termination if the employee doesn't return to work before expiration. They are leaves found in the employee handbook, which didn't apply to him. Specifically they are Employee Handbook Sec 113.1 "Non-disability Leave" (App. E to Pet., CP 454), and Sec. 113.2 "Disability Leave". (App. E to Pet., CP 454-455) The only accrued/paid leave that Merriman had ever been on was from Unrepresented Resolution 6.9 (App. D to Pet., CP 407). The Court of Appeals refers to an 89 day paid leave that does not exist.

Employee Handbook 113.2 (App. E to Pet., CP 454-455) was the leave the County wrongfully attempted to switch Merriman to on Aug 30 (CP 711), followed by additional attempts on Sep 8 (CP 602), Sep 15 (CP 604), Sep 19 (CP 605), Sep 20 (COA Op. pg. 2) (Original msg in CP 606), and Sep 22 (CP 609), after he requested several days of unpaid leave on Aug 25. (original msg in CP 572)

The opinion says, "The County sent two letters on September 27 and October 5, 2006 [on Sep. 27 (CP 617-619) and Oct. 5 (CP 620)], offering Merriman the opportunity to withdraw his resignation and outlining a number of leave options. Merriman did not return to work." (COA Op. pg. 3, see 8, 10-11) The problem with this statement is that the "outlining a number of leave options" doesn't take into account the fact that none of them were actually available or applicable to Merriman. (See App. A to this reply for tables discussing the illusory offers.)

Conspicuously absent from the two letters on Sep 27 (CP 617-619) and Oct 5 (CP 620) were offers of unpaid leave from Unrepresented Resolution 6.9 (App. D to Pet., CP 407), leave as an accommodation under the WLAD/ADA, and leave from Employee Handbook 113.2 (App. E to Pet., CP 454-455), which although inapplicable to Merriman, had been the only leave the County offered to consider prior to his Sep 26 resignation. (CP 711, CP 609, see CP 607-608)

VI. SUMMARY

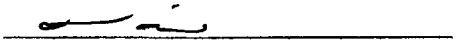
All discussions in the Court of Appeals' decision regarding the statute of limitations, hostile work environment and failure to make office accommodations are irrelevant to Merriman's "Petition For Review", because he only asks for review of the claims of failure to accommodate with leave, and constructive discharge. All the events necessary to prove these two claims occurred on or after Sep 22 and are not time-barred.

Merriman had an accurate understanding of Unrepresented Resolution 6.9 (App. D to Petition, CP 407); the County failed to follow its plain language. The Court of Appeals made many crucial mis-statements of fact that were not supported by the evidence such that it tainted its decision to the point that it was not supported by the evidence.

VII. CONCLUSION

The Supreme Court should do a de novo review of the dismissals of his claims for failure to accommodate with leave and constructive discharge and order that the above issues be considered if the petition is granted.

DATED this 7th day of March, 2014.



Timothy P. Merriman, Pro Se

APPENDICES

A. Tables discussing the how the specific offers to remove Merriman's misrepresented AWOL status were illusory.

B. 2006 Calendar.

C. "Sick Leave Policies Requiring Medical Certification Violate the ADA and Rehabilitation Act: Why the Second Circuit Got It Right and the Sixth Circuit Got It Wrong", 23 Geo. Mason U. C.R. L.J. 365 (2012-2013)

APPENDIX A

Tables discussing the how the specific offers to remove Merriman's misrepresented AWOL status were illusory.

Table 1. The illusory "options" in the September 27, 2006 letter (CP 617-619) analyzed under the County's personnel policies

1	**"Compassionate Leave"** - A donated paid leave from Unrepresented Resolution Sec. 6.2.2 (Appendix D to Pet., CP 406) This was the County's first offer of it. The County should have offered this when there was time to solicit donations back on August 25, 2006 when it was known that Merriman's own accruals/paid leaves would not cover the six weeks requested. (Original msg in CP 572) The letter stated medical documentation was required.
2	**"Non-Disability Leave"** - Employee Handbook Sec. 113.1 (Appendix E to Pet., CP 454) has an 89 day limitation and subsequent mandatory termination. Merriman would lose all protections of the ADA/WLAD under this "option". The County wouldn't have had to apply an accommodation analysis at the end of the 89 days in lieu of termination.
3	**"Disability Leave Request - per the Unrepresented Resolution (section 8.1.1)"** – This is "Benefits Coverage In Case of Documented Extended Illness or Injury" and is not a leave provision. (Appendix D to Pet., CP 408)
4	**"Long-Term Disability"** - Unrepresented Resolution Sec. 8.3.5 (Appendix D to Pet., CP 410) Refers to an employee paid long term disability insurance program. This is not a leave program. It is a way to move Merriman off the payroll rather than a way to retain him.

Table 2. The illusory "options" in the October 5, 2006 letter (CP 620) analyzed under the County's personnel policies

	"A generous sick leave program that allows employees to utilize vacation and other accrued time off" - This is Unrepresented Resolution Sec. 6.9 (Appendix D to Pet., CP 407) with its unpaid leave provision omitted. According to her (CP 617) and Keeley (Original msg in CP 606) Merriman had consumed all accrued/paid time off by September 22, 2006.
	"Full benefits under the Family/Medical Leave Act" - This is Sec. 6.7 of the Unrepresented Resolution (Appendix D to Pet., CP 407) The full 12 week FMLA yearly allotment had been fully consumed by Jun 2. (CP 617)
	"Furloughs and in situations where specific criteria is met" - Executive Order 02-01 (Appendix F to Pet.) The specific criteria are that "Furloughs must create NO additional labor costs" listing extra help hours, overtime and out-of-class pay as examples of additional labor costs a furlough can't create. Extra help hours and out-of-class pay costs were generated for Merriman to be on leave because he was a supervisor therefore he was ineligible for furloughs.
	"Donation of sick leave from other employees" - This is Sec. 6.1.7 of the Unrepresented Resolution "Sick Leave Sharing." (Appendix D to Pet., CP 405) This was the County's first offer of it. Donated paid leave should have been offered when there was time to solicit donations on August 25, 2006 when it was known that Merriman's own accruals/paid leaves would not cover the six weeks requested. (Original msg in CP 572) Medical documentation was required.

APPENDIX B

2006 Calendar.

Calendar for year 2006 (United States)

January

Su	Mo	Tu	We	Th	Fr	Sa
1	2	3	4	5	6	7
8	9	10	11	12	13	14
15	16	17	18	19	20	21
22	23	24	25	26	27	28
29	30	31				

February

Su	Mo	Tu	We	Th	Fr	Sa
			1	2	3	4
5	6	7	8	9	10	11
12	13	14	15	16	17	18
19	20	21	22	23	24	25
26	27	28				

March

Su	Mo	Tu	We	Th	Fr	Sa
			1	2	3	4
5	6	7	8	9	10	11
12	13	14	15	16	17	18
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APPENDIX C

Sick Leave Policies Requiring Medical Certification Violate the ADA and Rehabilitation Act: Why the Second Circuit Got It Right and the Sixth Circuit Got It Wrong", 23 Geo. Mason U. C.R. L.J. 365 (2012-2013)

SICK LEAVE POLICIES REQUIRING MEDICAL CERTIFICATION VIOLATE THE ADA AND REHABILITATION ACT: WHY THE SECOND CIRCUIT GOT IT RIGHT AND THE SIXTH CIRCUIT GOT IT WRONG

*Lydia Petrakis**

INTRODUCTION

Imagine the case of a young woman, Jane Doe, who works at XYZ Corporation. Jane Doe suffers from severe depression, which requires her to take sick leave from work. XYZ Corporation wants to start verifying that sick days taken by its employees are legitimate, so they enforce a policy requiring employees who take sick leave to provide a doctor's certification, stating the employee's general diagnosis or a statement regarding the nature of the employee's illness. This policy will result in the undesired disclosure of Jane Doe's severe depression to XYZ Corporation. Unlike individuals with a mobility disability, who need the assistance of devices such as walkers, crutches, or wheelchairs, an individual with severe depression does not need the assistance of any device that would make their illness apparent to the viewing public. Depression is considered an invisible disability and, therefore, an individual with this illness does not necessarily disclose their disability by simply walking into a room.[1] As an invisible disability, often medical professionals or only those closest to the individual, if anyone, are aware that the individual has severe depression.[2] With XYZ Corporation's new policy, it will know that

* George Mason University School of Law, J.D. Candidate, May 2013: Clemson University, B.A. Political Science, 2009. I would like to thank Brandy Wagstaff for her invaluable guidance and feedback, Erin Bartlett for her thoughtful editing, and the staff of the *George Mason University Civil Rights Law Journal*.

[1] *See Invisible Disabilities Information*, DISABLED WORLD, http://www.disabled-world.com/disability/types/invisible/ (last visited Feb. 14, 2013) (listing depression as a type of invisible disability and defining invisible disabilities as "certain kinds of disabilities that are not immediately apparent to others").

[2] *See* Chloe Lambert, *Thousands of Us Are Hiding Our Misery Behind a Happy Mask. Could YOU Be a Victim of Smiling Depression?*, MAILONLINE (Oct. 4, 2011), http://www.dailymail.co.uk/health/article-2044877/Could-YOU-victim-smiling-depression.html (describing "smiling depression" as term used to refer to people who, "[t]o the outside world . . . give no hint

Jane Doe has severe depression, and she will likely be subject to negative stereotypes and discrimination faced by individuals with disabilities.[3]

When Jane Doe returns to work, she notices that her supervisor is treating her differently. Her supervisor is taking her off of good assignments and is giving her less responsibility. Why does XYZ Corporation need to know Jane Doe has severe depression? If Jane Doe has sick days, why is she not able to take them without an inquiry from her employer? Does Jane Doe deserve to have her disability exposed when another individual with the same disability in her office does not have to disclose his disability as long as he does not take sick leave?[4]

The United States Census Bureau has estimated that one in five United States residents have a disability.[5] Historically, employers used information they requested from employees regarding an employee's physical or mental conditions to exclude and discrimination against individuals with disabilities, especially individuals with invisible disabilities, despite the employee's ability to perform the

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of their problem" and are "often holding down a full-time job, running a family home and enjoying an active social life" while suffering underneath); Cynthia Lubow, *Hidden Depression Among Us*, GOODTHERAPY.ORG (Aug. 14, 2012, 11:00 AM), http://www.goodtherapy.org/blog/depression-hidden-symptoms-addiction-0814124 (explaining that you can know someone who is depressed without knowing they are depressed because depression is not always obvious); *Why People with Depression Are Hiding Their Symptoms from Doctors*, HUFFINGTON POST (Sept. 13, 2011, 3:34 PM), http://www.huffingtonpost.com/2011/09/13/honest-about-depression_n_960512.html (reporting that a California survey found that 43% of people will keep their depression symptoms to themselves during a doctor's appointment).

[3] *See* Sarah Glynn, *Most Depression Patients Report Discrimination*, MEDICAL NEWS TODAY (Oct. 18, 2012), http://www.medicalnewstoday.com/articles/251703.php (stating that "[m]ore than three quarters of patients with depression have experienced discrimination because of their condition"); Anne Harding, *Depression in the Workplace: Don't Ask, Don't Tell?*, CNN.COM (Sept. 20, 2010, 8:54 AM), http://www.cnn.com/2010/HEALTH/09/20/health.depression.workplace/index.html (explaining that determining whether to let employers know about depression is a valid concern because "[t]he stigma surrounding depression . . . remains strong enough that most depressed employees would probably hesitate to reveal their condition to bosses and coworkers for fear of being marginalized professionally or being seen as weak," that stigma related to depression "definitely still exists" in the workplace, and that "[p]eople who disclose their depression to colleagues—or even just one colleague—should be prepared for gossip . . .").

[4] This hypothetical situation is a reality to many individuals in the United States and will be used for instructive purposes throughout this comment to demonstrate the potential civil rights violations by employers.

[5] *Number of Americans with a Disability Reaches 54.4 Million*, U.S. CENSUS BUREAU (December 18, 2008), http://www.census.gov/newsroom/releases/archives/income_wealth/cb08-185.html.

job.[6] The Americans with Disabilities Act's ("ADA") provision against disability-related inquiries and medical examinations exemplifies Congress's intent to "protect the rights of job applicants and employees to be assessed on merit alone," while also protecting the rights of employers, by ensuring individuals "can perform the essential functions of their jobs."[7]

Great efforts have been made to improve the ability of persons with disabilities to participate in society through assistive technologies[8] and removal of barriers, including architectural barriers.[9] However, there is still a long way to go before these individuals are fully integrated into society, especially in the realm of employment.[10] The Bureau of Labor and Statistics reported in 2011 that the employment-population ratio for persons with a disability was 17.8%, while the employment-population ratio among persons without a disability was much higher at 63.8%.[11]

It is critical that persons with disabilities are not discriminated against in employment settings because these individuals are the world's largest minority.[12] The ADA exists to help prevent such discrimination. The purpose of the ADA is to protect the rights of individuals with disabilities through the elimination of barriers that "prevent their participation in many aspects of working and living."[13]

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[6] EQUAL EMP'T OPPORTUNITY COMM'N ("EEOC"), ENFORCEMENT GUIDANCE: DISABILITY-RELATED INQUIRES AND MEDICAL EXAMINATIONS OF EMPLOYEES UNDER THE AMERICANS WITH DISABILITIES ACT ("ADA"), (July 27, 2000), http://www.eeoc.gov/policy/docs/guidance-inquiries.html (last modified March 24, 2005) [hereinafter EEOC, ENFORCEMENT GUIDANCE].

[7] *Id.*

[8] *See Assistive Technology*, ELDERCARE.GOV, http://www.eldercare.gov/ELDERCARE.NET/Public/Resources/Factsheets/Assistive_Technology.aspx (last visited Feb. 14, 2013).

