When Private Files Go Public: Remedies Under the Americans With Disabilities Act for Breach of Confidentiality Requirements

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Title I of the Americans With Disabilities Act, 42 U.S.C. §12101, et seq., (“ADA”) places significant restrictions on an employer’s ability to utilize medical information it has received from or about employees or applicants. Employers are required to treat such medical information as “confidential” and may not disclose it to anyone, for any purpose, other than in very limited categories and circumstances.

The statute’s concern for the privacy of medical data has been extensively explored by the EEOC through its issuance of two Enforcement Guidances, one addressing pre-employment inquiries and the other exploring the limits that apply when information is sought from or compiled about current employees. EEOC has also addressed those issues in a document discussing the intersection between the ADA and the Family and Medical Leave Act, 29 U.S.C. §2601, et seq., a statute which provides similar confidentiality guarantees for medical data.

Congress was concerned about the danger that employers would use medical information in a way that was harmful to the individual, either as a bar to their hiring or as a negative factor in their continued employment, instead of focusing on the key issue of whether the individual is able to perform the essential duties of the job. As explained in a Congressional report, “[a]n inquiry or medical examination that is not job-related serves no legitimate employer purpose but simply serves to stigmatize the person with a disability.” Similarly, the dissemination of information about an individual’s disability status risks coloring the employment decision-making process with matters unrelated to ability to perform.
A. Who Can Enforce the Act’s Confidentiality Guarantees? The importance of the privacy guarantees contained in the ADA is underscored by the fact that they apply whether or not the individual about whom medical information is compiled actually has a disability, and they apply at all three stages of the employment process – before a job offer has been extended, after an offer is made but before it is accepted, and once the individual has begun working for the employer. See, e.g., Roe v. Cheyenne Mountain Resort, Inc., 124 F.3d 1221, 1229 (10th Cir. 1997); Fredenburg v. Contra Costa County Dept. Of Health Servs., 172 F.3d 1176, 1182 (9th Cir. 1999) (requiring plaintiffs to prove that they have disabilities would defeat the privacy protections set forth in the ADA); Cossette v. Minn. Power & Light, 188 F.3d 964, 969 (8th Cir. 1999) (“[i]t 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”). See also, Griffin v. Steeltek, Inc., 160 F.3d 591, 593-95 (10th Cir. 1998), cert. denied, 526 U.S. 1065 (1999); Pollard v. City of Northwood, 161 F. Supp.2d 782, 793 (N.D. Ohio 2001); Gonzalez v. Sandoval County, 2 F. Supp.2d 1442, 1445 (D. N.M. 1998).

A few courts, however, have concluded that an individual must either be disabled or must demonstrate that they were “otherwise qualified” for the position. See, e.g., Hunter v. Habegger Corp., 139 F.3d 901 (7th Cir. 1998) (unpublished opinion); Armstrong v. Turner Industries, Inc., 950 F. Supp. 162 (M.D. La. 1996), aff’d, 141 F.3d 554, 558 (5th Cir. 1998). The Supreme Court has not resolved this difference of opinion. EEOC, however, has taken the position that “the plain language of the statute explicitly protects individuals with and without disabilities from improper disability-related inquiries and medical examinations.” At this juncture, affording standing to a non-disabled plaintiff to sue for breach of the Act’s confidentiality guarantees would appear to be the preferred view.
The ADA’s privacy protections also apply to protect the medical records of employees who have moved on to work elsewhere. Such cases will generally arise where the medical information was compiled while the plaintiff was an employee and is being used in a manner which might suggest retaliation or other discriminatory conduct in violation of the statute. This was the reasoning in *Heston v. Underwriters Laboratories, Inc.*, 297 F. Supp.2d 840 (M.D.N.C. 2003), where the plaintiff challenged her former employer’s disclosure of her back injury and work-related restrictions. After plaintiff lost several jobs for which she was otherwise qualified, she learned that her past supervisor was communicating this information to prospective employers who called for references. *Id.* at 841. The court held that “[t]he need to protect this sensitive information does not end upon the termination of employment,” noting that the ADA set no time limits on the confidentiality period. This absence of time limitations “is most reasonably read to impose a continuing duty of confidentiality, and the beneficiary of the duty is the person about whom the information has been collected, whatever their current relationship with the employer may be.” *Id.* at 845. Additionally, the court concluded that granting protection to confidential records only while the individual was an employee “defeats the purpose of confidentiality and allows for post-employment retaliation ....[J]ust as the employer has no right to retaliate, it has no right to reveal confidential information for use in a post-employment job reference.” *Id.* at 846 (footnote omitted).

