

EMPLOYMENT LAW—EMPLOYMENT DISCRIMINATION—  
UNNECESSARILY DUPLICATIVE: HAS THE SIXTH CIRCUIT GONE TOO FAR IN  
UPHOLDING AN EMPLOYER’S ABILITY TO REQUIRE INCUMBENT  
EMPLOYEES TO PROVIDE DOCTOR’S NOTES AFTER TAKING SICK LEAVE?  
*Lee v. City of Columbus, Ohio*, 636 F.3D 245 (6th Cir. 2011).

I. INTRODUCTION

Consider a typical American, Joe, who has come down with a case of the flu. Joe’s flu is not an extraordinary event and occurs only once this year. He takes a week off from work, feels better, and returns to the office. Upon his return, Joe’s employer requires him to provide a doctor’s note detailing both the nature of his illness and whether he can still perform the essential duties of his job. Being a good employee, he obliges. Seems fairly innocuous, does it not? Suppose, however, that Joe was not out of the office for a week suffering from the flu, but instead took time off because of complications from HIV, depression, alcoholism, drug abuse, or any other potentially embarrassing or stigmatized illness. Would he be so willing to disclose those types of illnesses to his employer? Moreover, despite any misgivings he might have, could his employer still require him to disclose them?

This note examines the Sixth Circuit Court of Appeals’ recent ruling in *Lee v. City of Columbus, Ohio*,<sup>1</sup> which upheld a Columbus, Ohio police department policy (“the Columbus policy”) that required incumbent employees to provide a doctor’s note to their immediate supervisor explaining both the nature of their illness and their fitness to return to duty.<sup>2</sup> The Columbus policy is a blanket provision, applying to any incumbent employees that use either three or more days of sick leave for themselves or two or more days of sick leave due to an illness in the immediate family.<sup>3</sup> *Lee* contradicts the

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1. 636 F.3d 245 (6th Cir. 2011).

2. See MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/incumbent> (last visited June 8, 2013). For the purposes of this note, the term “incumbent employee” is defined as an employee who holds a position of permanent employment with an employer.

3. *Lee*, 636 F.3d at 248. The full text of the Columbus policy was included in the Sixth Circuit’s opinion:

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:

majority rule as stated by the Court of Appeals for the Second Circuit in *Conroy v. New York Department of Correctional Services*.<sup>4</sup> In this case, employers were precluded from enacting a similar policy that required incumbent employees to provide a doctor's note to their immediate supervisor after using sick leave unless doing so served a vital business interest.<sup>5</sup>

In analyzing the recent development of a circuit split on this issue, Part II of this note<sup>6</sup> will first discuss a brief history of the Rehabilitation Act as it applies to incumbent employee discrimination.<sup>7</sup> It will then discuss a brief history of the Americans with Disabilities Act (ADA) as it applies to incumbent employee discrimination—including a discussion of the ADA's general prohibition against employer-mandated medical examinations and inquiries. Part II will conclude with a discussion of how both the ADA, and the Americans with Disabilities Act Amendments Act of 2008 (ADAAA) continued the long-standing policy of protecting incumbent employees against employer-mandated medical examinations and inquiries, even in the face of prior court decisions that attempted to curtail the scope of the ADA.<sup>8</sup>

Part III of this note will critique *Lee*'s holding. It will first discuss<sup>9</sup> how *Conroy*'s holding has developed into the majority rule amongst the Circuit

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(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. 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. . .

(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 your physician's note **to your immediate supervisor**.

*Id.* (alteration in original) (internal quotation marks omitted).

4. 333 F.3d 88, 97–98 (2d Cir. 2003).

5. *Id.*

6. *See infra* Part II.

7. *See* 29 U.S.C. § 794(a), (b) (2006). In *Lee*, the Sixth Circuit emphasized that the Rehabilitation Act was applicable to the plaintiffs' case because the Rehabilitation Act specifies that the standards used to determine whether the Act has been violated are the same standards applied under the ADA. 636 F.3d at 250.