[9] *See generally* George W. Bush, *Foreward to* FULFILLING AMERICA'S PROMISE TO AMERICANS WITH DISABILITIES, THE WHITE HOUSE, http://georgewbush-whitehouse.archives.gov/news/freedominitiative/freedominitiative.html (last visited Feb. 14, 2013); U.S. DEP'T OF JUSTICE, ADA TA: TECHNICAL ASSISTANCE UPDATES FROM THE U.S. DEPARTMENT OF JUSTICE at 1-3, 13 (1996) *available at* http://www.ada.gov/adata1.pdf.

[10] *See generally* Bush, *supra* note 9.

[11] *Persons with a Disability: Labor Force Characteristics Summary*, U.S. BUREAU OF LABOR STATISTICS (June 8, 2012), http://www.bls.gov/news.release/disabl.nr0.htm.

[12] U.N. INT'L CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES, SOME FACTS ABOUT PERSONS WITH DISABILITIES (2006), http://www.un.org/disabilities/convention/pdfs/factsheet.pdf ("Around 10 per cent of the world's population, or 650 million people, live with a disability. They are the world's largest minority.").

[13] *Employment Laws: Medical and Disability-Related Leave*, U.S. DEP'T OF LABOR, OFFICE OF DISABILITY EMP'T POLICY, http://www.dol.gov/odep/pubs/fact/employ.htm (last visited Feb. 14, 2013).

The ADA applies to public and private employers and states, in pertinent part, that:

> A covered entity[14] 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.[15]

These ADA restrictions on inquiries and examinations apply to all employees, both those with and without disabilities.[16]

The ADA limits an employer's ability to make disability-related inquires or require medical examinations at three stages: (1) pre-offer, (2) post-offer, and (3) during employment.[17] This Comment will focus on disability-related inquires relating to sick leave during employment. An employer is not allowed to require a medical exam or make a medical inquiry to make an employment decision unless the inquiry or examination is both job-related and consistent with business necessity.[18] However, many employers, to guard against abuse of sick leave, have instituted sick leave policies that require an employee to provide medical documentation verifying an illness or injury after a

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[14] 42 U.S.C. § 12111(2) (2006) ("'[C]overed entity' means an employer, employment agency, labor organization, or joint labor-management committee.").

[15] 42 U.S.C. § 12112(d)(4)(A) (2006).

[16] EEOC, ENFORCEMENT GUIDANCE, *supra* note 6; *see also* Lee v. City of Columbus, 636 F.3d 245, 252 (6th Cir. 2011) ("A plaintiff need not prove that he or she has a disability in order to contest an allegedly improper medical inquiry under 42 U.S.C. § 12112(d).") (citing Harrison v. Benchmark Elecs. Huntsville, Inc., 593 F.3d 1206, 1214 (11th Cir.2010) ("[A] plaintiff has a private right of action under [§ 12112(d)], irrespective of his disability status."); Thomas v. Corwin, 483 F.3d 516, 527 (8th Cir. 2007) (Section 12112(d)(4)(A) "applies to all employees, regardless of whether the employee has an actual disability."); Conroy v. N.Y. State Dep't of Corr. Servs., 333 F.3d 88, 94 (2d Cir. 2003) (and cases cited therein) ("[A] plaintiff need not prove that he or she has a disability unknown to his or her employer in order to challenge a medical inquiry or examination under 42 U.S.C. § 12112(d)(4)(a)."); Roe v. Cheyenne Mountain Conf. Resort, Inc., 124 F.3d 1221, 1229 (10th Cir. 1997) ("It makes little sense to require an employee to demonstrate that he has a disability to prevent his employer from inquiring as to whether or not he has a disability.") (citation and internal quotation marks omitted)); Conroy, 333 F.3d at 95 (citing EEOC, ENFORCEMENT GUIDANCE, *supra* note 6 ("This statutory language makes clear that the ADA's restrictions on inquiries and examinations apply to all employees, not just those with disabilities.")).

[17] *See* 42 U.S.C. § 12112(d)(4)(A) (2006); EEOC, ENFORCEMENT GUIDANCE, *supra* note 6.

[18] 42 U.S.C. § 12112(d)(4)(A) (2006); 29 C.F.R. § 1630.14 (explaining the EEOC's regulations regarding medical examinations and inquiries).

sick leave absence.[19] These policies can have the consequence of revealing an employee's disability to an employer.[20]

This Comment analyzes the two-way circuit split on sick leave policies and discrimination under the ADA and the Rehabilitation Act of 1973 (the "Rehabilitation Act"). Part I of this Comment will examine the ADA, the Rehabilitation Act, the Second Circuit's decision in *Conroy v. New York State Department of Correctional Services*,[21] and the Sixth Circuit's decision in *Lee v. City of Columbus*[22]. Part II of this Comment argues in favor of the Second Circuit's ruling that employer requirements to provide a general diagnosis or a statement regarding the nature of an employee's illness triggers ADA protections under Section 12112(d)(4)(A)—which are incorporated by reference in the Rehabilitation Act—even if the policy is extended to all employees. The only exception to this ruling is if the inquiry is shown to be job-related and consistent with business necessity.

I. BACKGROUND

Currently, there is a two-way circuit split on sick leave policies and discrimination under the ADA and the Rehabilitation Act. The ADA's purpose is "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."[23] To fulfill this goal it is important that individuals with disabilities are integrated into the workforce and employers cannot use their medical information to discriminate against them. The Second Circuit properly holds that an employer requesting a general diagnosis or a statement regarding the nature of the employee's illness triggers protections.[24] Section A outlines the Rehabilitation Act of 1973, Section B discusses the Americans with Disabilities Act of 1990, Section C introduces the Second Circuit case *Conroy v. New York State Department of Correctional Services*, and Section D introduces the Sixth Circuit case *Lee v. City of Columbus*.

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[19] BOND, SCHOENECK & KING, PLLC, *Labor and Employment Law Information Memo: Recent Second Circuit Decision Addresses the Validity of an Employer Requiring Medical Documentation After Sick Leave* (Sept. 2003), http://www.bondschoeneckking.com/pdfinfomemos/09-2003_im_labor.pdf.

[20] Conroy, 333 F.3d at 95-96.

[21] *Conroy v. N.Y. State Dep't of Corr. Servs.*, 333 F.3d 88 (2d Cir. 2003).

[22] Lee v. City of Columbus, 636 F.3d 245, 252 (6th Cir. 2011).

[23] 42 U.S.C. § 12102(b) (2006).

[24] *See infra* Part I.C.

A. *The Rehabilitation Act of 1973, as Amended*

The Rehabilitation Act prohibits discrimination on the basis of disability by federal agencies, state and local governments, and organizations that receive direct or indirect federal funding or federal financial support.[25] The Rehabilitation Act contains five sections, Sections 501-504 and 508, which address different aspects of equal opportunity for individuals with disabilities.[26] The Act defines an individual with a disability as "any individual who—(i) has a physical or mental impairment which for such individual constitutes or results in a substantial impediment to employment; and (ii) can benefit in terms of an employment outcome from vocational rehabilitation services provided pursuant to subchapter I, III, or VI, of this chapter."[27] Section 504 of the Rehabilitation Act states that:

> No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.[28]

Not only does the Rehabilitation Act protect individuals with disabilities from discrimination, but it also makes available direct services to individuals with disabilities to aid them in becoming qualified for employment.[29]

Both the Rehabilitation Act and the ADA have influenced the other.[30] Congress decided to enact the ADA in 1990 to broaden the

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25 29 U.S.C. § 794 (2006); *see also* NAT'L ENDOWMENT FOR THE ARTS, *Legal Overview: the ADA and the Rehabilitation Act* 15, 17, *available at* http://www.nea.gov/resources/accessibility/pubs/DesignAccessibility/Chapter2.pdf (last visited Feb. 14, 2013).

26 29 U.S.C. §§ 791-94, 798 (2006); *see also* NAT'L ENDOWMENT FOR THE ARTS, *supra* note 25, at 17-18 (noting that under the Rehabilitation Act, "federal agencies each have their own section 504 regulations and cultural organizations (private and public) must comply with the section 504 regulations of all agencies providing them with federal funds, whether directly or indirectly.").

27 29 U.S.C. § 705(20) (2006).

28 29 U.S.C. § 794(a) (2006).

29 Deborah Leuchovius, *ADA Q&A. . .The Rehabilitation Act and the ADA connection*, PACER CENTER 1 (2003), *available at* http://www.pacer.org/parent/php/PHP-c51f.pdf.

30 *Id.*

reach and interpretation of the protections of the Rehabilitation Act.[31] Later, the Rehabilitation Act was amended in 1992 "to reflect the language, goals and objectives of the ADA."[32] Both the Rehabilitation Act and the ADA prohibit discrimination against persons with disabilities, but the Rehabilitation Act states that it prohibits discrimination "solely" on the basis of disability.[33] However, in 1992, the Rehabilitation Act was amended to specify that:

> The standards used to determine whether this section has been violated in the complaint alleging employment discrimination under this section shall be the standards applied under title I of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111 et seq.) and the provisions of sections 501 through 504, and 510 of the Americans with Disabilities Act of 1990 (42 U.S.C. 122201 to 12204 and 12210) . . . .[34]

Therefore, the ADA's limitations on the disclosure of medical information[35] are incorporated by reference into the Rehabilitation Act and guide violation determinations for this section.[36]

B. *The Americans with Disabilities Act of 1990, as Amended*

The ADA "prohibits discrimination against people with disabilities in employment, transportation, public accommodation, communications, and governmental activities."[37] This Comment focuses on the ADA's role in employment discrimination. To better understand the ADA, Subsection 1 of this Comment provides a general overview of the ADA focusing on medical inquiries and examinations, Subsection

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[31] *Id.*

[32] *Id.*

[33] 29 U.S.C. § 794 (2006). *But see* 42 U.S.C. § 12112 (2006) (explaining that the ADA prohibits discrimination on the basis of disability without using the word "solely.").

[34] 29 U.S.C. § 794(d) (2006); *see also* McPherson v. Mich. High Sch. Athletic Ass'n, 119 F.3d 453, 459 (6th Cir. 1997) (en banc) (quoting Monette v. Elec. Data Sys. Corp., 90 F.3d 1173, 1177 (6th Cir. 1996) ("The analysis of claims under the Americans with Disabilities Act roughly parallels those brought under the Rehabilitation Act of 1973. . . .")) (explaining that the Rehabilitation Act and ADA "are quite similar in purpose and scope").

[35] *See* 42 U.S.C. § 12112(d)(4).

[36] *See, e.g.*, Doe v. U.S. Postal Service, 317 F.3d 339, 340 (D.C. Cir. 2003); Scott v. Napolitano, 717 F. Supp. 2d 1071, 1082 n.4 (S.D. Cal. 2010); *Brady v. Potter,* No. 0:02-CV-01121, 2004 WL 964264, at *4 (D. Minn. Apr. 30, 2004); Greer v. O'Neill, No. 1:01-CV-01398, 2003 WL 25653036, at *9 (D.D.C. Sept. 25, 2003).

[37] *Disability Resources: Americans with Disabilities Act*, U.S. DEP'T OF LABOR, http://www.dol.gov/dol/topic/disability/ada.htm (last visited Feb. 18, 2013).

2 explains the business necessity standard exception to limits on medical examinations and inquiries, and Subsection 3 discusses the role of the EEOC and how it enforces the ADA.

1. The ADA—A General Overview

On July 26, 1990, President George Bush signed the Americans with Disabilities Act of 1990 into law, which is based structurally on the Civil Rights Act of 1964 and the Rehabilitation Act of 1973.[38] The ADA expanded the civil rights of individuals with disabilities to provide broader coverage than Section 504 of the Rehabilitation Act, which had only reached those entities receiving federal financial assistance.[39] The ADA expanded coverage to all state and local governmental entities, all places of public accommodation, and all employers with fifteen or more employees.[40] The ADA prohibits disability-based discrimination "in employment, state and local government services, public accommodations, commercial facilities, transportation and telecommunications."[41]

The ADA defines a disability as "(A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment. . . ."[42] The language "being regarded as having such an impairment" provides ADA coverage for perceived disabilities.[43] Both discrimination in employment for an actual disability or a perceived disability are ADA violations.[44] An employee who

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[38] *See* Americans with Disabilities Act of 1990, Pub. L. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. § 12101 (2009)).

[39] NAT'L ENDOWMENT FOR THE ARTS, *supra* note 25, at 18.

[40] NAT'L ENDOWMENT FOR THE ARTS, *supra* note 25, at 19.

[41] NAT'L ENDOWMENT FOR THE ARTS, *supra* note 25, at 18.

[42] 42 U.S.C. § 12102(1) (2006).

[43] 42 U.S.C. § 12102(1)(C) (2006); *see also* Steven R. Anderson, *Amendments to ADA Expand Coverage*, FAEGRE BAKER DANIELS (Feb. 24, 2009), http://www.faegrebd.com/8983. An individual is discriminated against because of a perceived disability when "the employer treats the employee unfairly because the employer believes the employee is disabled when he/she is not, has an unreasonable bias against the perceived disability or medical condition or, without a proper basis, believes that the perceived disability or medical condition may change for the worse in the future." *Disability Discrimination and Perceived Disability Discrimination*, SCHWARTS & PERRY LLP, http://www.schwartzandperry.com/lawyer-attorney-1269323.html (last visited March 27, 2013).

[44] *See* Conroy v. N.Y. State Dep't of Corr. Servs., 333 F.3d 88, 96 (2d Cir. 2003).

others perceive as disabled has the same rights under the ADA as an employee who is actually disabled.[45] The ADA states that:

> 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[46] 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.[47]

The ADA's restrictions only apply to disability-related inquires and medical examinations.[48] The EEOC defines a "disability-related inquiry" as

> a question that is likely to elicit information about a disability, such as asking employees about: whether they have or ever had a disability; the kinds of prescription medications they are taking; and, the results of any genetic tests they have had. Disability-related inquiries also include asking an employee's co-worker, family member, or doctor about the employee's disability. Questions that are *not* likely to elicit information about a disability are always permitted, and they include asking employees about their general well-being; whether they can perform job functions; and about their current illegal use of drugs.[49]

Under the category of "[a]cceptable examinations and inquiries" the ADA permits a covered entity to "make inquiries into the ability

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[45] Keith A. Clouse, *The ADA Protects Workers Who Are Perceived to be Disabled*, CLOUSE DUNN LLP (Oct. 13, 2009), http://dallasemploymentlawyer.cdklawyers.com/The-ADA-Protects-Workers-Who-Are-Perceived-to-be-Disabled.html.