In one recent case, a §12112(d) claim was rejected because the employer’s disclosure of data occurred after the plaintiff was terminated by the company and occurred in the context of defending against the lawsuit for failure to accommodate plaintiff’s psychiatric disabilities. When the plaintiff in *Conneen v. MBNA America Bank, N.A.*, 182 F. Supp.2d 370 (D. Del. 2002), learned that the employer had talked
with her doctor about her medical condition, she contended that this constituted a breach of the confidentiality of her medical records. However, the court held that this type of disclosure did not fall within the ambit of the ADA since the plaintiff had waived any confidentiality claim by virtue of bringing a lawsuit which placed her medical condition at issue. *Id.* at 381. See, *e.g.*, *Scott v. Leavenworth Unified Sch. Dist. No. 453*, 190 F.R.D. 583 (D. Kan. 1999).

B. **What Is A Cognizable Injury?** While many cases have examined the issue of when and under what circumstances an employer may ask disability-related questions or require medical examinations, far fewer have considered the issue of what remedies, if any, are appropriate where “confidential” medical files are released to individuals or entities beyond the limited group permitted by the ADA. As described below, these decisions generally recognize that a claim may be asserted by an individual whose medical information has been disclosed, but limit recovery to those situations where “injury in fact” and/or “actual damage” has resulted from the disclosure. In general, the courts require that plaintiffs establish some type of adverse employment action directly caused by the breach of confidentiality.

The ADA’s confidentiality provisions do not explicitly create a cause of action against the employer. This omission led one appellate court to question whether any cause of action for improper release of medical records actually existed. *See Cash v. Smith*, 231 F.3d 1301, 1307 (11th Cir. 2000). The court disposed of the plaintiff’s claims under § 12112(d) without actually deciding the question. Most courts, however, have held that a violation of the §12112(d) privacy provisions does create a cause of action, but only if the unauthorized disclosure caused an "injury in fact" to the employee. *See, e.g.*, *Tice v. Ctr. Area Transp. Auth.*, 247 F.3d 506, 519 (3d Cir. 2001) (stating that an injury in fact occurs "through actual damage (emotional, pecuniary, or otherwise), or through the presence of a continuing illegal practice to
which plaintiff is likely to be subject absent court intervention”); Cossette, 188 F.3d at 971; Medlin v. Rome Strip Steel Co., Inc., 294 F. Supp. 2d 279, 293-95 (N.D.N.Y. 2003); Pouliot v. Town of Fairfield, 226 F. Supp. 2d 233, 246 (D.Me. 2002). See also Pollard, 161 F. Supp. 2d at 793 (holding, as an issue of first impression in the Sixth Circuit, that a cause of action exists for a violation of § 12112(d), but not deciding whether an injury in fact is necessary). 10

Several courts have described the plaintiff’s burden in adverse action terms. See, e.g., Buckles v. First Data Resources, Inc., 176 F.3d 1098, 1100 (8th Cir. 1999). Other courts, however, have suggested that failure to satisfy traditional “adverse employment action” standards might not necessarily be required if the factual circumstances are particularly egregious. See, e.g., Cossette, 188 F.3d at 971. 11

In Shaver v. Independent Stave Co., the court upheld summary judgment against an employee who claimed that he had been harassed by his co-workers because of his disability. 350 F.3d 716, 722 (8th Cir. 2003). The court first held that the ridicule to which plaintiff had been subjected due to his medical condition was not severe enough to constitute a prima facie case of harassment under the ADA. Id. at 721-22. Next, the court noted that Shaver had not alleged a separate cause of action in the district court for illegal disclosure of confidential information under the ADA, so he was procedurally barred from doing so on appeal. Id. at 722. Instead, he argued that, because the harassment arose due to an unauthorized disclosure of his medical information by his employer, the harassment somehow became severe enough to be actionable. Id. The court found this argument to be without merit. See id. at 722-23.