8. *See* ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2(a), 122 Stat. 3553, 3553–54 (2008) (codified as amended at 42 U.S.C. § 12101 (2009)).

9. *See infra* Part III.A.

Courts of Appeal.<sup>10</sup> Next, it will advocate that the Sixth Circuit could have reached the same conclusion while still following the majority rule.<sup>11</sup> Part III will then discuss how the Sixth Circuit's ruling goes too far in expanding an employer's ability to require both incumbent employees and their families to disclose private medical information, essentially arguing that the Sixth Circuit's ruling in *Lee* is unnecessarily duplicative.<sup>12</sup> Part III maintains that the majority rule would be the preferable approach in future judicial decisions because it would continue to limit an employer's ability to access private medical information about incumbent employees and their immediate families, and would also protect the vital role that family caregivers play in contemporary society.<sup>13</sup>

## II. BACKGROUND

### A. The Rehabilitation Act

In 1973, Congress passed the Rehabilitation Act, which prohibited state and local governments from discriminating against individuals with disabilities.<sup>14</sup> The Rehabilitation Act represented the culmination of many years of congressional efforts to provide a level playing field for individuals with disabilities.<sup>15</sup> The Rehabilitation Act had its shortcomings, however. Specifically, the Rehabilitation Act failed to address incumbent employee discrimination.<sup>16</sup> Prior to the ADA's enactment, seven circuits had held that no private right of action existed under the Rehabilitation Act.<sup>17</sup>

The absence of a private right of action under the Rehabilitation Act severely limited an incumbent employee's ability to sue his or her employer for discrimination experienced while on the job.<sup>18</sup> Regardless of this shortcoming, the Rehabilitation Act's impact was, nevertheless, illustrative of

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10. See, e.g., *Indergard v. Georgia-Pacific Corp.*, 582 F.3d 1049, 1056 (9th Cir. 2009); *Thomas v. Corwin*, 483 F.3d 516, 527 (8th Cir. 2007).

11. See *infra* Part III.B.

12. See *infra* Part III.C-1.

13. See *infra* Parts III.C-2, III.C-3; see also, e.g., Nicole Buonocore Porter, *Why Care About Caregivers? Using Communitarian Theory to Justify Protection of "Real" Workers*, 58 U. KAN. L. REV. 355, 410–11 (2010).

14. See 29 U.S.C. § 794(a), (b) (2006).

15. See Kathleen D. Henry, *Civil Rights and the Disabled: A Comparison of the Rehabilitation Act of 1973 and the Americans with Disabilities Act of 1990 in the Employment Setting*, 54 ALB. L. REV. 123, 123 (1989).

16. See Chai R. Feldblum, *Medical Examinations and Inquiries under the Americans with Disabilities Act: A View from the Inside*, 64 TEMP. L. REV. 521, 522 n.9 (1991) ("referring solely to affirmative action in employment decisions").

17. See Janet A. Flaccus, *Discrimination Legislation for the Handicapped: Much Ferment and the Erosion of Coverage*, 55 U. CIN. L. REV. 81, 88 (1986).

18. *Id.* at 87–89.

Congress's intent to cure discrimination against individuals with disabilities. The Rehabilitation Act now serves as both a precedent and a guidepost for interpreting the ADA, because the ADA extended the Rehabilitation Act's core principles (providing a level playing field for individuals with disabilities) to private employers.<sup>19</sup>

Both before, and shortly after, the ADA's enactment, existing anti-discrimination laws (such as the Rehabilitation Act) were "predominantly [litigated] to protect the existing positions of incumbent workers."<sup>20</sup> In fact, Congress specifically enacted the ADA within this period of predominant incumbent-employment litigation with far more sweeping provisions than previously enacted, thus protecting incumbent employees' rights in a way that the ADA's preceding legislation failed to do.<sup>21</sup>

## B. The Americans with Disabilities Act

The ADA's primary objective is "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."<sup>22</sup> Essentially, the ADA seeks to completely eliminate discrimination against individuals with disabilities, regardless of where the discrimination may present itself. Accordingly, the ADA does not limit its scope to pre-employment decisions, nor does the ADA apply only to states and local governments. The ADA, instead, represents Congress's attempt at broad-reaching legislation that provides a level playing field for individuals with disabilities in all aspects of life.