[46] See 42 U.S.C. § 12102(2) (2006) (The ADA defines a "disability" as "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment . . . .").

[47] 42 U.S.C. § 12112(d)(4)(A) (2006).

[48] EEOC, ENFORCEMENT GUIDANCE, *supra* note 6.

[49] EEOC, QUESTIONS & ANSWERS: ENFORCEMENT GUIDANCE ON DISABILITY-RELATED INQUIRIES & MEDICAL EXAMINATIONS OF EMPLOYEES UNDER THE AMERICANS WITH DISABILITIES ACT (July 26, 2000), *available at* http://www.eeoc.gov/policy/docs/qanda-inquiries.html [hereinafter EEOC, QUESTIONS & ANSWERS]. *See also* White v. Burlington N. & Santa Fe Ry. Co., 364 F.3d 789, 812 (6th Cir. 2004) (en banc) (quoting Meritor Sav. Bank v. Vinson, 477 U.S. 57, 65 (1986)) (holding that although the Enforcement Guidance is non-binding, it "constitute[s] a body of experience and informed judgment to which courts and litigants may properly resort for guidance."). *But see* E.E.O.C. v. SunDance Rehab. Corp., 466 F.3d 490, 500 (6th Cir. 2006) ("[The EEOC's] Enforcement Guidance is entitled to respect only to the extent of its persuasive power.")

of an employee to perform job-related functions."[50] Therefore, after a person starts work, a medical examination or inquiry must be "job-related and consistent with business necessity."[51] Under the ADA, employers are limited to conducting medical examinations and inquires only where there is evidence of a job performance or safety problem, where required by other Federal laws, when used determine current fitness to perform a particular job, and when voluntary examinations are part of an employee health programs.[52] Furthermore, any "information obtained regarding the medical condition or history" of an applicant must be "collected and maintained on separate forms and in separate medical files and is treated as a confidential medical record, except that . . . supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations."[53]

2. The Business Necessity Standard of the ADA

As previously mentioned, there is one exception to limits on medical examinations and inquiries under 42 U.S.C. § 12112, if the examination or inquiry is "job-related and consistent with business necessity."[54] There is little case law that discusses the interpretation of the business necessity standard in relation to medical inquiries of employees, especially in relation to employment sick leave directives.[55] In one of the few cases that has addressed the business necessity standard, the United States District Court for the Northern District of New York reasoned that:

> [I]n order to fall within the [business necessity] exception . . . , the employer must demonstrate some reasonable basis for concluding that the inquiry was necessary. That is, the employer must show that it had some reason for suspecting that the employee, or class of employees, would be unable to perform essential job functions or would pose a danger to the health and safety of the workplace.[56]

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[50] 42 U.S.C. § 12112(d)(4)(B) (2006).

[51] EEOC, U.S. DEP'T OF JUSTICE, *Americans with Disabilities Act, Questions and Answers*, ADA.GOV, http://www.ada.gov/qandaeng.htm (last updated Oct. 9, 2008).

[52] *Id.*

[53] 42 U.S.C. § 12112(d)(3)(B)(i) (2006).

[54] 42 U.S.C. § 12112(d)(4)(A) (2006).

[55] Conroy v. N.Y. State Dep't of Corr. Servs., 333 F.3d 88, 97 (2d Cir. 2003).

[56] Fountain v. N.Y. State Dep't of Corr. Servs., 190 F. Supp. 2d 335, 339 (N.D.N.Y. 2002).

On appeal the Second Circuit found this approach to be "generally sound."[57] The Second Circuit also endorsed the views of the Ninth Circuit in *Cripe v. City of San Jose*,[58] when it held that the "[t]he business necessity standard is quite high, and is not [to be] confused with mere expediency."[59] To demonstrate that an inquiry is a "business necessity," an employer cannot merely show that the "inquiry is convenient or beneficial to the business," but must prove that the "business necessity is vital to the business."[60] The employer must also demonstrate that the inquiry is no broader or more intrusive than necessary and that the inquiry is a reasonably effective method of achieving the employer's goal.[61]

The Second Circuit decided, based on previous case law involving inquiries directed toward individual employees, that courts will likely find a business necessity if:

> an employer can demonstrate that a medical examination or inquiry is necessary to determine 1) whether the employee can perform job-related duties when the employer can identify legitimate, non-discriminatory reasons to doubt the employee's capacity to perform his or her duties (such as frequent absences or a known disability that had previously affected the employee's work) or 2) whether an employee's absence or request for an absence is due to legitimate medical reasons, when the employer has reason to suspect abuse of an attendance policy.[62]

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[57] *Conroy*, 333 F.3d at 97.

[58] Cripe v. City of San Jose, 261 F.3d 877 (9th Cir. 2001).

[59] *Conroy*, 333 F.3d at 97 (citing *Cripe*, 261 F.3d at 890 (9th Cir. 2001) (internal quotation marks omitted); *see also* Tice v. Ctre. Area Transp. Auth., 247 F.3d 506, 515 (3d Cir. 2001) ("[A]n examination that is 'job related' and 'consistent with business necessity' must, at minimum, be limited to an evaluation of the employee's condition only to the extent necessary under the circumstances to establish the employee's fitness for the work at issue."); Sullivan v. River Valley Sch. Dist., 197 F.3d 804, 811 (6th Cir. 1999) ("[F]or an employer's request for an exam to be upheld, there must be significant evidence that could cause a reasonable person to inquire as to whether an employee is still capable of performing his job.").

[60] *Conroy*, 333 F.3d at 97.

[61] Conroy v. N.Y. State Dep't of Corr. Servs., 333 F.3d 88, 98 (2d Cir. 2003).

[62] *Id.* at 98 (citing Harris v. Harris & Hart, Inc., 206 F.3d 838, 844 (9th Cir. 2000)) (finding no ADA violation when employee refused to rehire plaintiff without a medical release when employee knew that plaintiff had a disability that had previously forced him to resign); Porter v. United States Alumoweld Co., 125 F.3d 243, 246 (4th Cir. 1997) (finding consistency with business necessity when employer required a medical exam from employee, whose job required lifting, when employee sought to return from a leave of absence following back surgery for a work-related injury); Riechmann v. Cutler-Hammer, Inc., 183 F. Supp. 2d 1292, 1299 (D. Kan. 2001)

For example, it might seem at first blush like a prohibited request if an employer requires a medical exam from an employee who is returning from a leave of absence for back surgery from a work-related instance. However, as seen in a Fourth Circuit case, if this employee's job requires heavy lifting, the exam may be consistent with business necessity.[63]

3. Enforcement of the ADA and the Equal Employment Opportunity Commission

When Congress passed the ADA, it directed the Equal Employment Opportunity Commission (the "EEOC"), the Department of Justice, and the Department of Transportation to develop regulations and accessibility standards.[64] Congress charged the Department of Justice and Department of Transportation with implementing ADA Titles II and III.[65] Congress charged the EEOC with enforcing and interpreting Title I of the ADA,[66] which addresses discrimination in employment.[67] The EEOC enforces federal laws prohibiting discrimination against a job applicant or employee for reasons of "race, color, religion, sex [ ], national origin, age [ ], *disability*, or genetic information.[68] Most employers with fifteen employees or more, labor unions, and employment agencies are covered under EEOC-enforced laws.[69]

Congress gave the EEOC authority to investigate charges of discrimination against employers and to settle the charge or file a lawsuit to protect the rights of individuals and the public's interest.[70] Charges of discrimination are sent to the EEOC by a job applicant or

(finding that evidence supported jury's finding that after plaintiff had suffered stroke and now requested transfer to a more strenuous position within the company, requiring extensive questionnaire from employee's doctor served business *necessity*); Rodriguez v. Loctite Puerto Rico, Inc., 967 F. Supp. 653, 661 (D.P.R. 1997) (finding no ADA violation when employer required an independent examination after plaintiff requested a two months leave of absence).

63 *Conroy*, 333 F.3d at 98 (citing *Porter*, 125 F.3d at 245).

64 NAT'L ENDOWMENT FOR THE ARTS, *supra* note 25, at 20.

65 NAT'L ENDOWMENT FOR THE ARTS, *supra* note 25, at 20.

66 NAT'L ENDOWMENT FOR THE ARTS, *supra* note 25, at 20; *see also* JOB ACCOMMODATION NETWORK, *Technical Assistance Manual: Title I of the ADA*, http://askjan.org/links/ADAtam1.html#X (last visited Mar. 27, 2013).

67 *The Americans with Disabilities Act (ADA) of 1990, as amended*, U.S. ACCESS BD., http://www.access-board.gov/about/laws/ada.htm (last visited Feb. 19, 2013).

68 *About EEOC: Overview*, EEOC, http://www.eeoc.gov/eeoc/ (last visited Mar. 27, 2013) (emphasis added).

69 *Id.*

70 *Id.*

employee.[71] Then, EEOC investigates the charges and seeks to resolve any issues of discrimination found and obtain relief for affected individuals through conciliation.[72] After completing an investigation, the EEOC determines whether the facts support a charge of employment discrimination.[73]

If the EEOC determines there is not enough support, it sends a dismissal and notice of rights letter to both parties.[74] The employee can still file their own suit in federal court.[75] However, if the EEOC determines there is enough support, they send a letter of determination to both parties and ask them to resolve the matter through conciliation, a voluntary dispute resolution process.[76] Conciliation is the parties' last chance to resolve the charge before the EEOC decides whether to litigate.[77] During conciliation, EEOC investigators attempt to help both parties negotiate a mutually agreeable remedy.[78] If the parties cannot come to a resolution during conciliation, then the EEOC decides to either litigate the charge and file suit in a federal court on behalf of the employee or not to litigate the case and send both the parties a dismissal notice and a rights letter.[79] The employee can then take a right to sue letter and file their own case in federal court.[80]

If Jane Doe wanted to pursue her claim, she would best do so by filing a charge of discrimination against XYZ Corporation under the ADA, Rehabilitation Act, or both, depending on how XYZ Corpora-

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71 *Technical Assistance Manual: Title I of the ADA*, *supra* note 66.

72 *Technical Assistance Manual: Title I supra* note 66; *see also About EEOC: Overview*, *supra* note 68.

73 *See* Grygor Scott, *What is EEOC Concilliation?*, HOUSTON CHRONICLE, http://smallbusiness.chron.com/eeoc-conciliation-36328.html (last visited March 27, 2013).

74 *Id.*

75 *Id.*

76 Under 42 U.S.C. § 2000e-5 the EEOC is required to attempt to resolve findings of discrimination through "informal methods of conference, conciliation, and persuasion." *Resolving a Charge*, EEOC, http://www.eeoc.gov/employers/resolving.cfm (last visited Feb. 6, 2013). *See also* Scott, *supra* note 73.

77 *See Resolving a Charge*, *supra* note 76 (noting the advantages of conciliation are that it is a voluntary process, allows for negotiations and counter-offers, is the last opportunity to resolve the charge informally, and conciliation agreements resolve uncertainty, cost, and ambiguity of litigation).

78 *See* Scott, *supra* note 73; *Resolving a Charge*, *supra* note 76.

79 *See* Scott, *supra* note 73; *The Americans with Disabilities Act (ADA) of 1990, as amended*, *supra* note 67.

80 *See* Scott, *supra* note 73.

tion is categorized.[81] If XYZ Corporation is an entity receiving federal funds, she would bring the charge of discrimination under the Rehabilitation Act; otherwise, she would bring the charge under the ADA.[82] Assuming XYZ Corporation does not receive federal financial support, Jane Doe would file a charge of discrimination under the ADA with the EEOC.[83] Jane Doe's claim would be that XYZ Corporation began treating her unfavorably after learning of her disability, by taking her off of good assignments and giving her less responsibility. The EEOC would then investigate the charge and determine whether there was reasonable cause to believe discrimination occurred.[84] The EEOC could attempt to work out a settlement between Jane Doe and XYZ Corporation, bring a lawsuit against XYZ Corporation, or issue a "right to sue" letter, which would allow Jane Doe to bring a private lawsuit under Title I of the ADA to enforce her own rights.[85]

In addition to investigating charges, the EEOC also assures federal agency and department compliance through regulation and issue enforcement guidance.[86] However, enforcement guidance provided by the EEOC is not binding.[87] Instead, the guidance is a "body of experience and informed judgment to which courts and litigants may properly resort for guidance,"[88] but it "is entitled to respect only to the extent of its persuasive power."[89]

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81 *See* U.S. DEP'T OF JUSTICE, A GUIDE TO DISABILITY RIGHTS LAWS (2009), http://www.ada.gov/cguide.htm.

82 *Id.*

83 *Id.*

84 *See The Charge Handling Process*, EEOC, http://www.eeoc.gov/employees/process.cfm (last visited Feb. 28, 2013); *see also How to Enforce Employment Rights Under the Americans with Disabilities Act*, COMPREHENSIVE ADVOCACY, INC., http://users.moscow.com/co-ad/publications/ADA%20EnforceEmployRights.htm#B (last visited Feb. 28, 2012).

85 *See The Charge Handling Process*, *supra* note 84; *see also How to Enforce Employment Rights Under the Americans with Disabilities Act*, *supra* note 84.

86 *About EEOC: Overview*, *supra* note 68.

87 White v. Burlington N. & Santa Fe Ry. Co., 364 F.3d 789, 798 (6th Cir. 2004) (en banc) (quoting Meritor Sav. Bank v. Vinson, 477 U.S. 57, 65 (1986)).

