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Employment Law

Sharing Employee's Private Medical Info Leads to Lawsuit

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The disclosure of confidential medical information can be a real thorn in the side of employers. While there are a myriad of laws protecting an employee's right to keep their medical information private in the workplace, preventing the spread is what can be troublesome. In some instances, employees will volunteer information about their medical condition to co-workers and even to managers and supervisors. In other cases, employees safeguard their private issues and dread disclosure at all costs.

What happens when a manager who lawfully comes into possession of confidential medical information disseminates that information to others employees, without consent? That was precisely the issue in a recent case from Fort Myers, Florida, in *Holtrey v. Collier County Board of County Commissioners*, Case No. 2:16-cv-34-FtM-38CM (M.D. Fl. Jan. 12). The result was a lawsuit alleging multiple violations of the Family and Medical Leave Act (FMLA).

Scott Holtrey worked for the Collier County Board of County Commissioners since 2006. In his amended complaint, Holtrey averred that he developed a chronic and serious health condition with his genito-urinary system in June 2015. He sought and received a leave of absence under the FMLA because of his condition. His application for leave included "sensitive and detailed medical information."

According to the opinion, unbeknownst to Holtrey, a manager allegedly disclosed his condition to his co-workers and subordinates at a staff meeting that he did not attend. As a result, the co-workers and subordinate began frequently making fun of him and making jokes and obscene gestures about his condition in front of him. The situation went unremedied, despite complaints by Holtrey. As a result he filed a federal lawsuit under the FMLA and a Charge of Discrimination with the U.S. Equal Employment Opportunity Commission (EEOC) alleging violations of the Americans with Disabilities Act (ADA).

In his federal lawsuit, Holtrey made claims for interference and retaliation on the grounds that his employer breached his right to confidentiality under the FMLA. He also made a hostile work

environment claim. What made the FMLA claims so interesting, and perhaps unique, was the fact that he alleged a violation of the confidentiality provision of the FMLA, 29 C.F.R. Section 825.500(g). The provision at issue reads, in part, that "records and documents relating to certifications, recertifications or medical histories of employees or employees' family members, created for purposes of FMLA, shall be maintained as confidential medical records in separate files/records from the usual personnel files." To avail himself of a violation of this provision, Holtrey had to allege either interference with his FMLA rights or retaliation for asserting his rights. He alleged both.

The employer filed a motion to dismiss arguing that Holtrey failed to allege a prima facie claim of interference and retaliation under the FMLA by failing to allege that it denied him FMLA benefits or engaged in an adverse employment action resulting in damages. The employer argued that because it approved the employee for FMLA leave no interference claim could be made. The employer also argued that the FMLA interference claim should be dismissed because the amended complaint did not adequately allege a hostile work environment.

Turning first to the interference claim, the court noted that district courts conflict on whether a disclosure of an employee's medical information constitutes an interference claim under the FMLA. There are no reported cases in this jurisdiction that have specifically addressed this issue. In fact, there is only one reported case within the scope of the U.S. Court of Appeals for the Third Circuit which even references the confidentiality provision of the FMLA at all, as in *Smith v. Virgin Islands Port Authority*, Civil No. 2002-227 (STT) (D.V.I. Aug. 29, 2008), (alleging interference violation due to medical documents in employee's personnel file rather than a separate confidential file as required by 29 C.F.R. Section 825.500(g)).

Nevertheless, the court in the instant case did not need to reach a decision on whether a private right of action exists because the employer did not raise that as a defense in its motion to dismiss. Instead, the employer challenged merely the sufficiency of the allegations. After reviewing the amended complaint in the light most favorable to the plaintiff, the court opined that Mr. Holtrey sufficiently alleged a right of confidentiality and that the defendant breached that right when it disclosed his protected medical information during a staff meeting and without his permission. The issue was not whether the plaintiff received FMLA, which clearly he did, but rather, whether confidentiality is a right protected by the FMLA. Indeed, the right to be from having your employer disclose your medical condition is a right provided and protected under the FMLA, the court said.

With respect to the hostile work environment claim, the court acknowledged that it was not your traditional Title VII claim. The very fact that Mr. Holtrey's employer disclosed his confidential medical information to his coworkers and subordinates, "which resulted in a work environment riddled with obscene gestures and jokes at his expense" was sufficient to plead a hostile work environment claim.

As for the retaliation claim, the court rejected the employer's argument that Holtrey suffered no adverse action by the disclosure of his medical condition. A challenged employment action, the court wrote, is "materially adverse if it well might have dissuaded a reasonable worker from making or supporting a claim under the FMLA." Here, the court said it was hard-pressed to find that disclosing confidential medical information about an individual's genito-urinary system to that employee's coworkers and subordinates does not materially affect his working conditions.

There are several different issues at play with this decision. First, it lends support to a private right of action for an employer's failure to comply with the confidentiality provisions of the FMLA, which includes, inter alia, failing to maintain confidential records and documents relating to certifications, recertifications or medical histories in separate files/records from the usual personnel files. Further, the decision provides a path to protecting disclosure of medical information through a viable interference claim, retaliation claim, hostile work environment claim or any one or combination of them all. The court was not prepared to standby idly while an employer entrusted with confidential information through one of its managers thought it would be amusing to poke fun at the employee's expense.

One last thought on this decision relates to the voluntary nature of the medical disclosure. Some courts have held that a voluntary disclosure in the absence of a medical inquiry or solicitation from the employer will not extend protection for the dissemination of otherwise confidential information, see discussion in *Equal Opportunity Employment Commission v. Thrivent Financial for Lutherans*, 795 F. Supp. 2d 840 (E.D. Wis. 2011), aff'd, 700 F. 3d 1044 (7th Cir. 2012). In other words, if an employer asks the employee why she was out of work, and she discloses that it was because she was receiving cancer treatment, the employee may be waiving her right to have privacy protection under the FMLA, ADA and HIPAA. Contrast that with the employee being asked to provide an FMLA certification or a reasonable accommodation form, and the protection extends. Why the difference? According to one court, the party who initiates the conversation that leads to a disclosure is not relevant; the party who initiates or requests the employee's actual disclosure of medical information is. Thus, employees are wise to choose their words carefully when asked about a medical condition he does not feel comfortable disclosing because doing so may just waive protection. •

Jeffrey Campolongo is the founder of the Law Office of Jeffrey Campolongo, which, for over a decade, has been devoted to counseling employees, working professionals and small businesses in employment discrimination and human resource matters. The law office also counsels aspiring and established artists and entertainers regarding various legal issues arising in the entertainment and media industries.