Several of the most recent cases dealing with violations of the ADA’s confidentiality provisions rely heavily upon the analysis in Cossette v. Minnesota Power & Light. In Cossette, the plaintiff had suffered a serious back injury that had
substantially impaired her ability to lift heavy objects. 188 F.3d at 966. When she asked for a transfer to a different department, Minnesota Power & Light ("MP&L") hired a local medical clinic to determine whether she could meet the physical demands associated with the new position. Id. at 967. The clinic concluded that Cossette had a lifting restriction of twenty to thirty-five pounds. When Cossette’s supervisor in the new department learned about her back injury and lifting restriction, he disclosed this information to her co-workers. Later, Cossette applied for a job as a part-time letter carrier with the U.S. Postal Service, a position which required her to lift up to seventy pounds. The MP&L supervisor learned of her application and revealed her medical condition and lifting restriction to the Postal Service, causing it to refuse to hire her. On learning of this disclosure, Cossette sued both MP&L and her supervisor for disclosing her confidential medical information to her co-workers and to the Postal Service, in violation of the ADA. Id. The district court granted summary judgment to the defendants and Cossette appealed. Id. at 966.

The Court of Appeals first held that Cossette could recover under the Act even though she was not "disabled" within the meaning of the Act. Id. at 969-70. The court next held that a violation of the ADA’s confidentiality provisions must cause some injury to the plaintiff to be actionable. Id. at 970. The court then found that a genuine issue of material fact existed as to whether the Postal Service rejected Cossette’s application because of her employer’s improper disclosure of medical data about her back injury and lifting restrictions. Assuming that Cossette could prove that defendants’ disclosure of the confidential information caused the job denial, the court had no difficulty concluding that she would satisfy the actual injury requirement. Id.
The defendants also argued that summary judgment was proper because, even if Cossette’s supervisor hadn’t disclosed her lifting restriction to the Postal Service, it would have been disclosed during the Postal Service’s medical examination. *Id.* However, the court noted that a post-rejection medical examination of Cossette had concluded that she met the functional requirements for a letter carrier position. *Id.* at 971. The court held that, because at some point between the plaintiff’s first medical examination and the one that occurred after the Postal Service job rejection, she "became physically able to perform the tasks required of a letter carrier," a reasonable factfinder could infer that Cossette could have passed a physical given by the Postal Service at the time she was rejected. *Id.*

Several decisions have explored in some depth the question of what satisfies the injury requirement when a claim is asserted for breach of the ADA’s confidentiality guarantees. In *Tice v. Centre Area Transportation Authority*, the plaintiff’s employer admitted that it had violated §12112(d) when it failed to keep confidential, employee medical documents separate from non-confidential records. 247 F.3d at 519; see 42 U.S.C. § 12112(d)(3)(B). Nevertheless, the court upheld summary judgment because the plaintiff had not alleged an injury caused by the employer’s illegal conduct. *Id.* at 520. The court reasoned that "beyond the bare allegations of ‘mental/emotional distress, mental anguish, stress and inconvenience’ set forth in his initial complaint, Tice [had] submitted no evidence as to the actual existence of such harms as a result of [his employer’s] ADA violations."13

In *Tice*, the plaintiff’s union had filed a grievance challenging the employer’s improper practice of keeping confidential and public information together and the employer had ceased its illegal conduct in response. *Id.* at 519. Although it is not clear from the opinion, it seems that Tice may have complained about the company’s record-keeping practices after the union had rectified the situation
through the grievance process, and the district court apparently viewed this as
dispositive on the issue of whether plaintiff had actually suffered any injury. *Id.*
On appeal, plaintiff argued that the pursuit of a remedy under the collective
bargaining agreement had prejudiced his ability to obtain relief under the ADA.
However, this claim was rejected since the court found that Tice was free to pursue
his claims both through union grievance procedures and in federal court, citing
held that Tice’s union grievance was relevant to the disposition of his claim only
because the grievance had stopped the continuation of harm to any employees from
the illegal conduct. Thus, any possible injury to Tice was eliminated once the
grievance was successfully resolved in favor of compliance with the ADA’s privacy
protections.