88 *Id.* at 812 (quoting Meritor Sav. Bank v. Vinson, 477 U.S. 57, 65 (1986)).

89 EEOC. v. SunDance Rehab. Corp., 466 F.3d 490, 500 (6th Cir. 2006).

C. *The Second Circuit's Medical Inquiry Analysis:* Conroy v. New York State Department of Correctional Services

In *Conroy v. New York State Department of Correctional Services*, an employee sued the New York State Department of Correctional Services ("DOCS") and its Commissioner.[90] The complaint alleged that the sick leave directive, requiring employees to submit general diagnoses as part of the medical certification procedure following certain absences, violated the ADA.[91] The Second Circuit held that the policy was an inquiry into disability; therefore, the policy was prohibited by the ADA absent proof of business necessity.[92] The court remanded the case, but only in reference to the factual issues relating to the business necessity defense.[93]

DOCS's sick leave directive required a medical certification to include a brief, general diagnosis that was:

> sufficiently informative as to allow [for] a determination concerning the employee's entitlement to leave or to evaluate the need to have an employee examined . . . prior to returning to duty. If a doctor's note states that an employee is 'under my care,' this is not sufficient. However, if a doctor's note, for example, states 'recuperating from minor surgery' or 'treated for a minor foot injury,' this is a sufficient diagnosis.[94]

The Second Circuit held that the "general diagnosis [language] may tend to reveal a disability" and was therefore sufficient to trigger the protections of the ADA.[95]

The court referenced the United States District Court for the District of Colorado's case *Roe v. Cheyenne Mountain Conference Resort*,[96] which held that requiring employees to disclose the prescription drugs they used was a prohibited inquiry because such a policy

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[90] Conroy v. N.Y. State Dep't of Corr. Servs., 333 F.3d 88, 91 (2d Cir. 2003).

[91] *Id.* at 92.

[92] *Id.* at 95, 100-01.

[93] *Id.* at 91. On remand the court found that the Defendants did not demonstrate a business necessity, and thus the directive violates the ADA. Fountain v. N.Y. State Dep't of Corr. Servs., No. 1:99-CV-00389, 2005 WL 1502146, at *9 (N.D.N.Y. June 23, 2005).

[94] *Conroy*, 333 F.3d at 95.

[95] *Id.*

[96] Roe v. Cheyenne Mountain Conference Resort, 920 F. Supp. 1153 (D. Colo. 1996), *aff'd in pertinent part*, 124 F.3d 1221 (10th Cir. 1997).

would reveal disabilities or perceived disabilities to employers.[97] Following this reasoning, the Second Circuit in *Conroy* held that "general diagnoses may expose those individuals with disabilities to employer stereotypes" and therefore the directive "implicates the concerns expressed in [the] provisions of the ADA."[98] For example, requiring an employee to submit a general diagnosis that states "received chemotherapy" would cause an employee to disclose a disability or perceived disability.[99] Because the statement "received chemotherapy" suggests that an employee has cancer,[100] it reveals to an employer the employee's disability or perceived disability.[101] Discrimination based on a perceived disability is also prohibited by the ADA, so even when a diagnosis alone is not sufficient to establish that an employee has a disability, ADA protections are triggered if the diagnosis may give rise to the perception of a disability.[102]

Furthermore, when discussing the EEOC's definition of a "disability-related inquiry,"[103] the Second Circuit found that the directive's requirement of having to prove a general diagnosis is more similar to

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[97] Conroy v. N.Y. Dep't of Corr. Servs., 333 F.3d 89, 95-96 (2d Cir. 2003) (citing *Cheyenne*, 920 F. Supp. at 1154-55).

[98] *Id.*

[99] *Id.* at 96 (citing Fountain v. N.Y. State Dep't of Corr. Servs., 190 F. Supp. 2d 335, 339 (N.D.N.Y. 2002)).

[100] *What is Chemotherapy*, CHEMOTHERAPY.COM, http://www.chemotherapy.com/new_to_chemo/what_is_chemo/ (last visited Feb. 7, 2013).

[101] There used to be a split among courts about whether or not cancer was a disability or perceived disability. *See generally* Littler Mendelson, *Courts Split on Whether Cancer is a Disability Under the ADA*, 5 No. 17 CAL. WORKPLACE MONITOR 5 (1997). However, after the passage of the American with Disabilities Act Amendments Act of 2008, which broadened the definition of a "disability," employees with cancer will most likely be considered as disabled individuals. *See* Ivelisse Bonilla, *Cancer as a Disability After the Americans with Disabilities Act Amendments Act*, 59 MAR. FED. LAW. 12 (2012).

[102] *Conroy*, 333 F.3d at 96. The ADA provision regarding perceived disabilities "is intended to combat the effects of archaic attitudes, erroneous perceptions, and myths that work to the disadvantage of persons with or regarded as having disabilities." Brunko v. Mercy Hosp., 260 F.3d 939, 942 (8th Cir. 2001) (quoting Wooten v. Farmland Foods, 58 F.3d 382, 385 (8th Cir. 1995)) (internal quotation marks omitted). Under 42 U.S.C. § 12102(3) (previously § 12102(2)(C)), the term "regarded as disabled" relates to the employer's perception of his employee's alleged impairment. Giordano v. City of New York, 274 F.3d 740, 748 (2d Cir. 2001). *See also* 42 U.S.C. § 12102(3) (2006). The employee must show that the employer regarded the employee as disabled under the meaning of the ADA, meaning that the employer perceived the employee as substantially limited in his ability to perform a major life activity. *Giordano*, 274 F.3d at 748 (citing Colwell v. Suffolk Cnty. Police Dep't, 158 F.3d 635, 646 (2d Cir. 1998) (internal quotation marks omitted)).

[103] Conroy v. N.Y. Dep't of Corr. Servs., 333 F.3d 89, 96 (2d Cir. 2003) (citing EEOC, QUESTIONS & ANSWERS, *supra* note 49 and accompanying text).

examples of prohibited inquires than to inquiries into general well-being or ability to perform job functions.[104] As provided in the definition of "disability-related inquiries," the directive's requirement is likely to elicit information about a disability.[105]

Several courts agree with the reasoning of the Second Circuit's decision including the United States District Court for the Middle District of Pennsylvania and the United States District Court for the Southern District of California.[106] Additionally, the United States District Court for the Southern District of New York, which is bound by the Second Circuit, followed the Second Circuit's reasoning.[107] These courts held that sick leave policies requiring employees to provide information that included the nature of their illnesses violated the ADA as the inquiries "may tend to reveal disabilities or perceived disabilities."[108] Additionally, these courts held that the inquiries were not job-related or consistent with business necessity.[109]

D. *The Sixth Circuit's Medical Inquiry Analysis:* Lee v. City of Columbus

In *Lee v. City of Columbus,* the Sixth Circuit considered a directive[110] that required employees of the city of Columbus, Ohio, returning to work following sick leave, injury leave, or restricted duty,

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104 *Conroy*, 333 F.3d at 96.

105 *See id.*

106 *See* Pa. State Troopers Ass'n v. Miller, 621 F. Supp. 2d 246 (M.D. Pa. 2008) (applying *Conroy* throughout); EEOC v. Dillard's Inc., No. 3:08-CV-01780, 2012 WL 440887 (S.D. Cal. Feb. 9, 2012).

107 *See* Transp. Workers Union of Am., Local 100, AFL-CIO v. N.Y.C. Transit Auth., 341 F. Supp. 2d 432, 437 (S.D.N.Y. 2004).

108 *Pa. State Troopers Ass'n*, 621 F. Supp. 2d at 251-52 (quoting *Conroy*, 333 F.3d at 95); *Transp. Workers Union of Am.*, 341 F. Supp. 2d at 447; *Dillard's Inc.*, 2012 WL 440887, at *5-6.

109 *Pa. State Troopers Ass'n*, 621 F. Supp. 2d at 259-60; *Transp. Workers Union of Am.*, 341 F. Supp. 2d at 449.

110 Lee v. City of Columbus, 636 F.3d 245, 247-48 (6th Cir. 2011) (emphasis in original). Directive 3.07 § III(H) relates to the procedures for when an employee seeks to take sick leave prior to the start of his shift and provides in relevant part:

H. Returning to Regular Duty Following Sick Leave, Injury Leave, or Restricted Duty

1. ***All*** Personnel

a. Notify the Information Desk ***to mark up prior to*** returning to ***regular*** duty.

b. If any of the following conditions apply, forward a note from the attending physician to [the Employee Benefits Unit] upon returning to ***regular*** duty:

(1) More than three days of sick leave were used.

The physician's note must state the nature of the illness and that you are capable of returning to ***regular duty.***

(2) Previously notified by a commander to do so.

"to submit a copy of their physician's note, stating the 'nature of the illness' and whether the employee is capable of returning to regular duty, 'to [his/her] immediate supervisor.'"[111] The plaintiffs, employees of the City of Columbus, Division of Police, alleged that the directive violated the Rehabilitation Act.[112] The district court granted summary judgment in favor of the plaintiffs and entered a permanent injunction prohibiting the city from enforcing the directive.[113]

The district court followed the Second Circuit's decision in *Conroy* and held that the directive invoked the protections of the ADA.[114] Reasoning that the directive required confidential medical information be disclosed to immediate supervisors, the court held that the directive violated "§ 12112(d)(4)(A) [of the ADA] because supervisory personnel in the chain of command are not authorized by the statute to have unfettered access to confidential medical information."[115] The district court found that the ADA "explicitly provide[s] that disclosure of [confidential] medical information to a supervisor only in select circumstances, and by so expressly limiting disclosure, the statutory scheme implicitly forecloses disclosure to supervisors for purposes that fall outside those narrow and specific purposes."[116] Therefore, the district court held that there would be no need for the Section 1211(d)(3)(B)(i) language if the ADA intended to allow full disclosure to a supervisor in all instances.[117]

However, the Sixth Circuit vacated the injunction and reversed and remanded for the entry of judgment in the city's favor.[118] The Sixth Circuit held that the requirement that an employee provide a general diagnosis or a statement regarding the nature of the

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The physician's note must state the nature of the illness and that you are capable of returning to ***regular duty.***

(3) More than two days of sick leave were used due to illness in the immediate family. The physician's note must state the nature of the family member's illness and that you were required to care for the family member.

Note: Consult the applicable work agreement for the definition of immediate family.

(4) You were assigned to restricted duty.

The physician's note must state that you are capable of returning to regular duty.

c. Submit a copy of the physician's note ***to your immediate supervisor.***

111 *Id.* at 247.

112 *Id.*

113 *Id.*

114 *Id.* at 251.

115 *Id.*

116 Lee v. City of Columbus, 636 F.3d 245, 251 (6th Cir. 2011).

117 *Id.* at 251-52.

118 *Id.* at 247.

employee's illness does not trigger ADA protections under Section 12112(d)(4)(A) because it is not necessarily a question about whether the employee is disabled.[119] Therefore, the court held that *Conroy*'s decision was too broad and prohibited "numerous legitimate and innocuous inquiries that are not aimed at identifying a disability."[120] The Sixth Circuit also focused on the requirement of the Rehabilitation Act that discrimination is based "solely" on the basis of disability, stating that "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."[121] The Sixth Circuit found no evidence that the inquiry was intended to reveal or necessitated revealing a disability.[122]

Going a step further, the Sixth Circuit stated that even if the directive could be characterized as a disability-related inquiry, the directive would not be prohibited by the ADA because it is a workplace policy applicable to all employees.[123] The Sixth Circuit cited to multiple cases from the EEOC, the district courts, and the Ninth Circuit in an unpublished opinion to support its holding that an employer's request for employees to supply information justifying the use of sick leave is not an improper medical inquiry under the Rehabilitation Act or the ADA.[124]

II. ANALYSIS

Courts should follow the Second Circuit's decision in *Conroy* and stay away from the line of analysis in the Sixth Circuit's decision in

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119 *Id.* at 254-55.

120 *Id.* at 254.

121 *Id.* at 255 (citing Verkade v. U.S. Postal Serv., 378 Fed. App'x 567, 578 (6th Cir. 2010)) ("An employer makes an adverse employment decision 'solely' because of its employee's disability when the employer has no reason left to rely on to justify its decision other than the employee's disability.") (citations and internal quotation marks omitted).

122 Lee v. City of Columbus, 636 F. 3d 245, 255 (6th Cir. 2011).

123 *Id.* (citing EEOC, QUESTIONS & ANSWERS, *supra* note 49)

> May an employer request that an employee provide a doctor's note or other explanation when the employee has used sick leave? (Question 15) Yes. An employer is entitled to know why an employee is requesting sick leave. An employer, therefore, may ask an employee to provide a doctor's note or other explanation, as long as it has a policy or practice of requiring all employees to do so.

(emphasis omitted).

124 *See generally id.* at 253-57.

Lee. Section A addresses the difference between acceptable and unacceptable disability-related medical inquiries, Section B looks at the other courts that have used the framework of the Second Circuit's decision in *Conroy,* Section C focuses on why the Sixth Circuit and other supporting arguments are wrong, Section D analyzes the negative effects the Sixth Circuit's decision has on individuals with disabilities, and Section E identifies the large number of barriers that exist in employment for individuals with disabilities.