The ADA places a heavy emphasis on regulating private employers. The ADA continues to prohibit adverse hiring decisions against individuals because of their disability (just as the Rehabilitation Act did), and also goes further by precluding private employers from discriminating against any individual under *any* "terms, conditions, and privileges of employment" because of a disability.<sup>23</sup> Put another way, the ADA specifically includes incumbent employees within its scope. The ADA not only prohibits the discrimination of potential applicants, but specifically forbids discrimination against those with a disability in *any* employment decision.<sup>24</sup> The ADA's construction also provides a strong incentive for employers to accommodate

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19. See Feldblum, *supra* note 16, at 521–22.

20. John J. Donohue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983, 984 (1991).

21. See Feldblum, *supra* note 16, at 522.

22. 42 U.S.C. § 12101(b)(1) (2006).

23. 42 U.S.C. § 12112(a) (2006).

24. *Id.* ("No covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, [or] job training . . .").

any employees with a disability already on the job.<sup>25</sup> The accommodation mandate is the strongest of these incentives because it requires noncompliant employers to pay added costs for their noncompliance.<sup>26</sup>

One of the most significant regulations of private employers came from Congress's efforts to restrict an employer's use of employer-mandated medical examinations and inquiries.<sup>27</sup> These restrictions applied to both potential applicants and incumbent employees.<sup>28</sup> Under these restrictions, employers cannot use either medical examinations or medical inquiries to determine whether an applicant or an incumbent employee has a medical condition or disability "unless such [an] examination or inquiry is shown to be job-related and consistent with business necessity."<sup>29</sup> The ADA basically recognized that employer-mandated medical examinations and inquiries could also be an avenue for discrimination. Congress was particularly concerned with the notion that employers could discover either an applicant's or an incumbent employee's disability through medical examination and inquiry policies, and, thus, an applicant or an incumbent employee could face discrimination.<sup>30</sup> This notion was especially troubling for Congress, because discrimination may not occur if employers are dissuaded from enacting a medical examination or inquiry policy.<sup>31</sup>

Congress heavily debated this portion of the ADA. Prior to the ADA's passage, Congress forged a compromise that specifically regulated pre-employment medical screenings in a way that ensured applicants with disabilities could ultimately determine whether their disabilities prevented them from being hired.<sup>32</sup> By extension, this compromise also limited an employer's ability to require incumbent employees to submit to further medical examinations and inquiries once on the job.<sup>33</sup> Congress incorporated the

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25. See Seth D. Harris, *Law, Economics, and Accommodations in the Internal Labor Market*, 10 U. PA. J. BUS. & EMP. L. 1, 8 (2007).

26. See *id.* at 59–60. Professor Harris argues that the costs and uncertainties associated with an incumbent employee's lawsuit under the ADA are effective methods of ensuring employers comply with the ADA's accommodation mandate. *Id.* "The most obvious way for the employer to avoid a discrimination claim and the attendant litigation costs is to provide the employee with an accommodation that she finds acceptable." *Id.* at 60.

27. See 42 U.S.C. § 12112(d).

28. *Id.* See also Feldblum, *supra* note 16, at 530 ("One of the key aspects of the ADA's employment title is a series of restrictions on the use of medical examinations and inquiries, both during the application process and after individuals have been employed.").

29. 42 U.S.C. § 12112(d)(4)(A).

30. See Feldblum, *supra* note 16, at 531, 539.

31. *Id.* at 538 ("As a practical matter, this restriction on the use of medical examination and inquiry results, together with potential liability for unwarranted disclosure of medical information, may convince many employers not to require broadrange medical examinations and inquiries.").

32. *Id.* at 531.