The EEOC has pursued some claims involving confidentiality provisions. In
the public sector, where claims are governed by the Rehabilitation Act, 29 U.S.C.
§791, *et seq.*, two cases illustrate the type of violations and relief obtained. In
*Granikos v. United States Postal Service*, EEOC App. No. 01A21992 (Oct. 16, 2003),
request for reconsideration denied, EEOC App. No. 05A40208 (Jan. 22, 2004), a
supervisor told various agencies about plaintiff’s disability and referred to it in a
performance evaluation that was retained in the employee’s personnel file. As a
result, the plaintiff was not offered jobs that he had sought. EEOC ordered the
USPS to remove all medical records from public files and to refrain from further
use of such records. In addition, the agency was ordered to train its supervisory
personnel on their confidentiality obligations. In *Brunnell v. United States Postal
Service*, EEOC App. No. 07A10009 (July 5, 2001), a complainant was awarded
$2,000 in compensatory damages caused by the agency’s wrongful disclosure of
medical data.
C. Exceptions and Defenses to Disclosure. The courts have created some exceptions to liability for violations of §12112(d). For example, employers have been excused from any liability where the medical information involved was shared by the employee voluntarily, rather than as a result of the employer’s request or demand. See, e.g., Cash, 231 F.3d at 1307-08 (employee disclosed illness without any examination or inquiry initiated by the employer); Pouliot, 226 F. Supp.2d at 246 (same); Rohan v. Networks Presentation LLC, 175 F. Supp.2d 806, 813-14 (D. Md. 2001) (same); Ballard v. Healthsouth Corp., 147 F. Supp.2d 529, 534 (N.D. Tex. 2001) (same).

Whenever an employer asks for medical information, however, the provision of such data is no longer voluntary and the Act’s privacy considerations offer protection to the employee who is harmed by the release of the data. A case that illustrates the importance of such a distinction is Doe v. United States Postal Service, 317 F.3d 339, 344 (D.C. Cir. 2003). There, an HIV-positive Postal Service employee missed several weeks of work. His employer sent a letter demanding that he either complete a medical certification form, as required by the Family and Medical Leave Act, 29 U.S.C. §2601, et seq., or face disciplinary action for excessive absenteeism. See id. at 341.

Doe completed the form and was granted FMLA leave, but when he returned to work his HIV+ status had become common knowledge among his co-workers. Id. He filed suit against the Postal Service claiming that it had violated the ADA by disclosing his confidential medical information. Id.

The Postal Service moved for summary judgment, claiming that because the plaintiff had "voluntarily" disclosed his medical diagnosis when he submitted his medical information along with the FMLA form, it could not be held liable for violating the ADA’s privacy provisions. Id. at 344. The court disagreed, finding that Doe’s disclosure occurred only after his receipt of the employer’s letter threatening him with disciplinary proceedings if he did not submit his medical
information. Thus, by initiating the request, accompanied by the threat of disciplinary action for non-compliance, the Postal Service could not validly claim that Doe had “volunteered” information about his medical condition. *Id.*

Although Doe could have avoided disclosure by failing to submit a completed FMLA certification form and risking disciplinary action, the court rejected such an approach because it would force employees to choose between waiving their ADA-guaranteed privacy rights and forfeiting their statutory rights to take job-protected FMLA leave. *Id.* The court concluded that Congress had intended to avoid just this situation when it enacted the confidentiality provisions of the ADA. *Id.*

As discussed above, the ADA does create a specific class of individuals and/or entities who are entitled to receive medical data about an employee. Consequently, there has been almost no litigation involving dissemination of data to entities presumed to have a “need to know.” Such issues were examined in *Doe v. Southeastern Pennsylvania Transportation Authority*, 72 F.3d 1133 (3d Cir. 1995), *cert. denied*, 519 U.S. 808 (1996), a case brought under 42 U.S.C. §1983 to redress a violation of the employee’s constitutional privacy rights. The court overturned a substantial jury award to an employee whose HIV+ status was disclosed because information about his prescription purchases of AZT was released by the drug benefits provider. The court held that the self-insured employer’s “need to know” about prescription drug usage outweighed the employee’s confidentiality interests, at least so long as the information was used solely for plan monitoring purposes. *See id.* at 1138-43. The court also emphasized that it did not believe the employee had proven sufficient “harm” to warrant a jury award in his favor. *Id.* at 1141. It is likely that courts faced with similar claims brought under the ADA would engage in the same type of analysis employed in *Doe*.