A. *Acceptable and Unacceptable Disability-Related Medical Inquiries*

Conroy establishes that "employers must take care to ensure that their requests are not overly broad and are closely related to a 'business necessity.'"[125] For example, the Office of Legal Counsel for the EEOC, in a letter dated October 5, 2004, stated that requesting an employee's entire medical history in response to a request for sick leave would violate the ADA.[126] Another unacceptable inquiry for an employer to make is to ask an employee what prescription medications they are taking. The Tenth Circuit in *Roe v. Cheyenne Mountain Conference Resort, Inc.*, held that an employer's policy requiring the disclosure of all legal prescription medication its employees were taking violated Section 102(d)(4) of the ADA because it elicited information about the employees' disabilities.[127]

The EEOC has provided a list of questions that are permitted, which include the following: (1) asking an employee about his general well-being with a question such as "How are you?"; (2) asking an employee if she is feeling ok if she looks tired or ill; (3) asking an employee if she has a cold or allergies if the employee is sneezing or coughing; (4) asking an employee how she is doing after the death of a loved one or at the end of a relationship or marriage; (5) "asking an employee about nondisability-related impairments [such as] "How did you break your leg?"; (6) "asking an employee whether [she] can per-

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[125] *Second Circuit Clarifies ADA's Prohibition Against "Medical Inquiries"*, KAUFF, MCGUIRE & MARGOLIS (July 2, 2003), http://www.kmm.com/articles-275.html.

[126] Letter from Christopher Kuczynski, Assistant Legal Counsel, ADA Policy Division, EEOC, *ADA: Disability-Related Inquiries & Medical Examinations of Employees*, EEOC (Oct. 5, 2004), *available at* http://www.eeoc.gov/eeoc/foia/letters/2004/ada_inquiries_examinations_2.html.

[127] Roe v. Cheyenne Mountain Conference Resort, Inc., 124 F.3d 1221, 1230-31 (10th Cir. 1997).

form job functions;" (7) asking an employee whether she has been drinking or about her current illegal use of drugs; (8) "asking a pregnant employee how she is feeling or when her baby is due"; and (9) "asking an employee to provide the name and telephone number of a person to contact in case of an emergency."[128] Thus, the sick leave policies that require medical documentation describing the nature of the illness or providing a general diagnosis are more in line with the prohibited disability-related inquiries than the permitted inquiries.[129] A general diagnosis or the nature of the illness are not questions about an employee's general well-being, do not relate to drug or alcohol use, are not general observations of a non-disability impairment, and are much more specific than questions about whether an employee can perform a job function. A statement including a general diagnosis or the nature of the illness is likely to elicit information about a disability because it requires a description from the doctor.

Although there is an exception to unacceptable inquiries—job-related and consistent with business necessity—this exception must be narrowly construed. Ensuring that the employer has the burden of proving a sick-leave policy is a business necessity is important to maintaining the goals of the ADA to prevent discrimination before it occurs.[130] The *Conroy* court indicated that an employer who asks

> an individual employee to provide a diagnosis could meet the business necessity standard if, among other things: (1) the employer has legitimate, nondiscriminatory reasons to doubt the employee's ability to perform his or her duties (such as because of the length of an absence or the existence of a known condition that had previously affected the employee's work); or (2) the employer has specific reason to suspect abuse of an attendance policy (such as frequent absences or a pattern of sick leave absences on Mondays or Fridays).[131]

The *Conroy* court also indicated that an employer who can show that it has legitimate business reason for defining a class of employees in a

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128 EEOC, ENFORCEMENT GUIDANCE, *supra* note 6 (emphasis omitted).

129 Conroy v. N.Y. State Dep't of Corr. Servs., 333 F.3d 88, 96 (2d Cir. 2003).

130 Brief for AARP as Amicus Curiae Supporting Plaintiff-Appellee at 10, 22-23 *Conroy*, 333 F.3d at 88, *aff'g in part and vacating in part* Fountain v. N.Y. State Dep't of Corr. Servs., 190 F. Supp. 2d 335 (N.D.N.Y. 2002) (No. 02-7415), 2002 WL 32387881, at *10, 22-23.

131 BOND, SCHOENECK & KING, PLLC, *supra* note 19 at 2.

particular way may be able to show that a general policy applied to that entire class of employees is lawful.[132]

> For example, if an employer can show that it has a reasonable basis for concluding that employees who are absent for four days or more pose a genuine health or safety risk and that requiring a general diagnosis decreases that risk effectively, the employer may properly define the class of employees as those who return from a sick leave absence of four days or more.[133]

However, to be lawful, the employer must prove that there is a correlation between the policy implemented and its alleged business necessity.[134]

Therefore, based on the Second Circuit's decision in *Conroy*, it is likely that a "broad policy requiring a diagnosis every time an employee returns from sick leave of any duration" will be found unlawful.[135] However, "a policy requiring a diagnosis only from those employees who have previously received warnings for abusing sick leave may be found lawful."[136]

B. *Applying the Analysis and Framework of the Second Circuit's* Conroy *Decision*

Other courts have followed the reasoning and analysis of the Second Circuit's decision in *Conroy* including the United States District Court for the Southern District of New York, which is bound by the Second Circuit, the United States District Court for the Middle District of Pennsylvania, and the United States District Court for the Southern District of California.

1. The United States District Court for the Southern District of New York

Transport Workers Union of America, Local 100, AFL-CIO v. New York City Transit Authority was the first case that applied the

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132 BOND, SCHOENECK & KING, PLLC, *supra* note 19 at 2.
133 BOND, SCHOENECK & KING, PLLC, *supra* note 19 at 2.
134 BOND, SCHOENECK & KING, PLLC, *supra* note 19 at 2.
135 BOND, SCHOENECK & KING, PLLC, *supra* note 19 at 2.
136 BOND, SCHOENECK & KING, PLLC, *supra* note 19 at 2.

analysis and framework set out by the *Conroy* court.[137] The New York City Transit Authority (the "Transit Authority") had a policy of making general inquiries about its employees' medical conditions before approving sick leave.[138] The policy involved three inquiries: first, the employee had to give at least one hour notice for sick leave and provide a brief statement of the *nature of the illness or condition*; second, upon returning to work, the employee had to submit a sick leave application to state the "nature of the disability;" and third, in certain circumstances, the employee was also required to have a doctor certify that the employee's illness incapacitated the employee to the point he was incapable of performing his duties, briefly state the employee's diagnosis or objective findings and the treatment or prognosis, and provide the doctor's expected return date for the employee.[139]

The plaintiff, the unions representing tens of thousands of Transit Authority employees, alleged that the sick leave policy violated the prohibited medical inquires and examinations provision of the ADA.[140] The defendant, the New York City Transit Authority, attempted to justify the policy claiming that the policy (1) curbed sick leave abuse and (2) maintained workplace and public safety.[141] The court disagreed with the defendant's justifications, holding that the first justification was only appropriate to employees with "egregiously

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137 Transp. Workers Union of Am., Local 100, AFL-CIO v. N.Y.C. Transit Auth., 341 F. Supp. 2d 432, 437 (S.D.N.Y. 2004).

138 *Id.*

139 *Id.* at 438-39. The exact language of the three inquiries was:

> [f]irst, any employee who seeks sick leave must, before missing work, call the Authority to give notice at least one hour prior to the start of his or her scheduled tour of duty. This notice must include a brief statement of the *nature of the illness or condition* causing the absence. Second, on returning to work, the employee must submit a sick leave application form [ ].The employee must give the completed sick form to his or her supervisor. The sick form must be submitted by all employees after an absence of any length, regardless of whether the employee seeks paid or unpaid leave. The sick form requires the employee to state again the *nature of [the] disability* which caused him or her to be unfit for work on account of illness during this period. The form must be submitted within three days of the employee's return from his or her absence. During that time, the employee returns to normal duty. Third, in certain circumstances, employees are also required to have the "doctor's certification" section of the sick form completed. In such cases, the employee's doctor must certify that the employee's illness so incapacitated the employee that he/she was incapable of performing his/her duties during a specific period of time. The doctor must also state briefly the employee's diagnosis/objective findings and treatment/prognosis and expected date of return.

(emphasis added) (internal quotation marks omitted).

140 *Id.* at 437.

141 *Id.*

poor attendance records," and the second only appropriate in respect to "employees with safety-sensitive jobs."[142]

Although the court found there be to a significant level of sick leave abuse at the Transit Authority, which was costly to the employer, the court did not find the evidence sufficient enough to prove that the abuse was so widespread as to prove it to be a norm among employees.[143] The court followed the reasoning in *Conroy* and held that the policy would only be lawful if the defendant could satisfy its burden by showing the inquiry to be "job-related and consistent with business necessity."[144] The employer must make a two-part showing.[145] First, the employer must show that the alleged business necessity of the policy is "vital to the business" and more than just "consistent with mere expediency" or "convenien[ce]" or "beneficial to [the] business."[146] As *Conroy* recognized, although a business necessity "may include ensuring that the workplace is safe and cutting down on egregious absenteeism," an employer "cannot merely rely on reasons that have been found valid in other cases," and must instead show that the business necessity is vital on the facts of the particular case.[147] Second, the employer also needs to prove "that the examination or inquiry genuinely serves the asserted business necessity and that the request is no broader or more intrusive than necessary."[148]

Holding that the inquiry in this case was almost identical to the inquiry in *Conroy*, the court found the policy to be a prohibited inquiry under the ADA because it "may tend to reveal disabilities or perceived disabilities."[149] Then, the court turned to whether the inquiry was job-related and consistent with business necessity and answered in the negative.[150] The court held that the justification of curbing sick leave abuse is not sufficient other than for employees on

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142 *Id.*

143 Transp. Workers Union of Am., Local 100, AFL-CIO v. N.Y.C. Transit Auth., 341 F. Supp. 2d 432, 442 (S.D.N.Y. 2004).

144 *Id.* at 446.

145 *Id.*

146 *Id.* at 446 (quoting Conroy v. N.Y. State Dep't of Corr. Servs., 333 F.3d 88, 98 (2d Cir. 2003)).

147 *Id.* (quoting *Conroy*, 333 F.3d at 98, 101).

148 *Id.*

149 Transp. Workers Union of Am., Local 100, AFL-CIO v. N.Y.C. Transit Auth., 341 F. Supp. 2d 432, 447 (S.D.N.Y. 2004) (quoting *Conroy*, 333 F.3d at 95 (internal quotation marks omitted)).

150 *Id.*

the sick leave control list.[151] The Transit Authority did not reasonably define the class of employees affected under the justification for curbing sick leave abuse.[152] The class of employees affected was too broad and the Transit Authority did not prove that such a broad group of employees were all sick leave abusers.[153] The Transit Authority proved it was capable of identifying employees that have egregious attendance records by maintaining a control list and, therefore, did not need the sick leave policy to identify abusers.[154] However, the court held that the justification for ensuring safety for bus drivers and possibly some other safety-sensitive employees was sufficient.[155]

Therefore the court held that the policy, other than when applied to employees on the sick leave control list and employees with safety-sensitive roles, violated the ADA.[156] The court outlined acceptable inquiries that the Transit Authority could make:

> The Authority may require [1] an employee to call in advance of an absence, but *may not require the employee to describe the nature of his illness* . . . [2] an employee to submit a sick form on his return, in which the employee must state that he was unfit to work due to illness during the period of absence, but *may not ask the employee to state the nature of his disability* . . . [3] an employee to submit a doctor's certificate for absences of certain lengths, as determined through collective bargaining . . . [4] that the doctor certify that the employee was incapable, due to illness, of performing his duties during a specific period, and that the employee is now fit to resume his duties, but *may not require the doctor to describe the nature of the illness or treatment*.[157]

These acceptable inquiries do not trigger ADA provisions and do not "tend to reveal a disability."[158] In the case of Jane Doe, XYZ Corporation could ask that she provide a note from a doctor stating that she was ill as long as it does not reveal the nature of her illness. This would enable XYZ Corporation to verify Jane Doe's use of sick leave

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151 *Id.*

152 *Id.* at 449.

153 *Id.*

154 *Id.*

155 Transp. Workers Union of Am., Local 100, AFL-CIO v. N.Y.C. Transit Auth., 341 F. Supp. 2d 432, 447 (S.D.N.Y. 2004).

156 *See id.* at 451.

157 *Id.* at 451-52.

158 *See id.* at 446.

was legitimate without disclosing to her supervisor that she has severe depression. Then, Jane Doe would not have been taken off of good assignments or been given less responsibility because of her supervisor's bias against Jane Doe having severe depression.

2. The United States District Court for the Middle District of Pennsylvania

In *Pennsylvania State Troopers Association v. Miller*, the plaintiff, a labor organization representing the state police officers, challenged the sick leave policy of the Pennsylvania State Police under the ADA.[159] The *Pennsylvania State Troopers Association* court followed the reasoning in *Conroy v.* New York State Department of Correctional Services, when it held that the sick leave policy violated the ADA.[160] The plaintiffs alleged that the policy violated the ADA because it required police officers requesting sick leave to disclose the "nature of their illness," which may result in the disclosure of information about disabilities.[161] The policy stated:

> Notification of Illness or Injury (Off Duty): Members who know that they will be unable to report for duty due to illness or injury they incurred while off duty shall immediately notify their supervisor (or ensure such notification) of the nature of the injury or illness, where they will be recuperating, and the expected date of return to duty. Supervisors shall also be advised of any changes in the above which may occur after the original notification was given.[162]

The defendants countered saying that the sick leave policy is essential to business operation because it allows supervisors "to plan for adequate shift coverage and ensure that officers are fit for duty upon return from sick leave."[163] Citing *Conroy*, the court held that "a policy that requires the employee to provide a general diagnosis or description of a medical condition constitutes a prohibited inquiry

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159 Pa. State Troopers Ass'n v. Miller, 621 F. Supp. 2d 246, 249-50 (M.D. Pa. 2008).

160 *Id.* at 265.

161 *Id.* at 250.