33. *Id.* at 538.

underlying policy of the Rehabilitation Act by stipulating that an incumbent employee's on-the-job performance was the best indicator of his or her ability to perform the job for which he or she was hired.<sup>34</sup> Nevertheless, Congress also recognized that circumstances could theoretically arise where an incumbent employee was no longer capable of performing his or her job due to a medical condition.<sup>35</sup>

This tension between an employer's objectives in ensuring that incumbent employees remain capable of performing their essential job functions, balanced against Congress's intent to prevent employers from discriminating against incumbent employees because of their disabilities, gave rise to the ADA's "vital business interest" test. Accordingly, the ADA's final version allowed employers to inquire about an incumbent employee's medical conditions only to determine whether an incumbent employee "remain[ed] qualified for the job."<sup>36</sup> Employer-mandated medical examinations and inquiries, therefore, had to be "job-related and consistent with business necessity."<sup>37</sup> In other words, these inquiries could not be arbitrary. Neither Congress nor the ADA's proponents, however, intended for the bill to prohibit voluntary medical examinations and inquiries of either applicants or incumbent employees.<sup>38</sup> This concession is instructive, as it further evidences that both Congress and the ADA's proponents intended to eliminate only the unjustifiable demands of *involuntary* medical examinations and inquiries.<sup>39</sup> The ADA's proponents sought this elimination because both parties were aware that such involuntary policies could compel either applicants or incumbent employees to disclose a misunderstood or socially-stigmatized medical condition, including HIV, cancer, or diabetes against their will.<sup>40</sup>

### C. The Americans with Disabilities Act Amendments Act

After the ADA became law, incumbent employees, rather than applicants who were denied employment because of a disability, continued to bring the vast majority of discrimination claims.<sup>41</sup> Commentators continued to criticize this paradox as counterproductive to the ADA's policy objectives, particularly because the wide availability of litigation under the ADA,

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34. *Id.*

35. *Id.*

36. Feldblum, *supra* note 16, at 538.

37. *Id.* at 538–39 (citing 42 U.S.C. § 12112(c)(4)(A) (2011)).

38. *See id.* at 540.

39. *Id.* at 539.

40. *Id.* at 533.

41. Samuel R. Bagenstos, Review Essay, *Has the Americans with Disabilities Act Reduced Employment for People with Disabilities?*, 25 BERKELEY J. EMP. & LAB. L. 527, 537 (2004).

allegedly, does not ultimately protect incumbent employees against discrimination.<sup>42</sup> Notwithstanding such criticisms, however, Congress declined to curtail incumbent employees' rights to sue their employers for ADA violations when Congress enacted the ADAAA in 2008.<sup>43</sup> Congress recognized that recent rulings by the Supreme Court of the United States had actually *narrowed* the ADA's scope in a manner that Congress had not intended under the original legislation.<sup>44</sup> Therefore, Congress took it upon itself to cure the Court's recent circumspection of the ADA.

#### D. Summary

Four things are evident from this historical analysis: First, Congress did not intend for the ADA to be limited only to applicants denied employment based upon their disability, nor did Congress intend for the ADA to be applicable only to public employers. Second, Congress clearly intended for incumbent employees to have the right to sue their employers for discrimination under the ADA. Third, Congress did not intend to curb incumbent employees' rights to sue their employers when Congress enacted the ADAAA in 2008. On the contrary, Congress clearly intended to *expand* incumbent employees' already-existing rights within the ADA framework. Finally, Congress specifically contemplated the discriminatory potential for employer-mandated medical examinations and inquiries, and, therefore, intended to place rigorous restrictions on their use.

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42. See *id.* at 536 (arguing that incumbent employees suing their employers under the ADA may cause an overall decrease in the incentive of employers to initially hire applicants with disabilities); see also Donohue & Siegelman, *supra* note 20 (believing the massive increase in the number of cases under the ADA may "impose a significant burden on federal judges").

43. ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (2008) (codified at 42 U.S.C. § 12101 *et seq.* (2009))

44. *Id.* § 2(a). The Supreme Court rulings specifically mentioned by Congress as having curtailed the ADA's scope were the following: First, *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999), upheld the defendant-airline's decision to reject a pair of myopic sisters' applications for employment on the ground that the sisters' myopia was not a disability because they could correct their impairments with corrective lenses. Second, *Toyota Motor Manufacturing of Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002), held that impairments alone do not constitute a disability unless the impairment prevents or severely restricts an individual from performing tasks that are central to his or her daily life. *Williams* is particularly instructive of how far the Supreme Court of the United States went in disassembling the ADA. The plaintiff in *Williams* was, in fact, an incumbent employee who brought suit against her employer for allegedly failing to make reasonable accommodations for her carpal tunnel syndrome while she remained on the job. *Id.* at 187.

## III. DISCUSSION

A. Prior to *Lee*, the Second Circuit's Ruling in *Conroy* Became the Majority Rule

*Conroy* was not a case of first impression in interpreting the ADA's restriction on employer-mandated medical examinations and inquiries. Before *Conroy*, a trend emerged in other circuits in which the courts began to scrutinize an employer's necessity for medical examinations and inquiries, thus requiring them to be construed more carefully around the ADA's business necessity standard.

For example, in 1997, the Tenth Circuit held that an employer's new drug and alcohol testing policy requiring incumbent employees to disclose whether they were taking prescription drugs violated the ADA's medical examinations and inquiries provision.<sup>45</sup> The Sixth Circuit went further in 1999, holding that in order for an employer to request an incumbent employee to submit to a medical exam, the employer had to show that there was "*significant evidence* that could cause a reasonable person to inquire as to whether an employee [was] still capable of performing his job."<sup>46</sup> In 2001, the Third Circuit interpreted the ADA's business necessity standard to mean that job-related medical examinations must be consistent with a business *activity*, thus, limiting them "only to the extent necessary under the circumstances to establish the employee's fitness for the work at issue."<sup>47</sup>

Later that same year, the Ninth Circuit elaborated further on this concept, articulating that the ADA's business necessity standard is a high standard to meet.<sup>48</sup> The Ninth Circuit opined that neither business efficiency nor expedience should ever provide a justifiable rationale in determining whether the business necessity standard has been met in a particular case.<sup>49</sup>

Then came *Conroy*. In 2003, the Second Circuit considered a blanket employment provision that required incumbent employees to submit a doctor's note to their employer after taking multiple days of sick leave.<sup>50</sup> In this case, the Second Circuit continued to cement the trend developing in other circuits by ardently requiring employers to prove that any policy that required an incumbent employee to disclose a medical reason for taking sick

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45. *Roe v. Cheyenne Mountain Conference Resort, Inc.*, 124 F.3d 1221, 1230–31 (10th Cir. 1997).

46. *Sullivan v. River Valley Sch. Dist.*, 197 F.3d 804, 811 (6th Cir. 1999) (emphasis added).

47. *Tice v. Ctr. Area Transp. Auth.*, 247 F.3d 506, 515 (3d Cir. 2001).

48. *Cripe v. City of San Jose*, 261 F.3d 877, 890 (9th Cir. 2001).

49. *Id.*

50. *Conroy v. N.Y. State Dep't of Corr. Servs.*, 333 F.3d 88, 97–98 (2d Cir. 2003).

leave actually served a vital business interest.<sup>51</sup> The court required employers to “first show that the asserted ‘business necessity’ is vital to the business,” and not merely arbitrary.<sup>52</sup> Although a vital business interest could include a need to ensure workplace safety, or even to cut down on “egregious absenteeism,” a mandatory medical inquiry, nevertheless, could be broader or more intrusive than necessary to serve the employer’s vital business interests.<sup>53</sup>

The court, therefore, outlined a two-part disjunctive test to determine whether an employer’s mandatory medical inquiry serves a vital business interest.<sup>54</sup> Under the first part of the test, any mandatory medical inquiry must be directed at determining whether the incumbent employee can still perform work-related duties, and the employer bears the burden of showing that a legitimate, non-discriminatory reason exists to doubt the incumbent employee’s ability to perform these work-related duties.<sup>55</sup> Under the second part of the test, any employer inquiry as to whether an incumbent employee’s absence is for legitimate medical reasons requires the employer to show it has reason to suspect the incumbent employee is abusing its attendance policy.<sup>56</sup>