In one case, an appeals court was required to reverse injunctive relief that had limited an employer’s ability to disseminate medical data to entities that the Act clearly
found appropriate. In Garrison v. Baker Hughes Oilfield Operations, Inc., 287 F.3d 955 (10th Cir. 2002), the district court had issued an injunction which precluded the employer from “gain[ing] medical or workers’ compensation information except to convey it to appropriate medical personnel who are reviewing it to determine job applicants’ abilities to perform the offered jobs.” Id. at 958-59. On appeal, the court vacated the injunction as overbroad because it limited employer disclosure solely to "medical personnel," despite the fact that it is lawful for employers to designate individuals who are not medical personnel to review workers’ compensation histories. Id. at 962.

D. Practical Suggestions for Pursuing ADA Confidentiality Claims.

If you are advising a client about possible ADA claims for breach of the Act’s confidentiality guarantees, several factors should be paramount. First, make certain that the information involved was not voluntarily disclosed by the employee to his/her co-workers or others. Also, make sure that the individuals to whom disclosures were made were not among those explicitly authorized by the statute or regulatory rulings to have access to such data.

Second, establish that an actual injury has occurred. Has the client suffered any adverse employment action directly traceable to the disclosure of the medical information? Has the client lost a promotion or favorable assignment or transfer because of the unlawful disclosure? Has s/he been denied a job for which s/he was otherwise clearly qualified? Has the client been exposed to personal embarrassment or ridicule that would rise to the level of a compensable injury? Has the client been forced to undergo the costs of additional medical evaluations because of questions raised about job performance ability that would not otherwise have been at issue as a result of the employer’s right to request a medical examination?

Third, investigate whether the breach of confidentiality is systemic or simply an error in judgment in this particular case. If it appears that the employer does not follow
the ADA’s clear guidelines on maintenance and confidential treatment of medical records, you may be able to assert a class complaint or at least enlist the EEOC’s interest in pursuing injunctive relief for a broad employee group. If the workplace is unionized, enlist the union’s help in understanding the employer’s practices and policies. Determine whether union has filed or is able and willing to file a grievance under the CBA challenging the employer’s failure to honor its ADA confidentiality obligations. Even if you have only an “individual” violation, consider having the individual file an EEOC charge detailing the violation. The agency may be interested in investigating the violation and pursuing enforcement options.

Fourth, investigate whether there are additional legal protections available as a basis for the client’s claim. Your state may have its own laws governing medical records that are more comprehensive than the ADA’s confidentiality provisions. California, for example, provides strong confidentiality protections for employee medical records and precludes employers from disclosing health information without the express consent of the employee.15 Hawaii’s Privacy of Health Care Information Act16 establishes specific notification requirements and consent procedures for release of medical data, grants employees the right to view and copy any medical information in the employer’s files that concerns them and obligates employers to provide all employees with written notice of their rights and of the employer’s policies that affect health information. Many states explicitly protect HIV-related information from disclosure.17 Some prescribe criminal penalties for violations.18 Adding a state law claim based on such statutorily protected confidentiality rights may strengthen your client’s court case.

Fifth, give careful consideration to whether or not to add common law claims such as invasion of privacy or intentional infliction of emotional distress. As noted earlier, these claims are difficult to prove and may distract from the central legal
violation created by the ADA. Unless the case law in your jurisdiction is extremely favorable to plaintiffs, there is no need to add “filler” to your pleadings through the assertion of such claims and risk distracting the judge and your adversary from the obvious merits of your client’s statutory case.