162 *Id.*

163 *Id.*

under § 12112(d)(4)" of the ADA.[164] The court held that "this inquiry has the potential to reveal whether the employee has a disability."[165]

The court explained that once the employee presents a prima facie case, it is the employer's burden to demonstrate that the policy is "job-related and consistent with business necessity."[166] The court held that the employer established a valid business necessity defense in regard to planning for substitute shift coverage because the state troopers handle unforeseen public emergencies and must maintain adequate coverage on all shifts.[167] In regards to the reporting clause, the employer must prove that the requirement "serves . . . business necessity and . . . is no broader or more intrusive than necessary."[168] The court held that the reporting clause of the policy was not consistent with business necessity.[169] The defendant alleged that a supervisor's experience in reviewing and approving employees' sick leave allows the supervisor to determine whether the employee made an unrealistic assessment of their date of expected return.[170] The policy incorrectly presumed that "police supervisors, who lack medical training and who receive only a brief description of the [employee's] illnesses, [could] more accurately assess the severity of the [employee's] condition than the [employee himself] or [the employee's] physician."[171] The court held that the brief communication about the general nature of the illness was not enough for a supervisor to form a proper judgment about the potential length of absence due to the employee's illness.[172] Instead, having the employee update their expected duration of leave as it changes would provide supervisor's with an estimate of absence duration, while avoiding the disclosure of the employee's illnesses.[173]

In addition to the justification that the policy was necessary to help supervisors determine when an employee could return to work,

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164 *Id.* at 252 (citing Conroy v. N.Y. Dep't of Corr. Servs., 333 F.3d 88, 95 (2d Cir. 2003); *see* 42 U.S.C. § 12112(d)(4).

165 Pa. State Troopers Ass'n v. Miller, 621 F. Supp. 2d 246, 253 (M.D. Pa. 2008) (quoting *Conroy*, 333 F.3d at 95-96) (internal quotation marks omitted).

166 *Id.* at 252 (M.D. Pa. 2008) (quoting 42 U.S.C. § 12112(d)(4)(A) (2006)).

167 *Id.* at 254-55.

168 *Id.* at 255 (quoting *Conroy*, 333 F.3d at 97).

169 *Id.* at 255-56.

170 *Id.* at 255.

171 Pa. State Troopers Ass'n v. Miller, 621 F. Supp. 2d 246, 255 (M.D. Pa. 2008).

172 *Id.*

173 *Id.* at 256.

the defendant also argued that the reporting clause was a business necessity because it enabled supervisors to determine whether an employee was fit to return to duty after a sick leave absence.[174] The court, however, disagreed and found the reporting clause to be too broad.[175] The court found that although it is important to ensure that employees, especially those who "often face volatile law enforcement encounters," are fit to return to duty, a broad inquiry is inappropriate at the outset of an illness.[176]

The court held that the reporting policy failed for several reasons.[177] First, the defendants justified the policy alleging that it enabled supervisors to detect latent injuries that could impair job performance, but they did not make such inquires of employees who do not request sick leave.[178] Second, there are other regulations that can allow for the assessment of employee's fitness for duty that are not in dispute.[179] Third, the policy is "not narrowly tailored to business necessity because it imposes reporting requirements upon many [employees] who are fit for duty while failing to impose similar requirements on many who are not."[180] Fourth, the policy is not limited to employees "whose job duties could be impaired by the conditions subject to the inquiry."[181] Lastly, the policy appears to be an inappropriate absenteeism control policy rather than "job-related and consistent with business necessity."[182]

The court found that the policy also does not comport with business necessity because it is based upon the use of sick leave instead of upon the employee's medical condition or employment duties.[183] Since the reporting obligations are imposed solely on employees who use sick leave, an employee who suffers an injury or illness does not need to report the condition if they do not use sick leave.[184] Therefore, employees are not treated equally because two employees could have an identical condition and only the member who requests sick

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174 *Id.*
175 *Id.* at 259.
176 *Id.* at 256, 259.
177 Pa. State Troopers Ass'n v. Miller, 621 F. Supp. 2d 246, 259 (M.D. Pa. 2008).
178 *Id.*
179 *Id.*
180 *Id.*
181 *Id.*
182 *Id.*
183 Pa. State Troopers Ass'n v. Miller, 621 F. Supp. 2d 246, 260 (M.D. Pa. 2008).
184 *Id.*

leave would be subject to the reporting clause of the policy.[185] There is no reason why the employee who requests sick leave may be found unfit for duty while the fitness of the employee who did not request leave is unquestioned.[186] The court found the above reasons, including the disparate treatment of employees, proved that the sick leave policy to be neither vital to employer's business nor narrowly tailored to serve the defendant's alleged business necessity. Instead, it is "an expedient way to screen [employees'] conditions and violates § 12112(d)(4)."[187]

3. The United States District Court for the Southern District of California

The Southern District of California, under the jurisdiction of the Ninth Circuit, has recently taken up the issue of medical leave and documentation in *EEOC v. Dillard's, Inc.* and followed the Second Circuit.[188] The court denied Dillard's motion for summary judgment, allowing the case to continue.[189]

The EEOC brought a suit under 42 U.S.C. § 12112 on behalf of individuals affected by Dillard's, Inc. and Dillard Store Services, Inc.'s attendance policy.[190] The attendance policy required that for a health related absence to be excused, an employee must submit a doctor's note stating "the nature of the absence . . . such as migraine, high blood pressure, etc." and that the note "must state the condition being treated."[191] An employee submitted a doctor's note only stating the day she would return to work, and her manager refused to accept the note because it failed to state the condition being treated.[192] The manager stated that although the note did not have to state a specific diagnosis, it did have to state the "nature of the illness" or the "nature of the absence."[193] An acceptable example would be: "[the employee] went to the doctor, the doctor decided she needed some medication,

185 *Id.*

186 *Id.*

187 *Id.*

188 EEOC v. Dillard's Inc., No. 3:08-CV-01780, 2012 WL 440887 (S.D. Cal. Feb. 9, 2012).

189 *Id.* at *11.

190 *Id.* at *1.

191 *Id.* (internal citations and quotation marks omitted).

192 *Id.*

193 *Id.*

and it would take a few days for the medication to work."[194] The store's old policy provided for termination for four unexcused absences, so the employee was terminated after failing to submit a detailed doctor's note and receiving an unexcused absence.[195] Dillard's rescinded the policy in July 2007, and began only requiring that an employee "report off work prior to their scheduled start time" for health-related absences.[196]

The court held that Dillard's old attendance policy, on its face, constituted an impermissible disability-related inquiry under 42 U.S.C. § 12112(d)(4)(A).[197] To make this decision, the court looked to the Second Circuit's reasoning in *Conroy v. New York Department of Correctional Services*, since the Ninth Circuit had not yet determined the issue.[198] The court also relied on a Ninth Circuit decision, *Indergard v. Georgia-Pacific Corporation*[199] Although the Ninth Circuit has not considered what constitute an "improper medial inquiry," it has considered when a medical examination triggers ADA protections under Section 12112(d)(4)(A).[200] In *Indergard*, the court held that a company's policy requiring an employee to submit to a physical capacity evaluation prior to returning to work from medical leave violated Section 12112(d)(4)(A).[201] It relied on the Second Circuit's reasoning in *Conroy*, especially the language stating an employer's requirement of a "general diagnosis . . . may tend to reveal a disability."[202] The *Indergard* court also held that an employer could inquire about whether an employee is able to perform a job-related function, but could not require a medical examination that is not a business necessity.[203]

The court held that Dillard's policy violated Section 12112(d)(4)(A) because the requirement to disclose "the nature of the absence . . . such as migraine, high blood pressure, etc. . . . and the

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194 EEOC v. Dillard's Inc., No 3:08-CV-01780, 2012 WL 440887, at *1 (S.D. Cal. Feb. 9, 2012).

195 *Id.*

196 *Id.* at *2.

197 *Id.* at *5.

198 *Id.* at *3.

199 *See* Indergard v. Georgia-Pacific Corp., 582 F.3d 1049 (9th Cir. 2009).

200 EEOC v. Dillard's Inc., No. 3:08-CV-01780, 2012 WL 440887, at *4 (S.D. Cal. Feb. 9, 2012).

201 *Id.* at *4 (citing *Indergard*, 582 F.3d at 1057).

202 *Id.* at *5 (citing *Indergard*, 582 F.3d at 1056).

203 *Id.* at *4 (citing *Indergard*, 582 F.3d at 1052-53).

condition being treated," was substantially similar to the "brief general diagnosis" requirement in *Conroy* and "may tend to reveal a disability."[204] Conditions such as migraines and high blood pressure may evidence a disability.[205] What would be acceptable is asking employees to submit a note stating the date the employee was seen, that the absence from work was a medical necessity, and the date on which the employee would be able to return to work.[206] The court held that the policy was too intrusive into an employee's medical condition and tended to elicit information regarding an actual or perceived disability. Therefore, the court held that the policy violated Section 12112 (d)(4)(A) unless it could be shown that the policy was "job related and consistent with business necessity."[207] The court found that Dillard's failed to provide evidence proving the policy was job-related and consistent with business necessity.[208] Dillard's did not even attempt to provide an explanation for why it was necessary to identify the underlying medical condition, instead of just plainly stating the employee has a medical condition requiring her to be out of work and specifying when the employee would return to work.[209] Furthermore, if the policy was a business necessity, Dillard's would not have rescinded the policy.[210]

C. *Why the Sixth Circuit and Other Supporting Arguments Are Wrong*

The Second Circuit's decision in *Conroy* should be favored over the Sixth Circuit's decision in *Lee*. *Lee* improperly decided that a requirement that an employee provide a general diagnosis or a statement regarding the nature of the employee's illness does not trigger ADA protections. Subsection 1 argues that *Lee* interprets EEOC guidance, which is not binding, too broadly. Subsection 2 argues that *Lee* improperly distinguishes the ADA and Rehabilitation, and Subsection

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204 *Id.* at *5 (internal quotation marks omitted).

205 *Id.* at *5 (citing Rohr v. Salt River Project Agric. Imp. & Power Dist., 555 F.3d 850, 863 (9th Cir. 2009)).

206 EEOC v. Dillard's Inc., No. 3:08-CV-01780, 2012 WL 440887, at *5 (S.D. Cal. Feb. 9, 2012).

207 *Id.* at *5.

208 *Id.* at *6.

209 *Id.*

210 *Id.*

3 argues that *Lee*'s cited support is not strong enough to reach its result.

1. EEOC Is Not Binding and *Lee* Interprets EEOC Guidance Too Broadly

Lee relies on to the Enforcement Guidance of the EEOC, which states that an employer "may ask an employee to provide a doctor's note or other explanation, as long as it has a policy or practice of requiring all employees to do so."[211] However, enforcement guidance provided by the EEOC is not binding.[212] Instead, the guidance is a "body of experience and informed judgment to which courts and litigants may properly resort for guidance,"[213] but it "is entitled to respect only to the extent of its persuasive power."[214] Furthermore this EEOC guidance refers to a "doctor's note or other explanation," but does not provide whether this note or explanation can disclose the nature of the illness.[215] *Lee* and the cases following its reasoning have interpreted this EEOC guidance too broadly. There is a significant distinction between a general doctor's note that merely states an employee saw a doctor and a doctor's note that requires an explanation of the nature of the illness or injury.

2. *Lee's* Improper Distinction Between the ADA and the Rehabilitation Act

Lee distinguishes *Conroy* based on the fact that *Conroy* interpreted the ADA, which does not contain the language "'solely by reason' of a disability."[216] Therefore, the court in *Lee* stated that the analysis under the Rehabilitation Act focused on whether a medical inquiry is "intended to reveal or necessitates revealing a disability, rather than whether the inquiry may merely tend to reveal a disabil-

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211 Lee v. City of Columbus, 636 F.3d 245, 255 (6th Cir. 2011) (citing EEOC, QUESTIONS & ANSWERS, *supra* note 49); *see* 42 U.S.C. § 12112(d)(4)(A) ("A covered entity 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.").

212 *Lee*, 636 F.3d at 256 (citing White v. Burlington N. & Santa Fe Ry. Co., 364 F.3d 789, 812 (6th Cir. 2004) (en banc)).

213 *Id.* (quoting *White*, 364 F.3d at 812).

214 *Id.* (quoting EEOC v. SunDance Rehab. Corp., 466 F.3d 490, 500 (6th Cir. 2006)).

215 EEOC, QUESTIONS & ANSWERS, *supra* note 49.

216 *Lee*, 636 F.3d at 256.

ity."[217] However, the Rehabilitation Act specifically states that ADA standards will be used to determine if there is a violation under the Rehabilitation Act.[218] The Rehabilitation act provides that:

> [t]he standards used to determine whether this section has been violated in a complaint alleging employment discrimination under this section shall be the standards applied under title I of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111 et seq.) and the provisions of sections 501 through 504, and 510, of the Americans with Disabilities Act of 1990 (42 U.S.C. 12201 to 12204 and 12210), as such sections relate to employment.[219]

This is commonly understood and multiple courts, including the Sixth Circuit, have held that the ADA's limitations on the disclosure of medical information are incorporated by reference into the Rehabilitation Act.[220] These courts include the United States Court of Appeals for the First Circuit,[221] the United States Court of Appeals for the Second Circuit,[222] the United States Court of Appeals for the Third Circuit,[223] the United States Court of Appeals for the Fourth Circuit,[224] the United States Court of Appeals for the Sixth Circuit,[225] the United States Court of Appeals for the Seventh Circuit,[226] the United States Court of Appeals for the Eight Circuit,[227] the United States Court of Appeals for the Ninth Circuit,[228] the United States Court of Appeals for the Tenth Circuit,[229] the United States Court of

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217 *Id.* at 255 (emphasis omitted).

218 29 U.S.C. § 794(d) (2006).

219 *Id.*

220 *See infra* notes 221-24.

221 Calero-Cerezo v. U.S. Dep't of Justice, 355 F.3d 6, 11 n.1 (1st Cir. 2004) (citing Oliveras-Sifre v. P.R. Dep't of Health, 214 F.3d 23, 25 n.2 (1st Cir. 2000)).

222 Francis v. City of Meriden, 129 F.3d 281, 284 n.4 (2d Cir. 1997) ("Because the ADA and the RHA are very similar, we look to caselaw interpreting one statute to assist us in interpreting the other.").

223 Donahue v. Consol. Rail Corp., 224 F.3d 226, 229 (3d Cir. 2000) (elements of a claim under section 504 of the Rehabilitation Act and Title 1 of the ADA are very similar).