The Second Circuit further harmonized its ruling with Congress’s original sensitivity to potential acts of discrimination that could arise from a mandatory medical inquiry program.<sup>57</sup> Specifically, the court speculated that certain types of medical treatments, if disclosed to an employer, might compel an incumbent employee to disclose either an actual disability or even a perceived disability.<sup>58</sup> The Second Circuit mentioned chemotherapy as an example, alluding to the fact that cancer treatment may require an incumbent employee to take significant amounts of sick leave, and, consequently, a mandatory medical inquiry would compel the incumbent employee to disclose to his or her employer that he or she has cancer.<sup>59</sup>

After *Conroy*, several circuit courts and many federal district courts began to coalesce around *Conroy*’s holding and further developed *Conroy* into the majority rule. The Eighth Circuit became the first to adopt the Second Circuit’s reasoning.<sup>60</sup> The court recognized that employer-mandated medical examination and inquiry policies were not the only means available

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51. *Id.* at 97.

52. *Id.*

53. *Id.* at 97–98.

54. *Id.* at 98.

55. *Id.*

56. *Conroy*, 333 F.3d at 98.

57. *Id.* at 96.

58. *Id.*

59. *Id.* (citing *Fountain v. N.Y. State Dep’t of Corr. Servs.*, 190 F. Supp. 2d 335, 339 (N.D.N.Y. 2002), *aff’d in part, vacated in part, Conroy*, 333 F.3d at 98).

60. *Thomas v. Corwin*, 483 F.3d 516, 527 (8th Cir. 2007).

to achieve an employer's vital business interests.<sup>61</sup> Instead, the Eighth Circuit prescribed a more objective approach, stating that employer-mandated medical examinations or inquiries "must be a reasonably effective method to achieve the employer's goals."<sup>62</sup> In *Indergard v. Georgia-Pacific Corp.*,<sup>63</sup> the Ninth Circuit agreed with the Second Circuit when it reasoned that requiring incumbent employees to disclose the nature of their use of sick leave "went beyond simply measuring [the incumbent employee's] physical ability to perform job tasks and could have revealed a disability."<sup>64</sup>

The federal district courts followed suit, neglecting opportunities to distinguish *Conroy* in circumstances analogous to the facts in both *Conroy* and *Lee*, despite Congress's recent enactment of the ADAAA in 2008. For example, in 2008, a district court found an almost carbon copy of the police department policy in *Lee* to be a violation of the ADA.<sup>65</sup> Another district court held that "questions broadly seek[ing] information about illnesses, mental conditions, or other impairments [an incumbent employee] has or had in the past"<sup>66</sup> violates both the ADA and the Rehabilitation Act.<sup>67</sup> Finally, even a district court within the Sixth Circuit relied heavily upon *Conroy*'s reasoning when rendering its opinion.<sup>68</sup>

By the time the Sixth Circuit issued its ruling in *Lee*, the Second Circuit's ruling in *Conroy* represented well-established law across many circuits. Rulings that favored *Conroy*'s approach continued to rigidly restrict an employer's ability to require incumbent employees to submit to medical examinations or inquiries.<sup>69</sup> These rulings also continued to elaborate and expand on *Conroy*'s analysis, further explaining that an employer could satisfy its vital business interests by means other than mandated medical examinations and inquiries.<sup>70</sup> In addition, these rulings continued to touch upon the Second Circuit's noted policy objections to employer-mandated medical inquiries and examinations, agreeing that they could compel an incumbent employee to involuntarily reveal a disability to his or her employer.<sup>71</sup>

Moreover, these revelations could expose an incumbent employee to discrimination. By the time the Sixth Circuit decided *Lee*, several circuits

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61. *Id.*

62. *Id.* (citing *Conroy*, 333 F.3d at 98).

63. 582 F.3d 1049 (9th Cir. 2009).

64. *Id.* at 1057.