Finally, be sure you have fully discussed the pros and cons of litigation and the fact that the plaintiff’s “confidentiality” concerns will give way to the more or less public forum of a courtroom and the adversary process. You may be able to obtain an employer’s written assurances regarding future use of medical information, together with some financial relief where significant harm has occurred without full-blown litigation. As always, carefully investigated claims and persuasive pre-litigation communications with the employer’s counsel may result in settlement which will advance the statute’s purposes and provide reasonable and fair relief to your client.

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1 The author serves as Special Litigation Counsel to the Communications Workers of America, AFL-CIO and as General Counsel to the Coalition of Labor Union Women. The assistance of Conor Mulcahy, a third-year student at Boston College Law School, in the preparation of this paper is much appreciated.

2 See 42 U.S.C. §§12112(d)(3)(B) (“information obtained [during an entrance exam for employment] regarding the medical condition or history of the applicant is collected and maintained on separate forms and in separate medical files and is treated as a confidential medical record”, except that data can be released to, inter alia, supervisors and managers who need to know about work restrictions or accommodations, first aid and safety personnel and government officials); (4)(C) (medical information obtained about current employees subject to same requirement). See, also, 29 C.F.R. §1630.14(b)(1) and (c)(1). In addition to the statutory exemptions from the strict confidentiality requirement, the EEOC has interpreted the ADA to allow release of medical data to workers’ compensation officials, health care professionals (when seeking advice about reasonable accommodations), and insurance carriers. See 29 C.F.R. §1630.14(b)(1) and (c)(1). In a 1997 opinion letter issued by EEOC to the NLRB’s Division of Advice, the agency also determined that union representatives could receive medical information if its release was necessary to enable them to pursue grievances or other matters relevant to their collective bargaining function. If unions receive such data on a “need to know” basis, they are obligated to maintain it under the same confidentiality restrictions that apply to employers. (A copy of this opinion letter is attached to this paper.)

1 See EEOC ENFORCEMENT GUIDANCE: PREEMPLOYMENT DISABILITY-RELATED QUESTIONS AND MEDICAL EXAMINATIONS UNDER THE AMERICANS WITH DISABILITIES ACT OF 1990 (1995); EEOC Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees Under the Americans With Disabilities Act (2000). See also, EEOC Fact Sheet, The Family and Medical Leave Act, the Americans With Disabilities Act, and Title VII of the Civil Rights Act of 1964, Q. & A. No. 11 (permitting
employer to keep “a single confidential medical file for each employee, separate from the usual personnel file” in compliance with both statutes). These materials are available at http://www.eeoc.gov/policy/docs.html.

2 The FMLA imposes a confidentiality requirement on records and documents relating to medical certifications or medical histories of employees or their family members. 29 C.F.R. §825.500(g). These records must be segregated from other employer records, in compliance with the ADA’s confidentiality requirements, and may be released only to designated supervisory employers, first aid personnel, or government officials. Id. It is not clear whether a private right of action exists to enforce the FMLA’s confidentiality provision. See, e.g., Johnson v. Moundsvista, Inc., 2002 WL 2007833 (D. Minn. 2002), *7 (assuming arguendo that such a right exists, and that it would “mirror that afforded by the ADA”).


4 As recently as 2002, the Seventh Circuit had not explicitly decided whether a non-disabled individual can state a claim for a violation of the ADA’s confidentiality provisions. O’Neal v. City of New Albany, 293 F.3d 998, 1007 (7th Cir. 2002).

5 On appeal, the Fifth Circuit in Armstrong assumed without deciding that a non-disabled plaintiff could sue under §12112(d)(2) so long as s/he could show “some cognizable injury in fact of which the violation is a legal and proximate cause for damages to arise from a single violation.” 141 F.3d at 562. See Point B, infra.

6 EEOC ENFORCEMENT GUIDANCE ON DISABILITY-RELATED INQUIRIES AND MEDICAL EXAMINATIONS OF EMPLOYEES, supra n.3, at n.15.

7 The existence of litigation that places an employer’s treatment of employees with disabilities directly at issue does not conflict with the Act’s confidentiality guarantees. Where medical files of employees are relevant to the claims being litigated, their production cannot be withheld on the grounds that the ADA imposes confidentiality-based disclosure limitations.