224 Hooven-Lewis v. Caldera, 249 F.3d 259, 268 (4th Cir. 2001).

225 Lee v. City of Columbus, 636 F.3d 245, 252 (6th Cir. 2011); Holiday v. City of Chattanooga, 206 F.3d 637, 642 n.1 (6th Cir. 2000).

226 Jackson v. City of Chicago, 414 F.3d 806, 810-11, 810 n.2 (7th Cir. 2005).

227 Ballard v. Rubin, 284 F.3d 957, 960 n.3 (8th Cir. 2002).

228 Coons v. Sec'y of U.S. Dep't of Treasury, 383 F.3d 879, 884 (9th Cir. 2004).

229 McGeshick v. Principi, 357 F.3d 1146, 1150 (10th Cir. 2004).

Appeals for the Eleventh Circuit,[230] the United States Court of Appeals for the District of Columbia Circuit,[231] the United States District Court for the District of Columbia,[232] the United States District Court for the Southern District of California,[233] and the United States District Court of the District of Minnesota.[234] Because of this incorporation by reference, the distinction *Lee* makes between the Rehabilitation Act and the ADA because of the lack of the word "solely" in the ADA should be irrelevant.

The Sixth Circuit's focus on the requirement of the Rehabilitation Act that discrimination is based "solely" on the basis of disability, when stating that "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"[235] is also misguided for another reason. Although medical inquiries are prohibited by the ADA,[236] the medial inquiries themselves are not discrimination based on a disability. Even an individual without a disability could sue under the ADA – and presumably Section 504 of the Rehabilitation Act – for a perceived disability.[237] The purpose of the prohibition on medical inquiries under the ADA and Rehabilitation Act is that such inquiries have a tendency to reveal a disability or perceived disability, which could then lead an employer to discriminate against an employee based on this information.[238] Medical inquiries are prohibited under Section 504 because Section 504

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230 Cash v. Smith, 231 F.3d 1301, 1305 (11th Cir. 2000).

231 Doe v. U.S. Postal Serv., 317 F.3d 339, 340 (D.C. Cir. 2003).

232 Zeigler v. Potter, 510 F. Supp. 2d 9, 15 (D.D.C. 2007); Greer v. O'Neill, No. 1:01-CV-01398, 2003 WL 25653036, at *9 (D.D.C. Sept. 25, 2003).

233 Scott v. Napolitano, 717 F. Supp. 2d 1071, 1082 n.4 (S.D. Cal. 2010).

234 Brady v. Potter, No. 0:02-CV-01121, 2004 WL 964264, at *4 (D. Minn. Apr. 30, 2004).

235 *See* Lee v. City of Columbus, 636 F. 3d 245, 255 (6th Cir. 2011) (citing Verkade v. U.S. Postal Serv., 378 Fed. App'x 567, 578 (6th Cir. 2010)) ("An employer makes an adverse employment decision 'solely' because of its employee's disability when the employer has no reason left to rely on to justify its decision other than the employee's disability.") (citations and internal quotation marks omitted).

236 *See* 42 U.S.C. § 12112(d)(4)(A) (2006).

237 *See* Clouse, *supra* note 45.

238 *See* Conroy v. N.Y. State Dep't of Corr. Servs., 333 F.3d 88, 95 (2d Cir. 2003); Pa. State Troopers Ass'n v. Miller, 621 F. Supp. 2d 246, 251-52 (M.D. Pa. 2008) (quoting *Conroy*, 333 F.3d at 95); Transp. Workers Union of Am., Local 100, AFL-CIO v. N.Y.C. Transit Auth., 341 F. Supp. 2d 432, 447 (S.D.N.Y. 2004); EEOC v. Dillard's Inc., No. 3:08-CV-01780, 2012 WL 440887, at *5-6 (S.D. Cal. Feb. 9, 2012).

adopted the medical inquiry prohibition from the ADA.[239] Therefore, since a medical inquiry under Section 504 is not discriminatory in itself, it does not have to be made for the "sole" purpose of revealing a disability.

Furthermore, *Lee*'s interpretation frustrates Congress's intent to apply the same standards to both the ADA and the Rehabilitation Act. It is very difficult to prove employment discrimination claims in the first place and many are dismissed summarily for lack of proof.[240] Employers rarely admit that they discriminated against an employee.[241] Employers who discriminate often hide their motives by not making overtly discriminatory remarks, not leaving a paper trail, and avoiding eyewitnesses.[242] Under *Lee's* interpretation, litigants under the Rehabilitation Act would face great hurdles that ADA litigants would not have to overcome. Following *Lee,* "[e]mployers in the Sixth Circuit now have far more leeway than those in the Second Circuit to require doctor's notes for illness and injury so long as the policy applies equally to all employees."[243] Furthermore, the "distinction between policies that *may* reveal disabilities and those *aimed* at revealing disabilities makes disability discrimination class actions far more susceptible to an employer's motion for summary judgment."[244]

3. *Lee's* Cited Support Is Insufficient To Reach Its Result

Lee uses multiple cases as support for its reasoning that an employer's request for its employees to justify the use of sick leave is a proper medical inquiry under the Rehabilitation Act. However, many of these cases are distinguishable from the issue that was at hand in

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[239] *See* 42 U.S.C. § 12112(d)(4); Doe v. U.S. Postal Service, 317 F.3d 339, 340 (D.C. Cir. 2003); Scott v. Napolitano, 717 F. Supp. 2d 1071, 1082 n.4 (S.D. Cal. 2010); Brady v. Potter, No. 0:02-CV-01121, 2004 WL 964264, at *4 (D. Minn. Apr. 30, 2004); Greer v. O'Neill, No. 1:01-CV-01398, 2003 WL 25653036, at *9 (D.D.C. Sept. 25, 2003).

[240] Jay Jason Chatarpaul, *Proving an Employment Discrimination Case*, AVVO, http://www.avvo.com/legal-guides/ugc/proving-an-employment-discrimination-case-1 (last visited Feb. 15, 2013).

[241] Neil Klingshirn, *Discrimination in Employment FAQs*, FORTNEY & KLINGSHIRN, http://www.fklaborlaw.com/faqs/employment-law-discrimination-eeoc.html#A-3 (last visited Feb. 15, 2013).

[242] Chatarpaul, *supra* note 240.

[243] Colter Paulson, *Creating a Split with the Second Circuit, the Sixth Circuit Approves Sick Leave Policies that may Reveal a Disability to a Supervisor*, SIXTH CIRCUIT APPELLATE BLOG (Mar. 3, 2011), http://www.sixthcircuitappellateblog.com/recent-cases/creating-a-split-with-the-second-circuit-the-sixth-circuit-approves-sick-leave-policies-that-may-rev/.

[244] *Id.*

Lee. Additionally, little support is provided for ADA violations because all of the cases used in support are under the Rehabilitation Act, except for an unpublished decision of the Eastern District of Virginia, *Montano v. INOVA Health Care Services*.[245]

Lee argued that the *Montano* court held that the employer's inquiry into the reason for the plaintiff's medical leave was not a disability-related inquiry protected by ADA.[246] However, this case is distinguishable because the plaintiff only alleged that she informed human resources of her surgery and that her co-workers made comments that indicated awareness that she had undergone a medical procedure.[247] The plaintiff's claim was based on speculation and did not pass the Federal Rules of Civil Procedure pleading standard under *Conley v. Gibson*[248] because her allegations were not supported by factual basis.[249] Furthermore, the claims in this case were hostile work environment and discrimination based on race, national origin, and gender.[250] There was not a disability-related injury.[251]

Lee also relied on multiple EEOC Commission decisions regarding the Rehabilitation Act. In *White v. Potter*, the EEOC rejected the employee's claim that he was discriminated against on the basis of age, holding that the agency's reasoning for placing the employee on leave without pay for failing to provide the required leave documentation was legitimate and nondiscriminatory.[252] Again, this case is an age discrimination case and does not discuss disability-related inquiries.[253] Furthermore, *Lee*'s reliance on this case comes from a footnote that specifically states that an improper medical inquiry under the Rehabilitation Act was not even raised by the parties.[254]

In *Donoghue v. Nicholson*, "the EEOC rejected the complainant's Rehabilitation Act claim alleging that her employer failed to

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245 Montano v. INOVA Health Care Servs., No. 1:08-CV-00565, 2008 WL 4905982, at *7 (E.D. Va. Nov. 12, 2008).

246 Lee v. City of Columbus, 636 F.3d 245, 257 (6th Cir. 2011) (citing *Montano*, 2008 WL 4905982, at *7).

247 *Montano*, 2008 WL 4905982, at *2, 7.

248 Conley v. Gibson, 355 U.S. 41, 47 (1957).

249 *Montano*, 2008 WL 4905982, at *7.

250 *Id.* at *1.

251 *Id.* at *7.

252 White v. Potter, No. 01A14266, 2002 WL 31440931, at *2 n.2 (E.E.O.C. Oct. 23, 2002); *see also* Lee v. City of Columbus, 636 F.3d 245, 256 (6th Cir. 2011) (citing *White*, 2002 WL 31440931, at *2 n.2).

253 *White*, 2002 WL 31440931, at *1.

254 *See Lee*, 636 F.3d at 256 (citing *White*, 2002 WL 31440931, at *2 n.2).

accommodate her disability by denying her leave and retracting previously approved sick leave, holding that '[e]ven if complainant verbally informed her supervisor that she needed the leave because of a medical test, complainant's supervisor was entitled to request reasonable medical documentation.'"[255] The focus of the complaint in this case is the complainant's claim that she was denied a reasonable accommodation under the ADA when she was denied a leave request.[256] The complainant wanted to take leave and have it be considered a reasonable accommodation.[257] The crux of the Commission's argument is that management did not have knowledge of her disability provided in writing to consider the request.[258] The Commission only mentions in dicta that the supervisor "was entitled to request medical documentation" and cites to EEOC Enforcement Guidance.[259]

The Commission in *Miller v. Donley* rejected the a discrimination claim under the Rehabilitation Act based upon the employer's issuance of a letter of absence because the agency legitimately issued the letter "'after Complainant had been off for weeks and did not submit the documentation required for extended leave in the form the Agency required[,]' and the agency reversed the denial of sick leave once the complainant 'submitted documentation that the agency found adequate."[260] The claims in this case are disparate treatment and a reprisal.[261] The employee contested his employer's decision to not allow him to return to work, but this decision was supported because the employee was a "direct threat" to his own safety and the safety of others because of the nature of his job.[262] Also, the employee's supervisor already knew about the employee's disability prior to the disputed absences.[263] Furthermore, nothing in the Commission's decision even discusses disclosure of medical information from an employer's request of medical documentation.[264]

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255 *Lee*, 636 F.3d at 256 (quoting Donoghue v. Nicholson, No. 0120063441, 2007 WL 2907575, at *4 (E.E.O.C. Sept. 26, 2007)).

256 *See Donoghue*, 2007 WL 2907575, at *3.

257 *Id.* at *3-4.

258 *See id.* at *4.

259 *Id.*

260 Lee v. City of Columbus, 636 F.3d 257 (6th Cir. 2011) (quoting Miller v. Donley, No. 0120082055, 2010 WL 4388416, at *4 (E.E.O.C. Oct. 26, 2010)).

261 *Miller*, 2010 WL 4388416, at *3.

262 *Id.* at *4.

263 *Id.* at *1.

264 *See Miller*, 2010 WL 4388416.

In addition to Commission cases, *Lee* uses several court cases to support its decision, many of which are unpublished. In *McGill v. Munoz* the court found that there was insufficient evidence to prove that a federal agency discriminated against an employee for her depression under the Rehabilitation Act by requiring the employee to comply with the written sick leave policy and provide a doctor's note for requested sick leave because no evidence showed that other employees "with similarly suspicious patterns of absenteeism were treated differently."[265] While this case may be more in line with supporting the Sixth Circuit's decision in *Lee*, this case dealt with an employee who had a pattern of absenteeism, and her employer questioned her leave because it thought she might be using sick leave for purposes other than sickness.[266] However, this line of analysis should not be followed because requiring documentation in this case could still tend to reveal a disability. There is a distinction in degree between a pattern of absenteeism and an excessive pattern of absenteeism. Some disabilities may lend to a specific pattern of absenteeism over a long period of time if "pattern" is defined too broadly. Ways to separate the two could including looking at whether the patterns are consistent with leave abuses such as always occurring on Fridays, long weekend, etc.[267]

But, courts should be wary to allow "patterns" as a blanket exception to the medical limitations provisions of the ADA and the Rehabilitation Act. Even if an employer needs to require medical documentation to ensure the absence is medically related, there is no need to have the documentation provide a general diagnosis or a statement regarding the nature of the illness. The doctor could simply verify the employee is seeking medical attention.

In *Luther v. Gutierrez*, the court held that a terminated employee who did not follow supervisory instructions and sick-leave procedures, and was repeatedly absent without leave, did not establish a prima facie case of disability discrimination under the Rehabilitation Act.[268] The court also noted that "the Rehabilitation Act does not serve to

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265 Lee v. City of Columbus, 636 F.3d 245, 256 (6th Cir. 2011) (citing McGill v. Munoz, 203 F.3d 843, 847-48 (D.C. Cir. 2000)).

266 *McGill*, 203 F.3d at 848.

267 ELIZABETH KEENAN & SHERI FARAHANI, MANAGING DISABILITY & ABSENTEEISM IN THE WORKPLACE 1, 2, *available at* http://www.fmc-law.com/upload/en/publications/archive/361862_Keenanpaper.pdf.