8 A number of cases raise state common law claims such as invasion of privacy and/or intentional infliction of emotional distress, along with the ADA claim. Such claims are generally more difficult to establish and often fail even where the plaintiff defeats summary judgment on the ADA claim, although in some cases the court will assume that a sufficient factual dispute exists to send the claim to the jury. See, e.g., Karraker v. Rent-A-Center, 239 F.Supp.2d 828, 836-39 (C.D.Ill. 2003) (public disclosure of private facts invasion of privacy claim and claims under Illinois statutes guaranteeing confidentiality between patient and therapist sufficient to defeat motion to dismiss; false light claim dismissed); Cash v. Smith, 231 F.3d 1301, 1308 (11th Cir. 2000) (dismissing invasion of privacy claim based on employer’s disclosure of fact that plaintiff suffered from diabetes). Other states have statutes that may cover claims regarding release of confidential health data. See, e.g., Doe v. Town of Plymouth, 825 F.Supp. 1102 (D. Mass. 1993) (disclosure of plaintiffs HIV+ status without her consent violated Massachusetts Privacy Act, M.G.L.A. c. 12, §1, et seq.) The viability of such state law claims is beyond the scope of this paper. Similarly, enforcement of privacy rights under the Health Insurance Portability and Accountability Act (“HIPPA”) enforcement rules is not addressed in this paper. See, 67 Fed. Reg. 53182 (Aug. 14, 2002).

9 The ADA does not define the terms “medical records” or “medical files,” nor does it indicate what health-related information is intended to be covered by the Act. EEOC’s regulations refer to “information...regarding the medical condition or history of the [individual],” including all information obtained as result of post-offer or employment-related medical examinations. See 29 C.F.R. §1630.14(b)(1), (b)(3), (c), (d). Records that are created through voluntary employer health programs, including information about the employee’s health that is voluntarily provided as part of these programs, are also subject to the Act’s confidentiality requirements. 29 C.F.R. §1630.14(d).

10 In Pollard, the plaintiff alleged that he was required to undergo a fitness-for-duty examination, the results of which were disclosed to the news media by a supervisor who described him as “unfit to be a police officer” and as “on Prozac,” while at the same time stating that the officer’s psychological examinations were not “public record”
and could not be reviewed by reporters. \textit{Id.} at 793. The court held that a jury could find that these statements “illegally disclosed plaintiff’s psychological condition based on the results of his evaluation.” \textit{Id.}

11 In traditional Title VII cases, shunning by co-workers or loss of prestige does not usually rise to the level of an actionable adverse action. \textit{See, e.g., Scusa v. Nestle U.S.A. Co.}, 181 F.3d 958, 968-69 (8th Cir. 1999).

12 The court also reversed the grant of summary judgment on plaintiff’s claim that her supervisor’s disclosure of medical information to co-workers violated the ADA. (She had alleged that her colleagues treated her “in a condescending and patronizing manner” after they found out about her lifting restriction, and that this treatment caused her injury.) Because the parties had not briefed the issue of whether this ridicule sufficed to create an injury justifying a claim under § 12112(d), the court suggested that the district court should consider this issue. \textit{Id.} at 971-72.

13 \textit{But see Medlin}, 294 F. Supp.2d at 295, n.10 (N.D.N.Y. 2003), holding that “bare allegations” of harm caused by unauthorized disclosures were sufficient to defeat summary judgment. There, plaintiff asserted that by revealing medical information about his condition, the employer had “further exacerbated [plaintiff’s] stress, emotional pain and suffering and distress.”

14 FMLA regulations allow employers to require medical certification from an employee’s health care provider to document the need for FMLA-protected leave. 29 C.F.R. §825.305-306. The Department of Labor has designed an optional form (Form WH-380) that illustrates what kind of information may lawfully be required of the health care provider. The employer may require “basic information” about the serious health condition involved but may not ask for “additional information” and may not seek information about any condition other than the one “for which the current need for leave exists.” \textit{Id.} §825.306(b).


18 \textit{See, e.g., Colo. Rev. Stat. §18-4-412; §10-3-1104.5; N.H. R.S.A. §141-F.}