268 Luther v. Gutierrez, 618 F. Supp. 2d 483, 491-92 (E.D. Va. 2009).

immunize a disabled employee from discipline in the workplace based on a violation of a valid work rule applied to all employees."[269] In this case the plaintiff was unable to rebut the non-discriminatory, legitimate reasons for his termination such as multiple performance-related reasons and engaging in conduct unbecoming of a federal employee, and only had "speculative allegations of pretext and discrimination."[270] The employee also failed to prove another necessary prong of the Rehabilitation Act: "that he was otherwise qualified for continued employment."[271] Furthermore, while the *Lee* court could have found some reliance on the employee failing to follow proper leave-requesting procedures, the court does not provide what these procedures entailed.

In an unpublished Ninth Circuit decision, *Ogawa v. Henderson*, the court affirmed the district court's summary judgment against a postal carrier, injured on the job, who failed to establish that he was terminated solely on the basis of his disability.[272] In this case "[t]he USPS based its termination . . . on his failure to provide medical documentation after each absence, as required by its sick leave policy [for] [e]mployers may terminate otherwise disabled individuals who violate company rules."[273] This unpublished decision for summary judgment probably falls most closely in line with the Sixth Circuit's strict construal of the term "solely" in the Rehabilitation Act instead of using the broadened standards of the ADA, which were incorporated by reference into the Rehabilitation Act.[274]

Bosse v. Chertoff, in an unpublished decision, rejected an "employee's claim of disability discrimination under the Rehabilitation Act where the employer 'tried to work with [the plaintiff] and required only that he follow prescribed paperwork and procedures for using sick leave[,]' but the plaintiff 'adamantly refused to follow these . . . procedures' and 'refused to provide the [employer] with the medical certificates substantiating his illnesses.'"[275] On the outset, this case is distinguishable from *Lee*, because the employee in this case was not

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269 *Id.* at 493.

270 *Id.*

271 *Id.* at 491.

272 Ogawa v. Henderson, 10 Fed. App'x 587, 588-89 (9th Cir. 2001).

273 Lee v. City of Columbus, 636 F.3d 245, 256 (6th Cir. 2011) (quoting *Ogawa*, 10 Fed. App'x at 588).

274 *See id.* at 255.

275 *Lee*, 636 F.3d at 257 (quoting Bosse v. Chertoff, No. CV 07-12-H-CCL, 2008 WL 906019, at *10 (D. Mont. March 31, 2008)).

considered disabled.[276] Additionally, the court granted a motion for summary judgment because the employee failed to exhaust administrative remedies with the EEOC first, which is a requirement before an employee can file a Rehabilitation Act claim in district court.[277]

D. *The Negative Effects of the Sixth Circuit's Decision*

The Sixth Circuit's decision in *Lee* negatively impacts individuals with disabilities. Part D addresses the negative effects of the Sixth Circuit's decision by taking a look at the discriminatory effect it produces and how it undermines the goals of the ADA.

1. *Lee v. City of Columbus* Has a Discriminatory Effect

The court in *Lee*, citing Enforcement Guidance from the EEOC, held that the sick leave policy directive would not violate the ADA because the policy was applicable to all employees.[278] However, even if a policy requires a general diagnosis or statement regarding the nature of the illness applies to all employees, the policy still tends to reveal disabilities. In fact, only those employees with disabilities will be impacted, so the discriminatory effect still exists regardless if the policy applies to all employees or only a group of employees. The ADA provisions are intended to protect individuals with disabilities, and a sick leave policy requiring a doctor's note or other explanation with a general diagnosis or statement regarding the nature of the illness should trigger ADA provisions.

The directive in *Lee* had the same basis as the sick leave policy in *Pennsylvania State Troopers Association v. Miller,* where the court held that the policy requiring the disclosure of the nature of the employee's illness or injury violated ADA provisions.[279] Like the policy in *Pennsylvania State Troopers Association*, the directive in *Lee* was based upon the amount of sick leave used by an employee rather than upon the employee's actual medical condition.[280] City employees

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276 *See Bosse*, 2008 WL 906019, at *10.

277 *Id.* at *6, 11. A court does retain the right to permit an unexhausted claim to proceed if there has been a waiver, or if equitable estoppel or equitable tolling applies. *Id.* at *6 (citing Leorna v. U.S. Dep't of State, 105 F.3d 548, 550 (9th Cir. 1997)).

278 *Lee*, 636 F.3d at 255 (citing EEOC, QUESTIONS & ANSWERS, *supra* note 49).

279 Brief of Plaintiffs-Appellees at 40, Lee, 636 F.3d at 245 (No. 09-3899), 2009 WL 3639844.

280 *Id.* at 47.

in *Lee* who may have had ongoing medical conditions were not required to disclose confidential medical information unless they were absent for more than three days.[281] This allows for disparate treatment between employees with the same medical condition because the potential disclosure can "ignite myth, fear, and stereotyping from those who had access to the information."[282]

Lee also has a discriminatory effect among older persons. *Lee* places older persons "especially at risk of being subject to disability-related workplace discrimination."[283] The risk of disability-related bias increases if employers can require sensitive and confidential medical information "without having to justify the disclosure on business-related and narrowly crafted grounds."[284]

Imagine in the case of Jane Doe that there is a second employee at XYZ Corporation with severe depression. If the second employee only struggled with his depression during weekends, holidays, or during a time when he did not need to request sick leave, there would be disparate treatment amongst Jane Doe and the second employee. In this instance, the supervisor would only be made aware of Jane Doe's severe depression and not the severe depression of the second employee. Only Jane Doe would be taken off of good assignments and given less responsibility, not the second employee. This disparate treatment would be based solely on the basis of sick leave taken.

2. *Lee v. City of Columbus* Undermines the Goals of the ADA

The decision in *Lee*, undermines the goal of the ADA to eliminate discrimination against individuals with disabilities.[285] The Tenth Circuit in *Griggin v. Steeltek, Inc.*,[286] held that the legislative history of the ADA shows Congress's desire to restrict all questions and inquiries used to identify and exclude persons with disabilities from employ-

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281 *Id.*

282 *Id.*

283 Dan Kohrman, *Appeals Court Fails to Extend Protection Against Intrusive Disability-Related Inquiries*, AARP FOUND. LITIG. (Mar. 14, 2011), http://www.aarp.org/work/employee-rights/info-03-2011/lee_v_city_of_columbus.html.

284 *Id.*

285 *See* 42 U.S.C. § 12101(b).

286 Griffin v. Steeltek, Inc., 160 F.3d 591 (10th Cir. 1998).

ment.[287] Evidence of this desire comes from multiple sources including Congress's decision to allow all applicants, both disabled and non-disabled, who have been subject to illegal medical questioning to sue to enforce Congress's blanket prohibition.[288] Congress explicitly said that one of the purposes of the ADA is to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."[289]

To reach this goal, it is critical to *prevent* potential disability-based discrimination in the workplace before it occurs. The preventative approach can be seen in multiple provisions of the ADA including restrictions on an employer's access to employee medical data[290] and limits on pre-employment employer medical exams and inquiries.[291] Strictly limiting an employer's access to information about an employee's disability allows ADA goals to be reached.[292]

Unnecessary data regarding an employee's disability too often reaches the hands of employers and creates "barriers which prevent qualified individuals with disabilities from enjoying the same employment opportunities that are available to persons without disabilities."[293] For example, in *EEOC v. Ford Motor Credit Company*, the employee disclosed his HIV status after his supervisor demanded to know the reason why the employee needed to take time off.>[294] The supervisor disclosed this medical information to another employee, which was then told to other co-workers.[295] The disclosure of the employee's HIV status caused the employee depression, embarrass-

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287 *Id.* at 594 (citing H.R. REP. No. 101-485(II), at 22-23 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 304, 1990 WL 125563).

288 *Id.* (citing H.R. Rep. No. 101-485(II), at 72-73 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 355). Many articles also provide evidence. *See, e.g.,* Donna L. Mack, *Former Employees' Right to Relief Under the Americans with Disabilities Act*, 74 Wash. L. Rev. 425, 427-28 (1999); Margaret E. Stine, *Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act of 1990,* 37 S.D. L.REV. 97, 97 (1991/1992).

289 42 U.S.C. § 12101(b)(1) (2006). Furthermore, many other resources discussing the ADA also support that this is Congress's intent. *See, e.g., The Americans with Disabilities Act (ADA) of 1990, as amended*, *supra* note 67.

290 42 U.S.C. §§ 12112(d)(3)(B)-(4)(C).

291 42 U.S.C. § 12112(d)(2).

292 Brief for AARP as Amicus Curiae in Support of Plaintiff-Appellee at 22, Fountain v. N.Y. State Dep't of Corr. Servs., 190 F. Supp. 2d 335 (N.D.N.Y. 2002) (No. 1:99-CV-00389), 2002 WL 32387881, at *22.

293 *Id.*

294 EEOC v. Ford Motor Credit Co., 531 F. Supp. 2d 930, 933 (M.D. Tenn. 2008).

295 *Id.* at 934-35.

ment, and shame.[296] The United States District Court for the Middle District of Tennessee held that the employer's demand and disclosure was a disability-related inquiry under the ADA.[297]

Similar problems can occur even for an employee who does not have an actual disability. The ADA protects both employees with disabilities as well as those employees who are perceived as having disabilities by their employers, even if they are not actually disabled.[298] ADA medical inquiry prohibitions are critical to the antidiscrimination goal of the ADA and the Rehabilitation Act.[299] It is important to also protect employees with perceived disabilities because "a supervisor who has no medical expertise may be prey to the same 'myths, fears and stereotypes' about disease that the statutory scheme was intended to eliminate from the workplace and public life."[300]

In the case of a perceived disability or for the plaintiff in *Ford Motor Credit Company*, confidential medical information of an employee rarely serves a legitimate use for a supervisor. It is likely that the only "use" supervisors may have for the information is to effectuate stereotypes that laws like the ADA and the Rehabilitation Act intend to eliminate. For example, in the case of Jane Doe, her supervisor did not need to know she has severe depression. However, once Jane Doe's supervisor at XYZ Corporation learned of her severe depression, she was treated differently at work. Therefore, the information was used to discriminate against Jane Doe based on stereotypes of people with depression.

E. *Too Many Barriers Currently Exist in Employment for Individuals with Disabilities*

Allowing for the disclosure of disabilities violates the intent of Congress to protect the right of job applicants and employees to be assessed solely on merit.[301] Persons with disabilities face enough difficulties entering the job market, and the legal system should not create another barrier. A 2003 Work Trends study conducted by Rutgers

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296 *Id.* at 935.

297 *Id.* at 939.

298 *See* Conroy v. N.Y. State Dep't of Corr. Servs., 333 F.3d 88, 96 (2d Cir. 2003); *see also* Clouse, *supra* note 45.

299 Brief of Plaintiffs-Appellees at 44, Lee v. City of Columbus, 636 F.3d 245 (6th Cir. 2011) (No. 09-3899), 2009 WL 3639844.

300 *Id.*

301 EEOC, ENFORCEMENT GUIDANCE, *supra* note 6.

University's John J. Heldrich Center for Workforce Development, found that individuals with disabilities continue to be vastly underrepresented in the American workplace, despite their desire and ability to work.[302] The United States Department of Labor began tracking employment for individuals with disabilities in October 2008.[303] In August 2009, the unemployment rate among individuals with disabilities reached a record high for a third month in a row.[304] At that time, the unemployment rate for persons with disabilities reached 16.9%, a 1.8% increase from the previous month, while the unemployment rate for persons without disabilities decreased to 9.3% from the previous month's rate of 9.5%.[305] Although unemployment rates have improved, according the Bureau of Labor and Statistics, there is still a large disparity between persons with and without disabilities. The recent report from the Bureau of Labor Statistics shows that the unemployment rate for persons with disabilities for February 2013 was 12.3%, while the rate for persons without disabilities was only 7.9%.[306] Allowing employers to maintain a sick leave policy that requires an employee to disclose the nature of their illness will only create additional barriers and lead to further discrimination of individuals with disabilities in employment.

CONCLUSION

In sum, an employer's policy that requires medical documentation disclosing the nature of the illness or general diagnosis violates the protections of the ADA, which are incorporated by reference in the Rehabilitation Act. Integrating people with disabilities into the mainstream of society, including employment, is the fundamental pur-

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302 K.A. DIXON, DOUG KRUSE, PH.D., & CARL E. VAN HORN, PH.D., RESTRICTED ACCESS: A SURVEY OF EMPLOYERS ABOUT PEOPLE WITH DISABILITIES AND LOWERING BARRIERS TO WORK 9 (Mar. 27, 2003), *available at* http://www.heldrich.rutgers.edu/sites/default/files/content/Restricted_Access.pdf.; *see also* EEOC, QUESTIONS & ANSWERS, *supra* note 49.

303 Michelle Diament, *Unfavorable Job Market Continues for People with Disabilities*, DISABILITY SCOOP (Sept. 4, 2009), http://www.disabilityscoop.com/2009/09/04/august-employment/4831/. The data covers individuals with disabilities over the age of 16 who do not live in institutions.

304 *Id.*

305 *Id.*

306 *Economics News Release: Table A-6. Employment status of the civilian population by sex, age, and disability status, not seasonally adjusted*, U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS, http://www.bls.gov/news.release/empsit.t06.htm (last modified Mar. 8, 2013).

pose of the ADA and Rehabilitation Act.[307] Therefore, it is important that the courts uphold these protections of the ADA and do not interpret them too broadly like in *Lee*. *Lee's* interpretation violates Congress's intent to protect the right of employees to be assessed on merit alone and instead promotes the ability of employers to discriminate against employees with disabilities.

The Supreme Court of the United States should take this issue upon review and follow the analysis and reasoning of the Second Circuit in *Conroy v.* New York State Department of Correctional Services and discontinue use of the Sixth Circuit's decision in *Lee v. City of Columbus*. In the meantime, "employers should carefully scrutinize their sick leave policies and the manner in which they apply these policies to ensure compliance" with the ADA and Rehabilitation Act.[308]

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[307] *See* LEUCHOVIUS, *supra* note 29, at 1.

[308] *See* BOND, SCHOENECK & KING, PLLC, *supra* note 19, at 2.

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