65. *Pa. State Troopers Ass'n v. Miller*, 621 F. Supp. 2d 246, 253–65 (M.D. Pa. 2008).

66. *Scott v. Napolitano*, 717 F. Supp. 2d 1071, 1084 (S.D. Cal. 2010).

67. *Id.* at 1084–85.

68. *See Lee v. City of Columbus, Ohio*, 644 F. Supp. 2d 1000, 1011 (S.D. Ohio 2009), *overruled*, 636 F.3d 245, 257–59 (6th Cir. 2011).

69. *See, e.g., Indergard v. Georgia-Pacific Corp.*, 582 F.3d 1049, 1056 (9th Cir. 2009).

70. *See, e.g., Thomas v. Corwin*, 483 F.3d 516, 527 (8th Cir. 2007).

71. *See, e.g., Indergard*, 582 F.3d at 1056.

had decided to err on the side of caution, and on the side of incumbent employees, by further pressuring employers to meet the very high burden of showing that their mandated medical examination and inquiry policies constitute absolute necessities to the vital interests of the business.

B. The Sixth Circuit's Reasoning Goes Too Far in Expanding an Employer's Ability to Require the Disclosure of Private Medical Information About Both Incumbent Employees and Their Families

In *Lee*, the Sixth Circuit reversed course and upheld the Columbus Police Department's medical inquiry policy.<sup>72</sup> The Columbus policy, however, was substantially different from the policy under review in *Conroy*.<sup>73</sup> In *Conroy*, the New York Department of Corrections' policy required incumbent employees to bring only a "medical certification" attesting to their fitness to return to work after an absence.<sup>74</sup> The Columbus policy was far more intrusive. It required *all* incumbent employees to submit a doctor's note—not just a medical certification—stating the nature of their illness to their immediate supervisors if more than three sick days were used.<sup>75</sup> Even more intrusive, if an incumbent employee took only two or more days of sick leave to take care of a family member, the policy required a doctor's note stating the nature of *the family member's illness*.<sup>76</sup>

In upholding the Columbus policy, the Sixth Circuit relied heavily on the fact that the Equal Employment Opportunity Commission's (EEOC) published guidelines permit an employer to request that incumbent employees provide a doctor's note upon return from sick leave, as long as the employer requires all incumbent employees to do so.<sup>77</sup> A reading of these very same EEOC guidelines, however, lends credence to the idea that the Sixth Circuit's ruling went too far in supporting the Columbus policy.

The EEOC guidelines imply that an employer's necessity for receiving such information from an incumbent employee may be satisfied by either a doctor's note *or by some other explanation*.<sup>78</sup> Consistent with both the Second Circuit's ruling in *Conroy* and with the majority rule, an employer-

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72. *Lee*, 636 F.3d at 261.

73. *See Conroy v. N.Y. State Dep't of Corr. Servs.*, 333 F.3d 88, 92 (2d Cir. 2003).

74. *Id.*

75. *See Lee*, 636 F.3d at 248.

76. *Id.* For the full text of the Columbus policy as published in the Sixth Circuit's opinion, see *supra* note 3.

77. *Lee*, 636 F.3d at 255.

78. *See Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees under the Americans with Disabilities Act (ADA)*, THE U.S. EQUAL EMP'T OPPORTUNITY COMM'N (July 27, 2000), <http://www.eeoc.gov/policy/docs/guidance-inquiries.html> [hereinafter "*EEOC Guidelines*"]. The relevant section is found at Question 15.

mandated medical inquiry is not the only means available to an employer to discover why an incumbent employee has taken sick leave. The language “doctor’s note or other explanation” is indicative of this assessment.<sup>79</sup> Accordingly, the EEOC Guidelines upon which the Sixth Circuit relied so heavily do not suggest that the required procurement of a doctor’s note is the only way an employer can discover an incumbent employee’s reason for taking, or having taken, sick leave. Indeed, the EEOC Guidelines specifically refuse to foreclose the possibility that other, more reasonable methods may be available.

The EEOC guidelines also make no mention whatsoever of an employer’s ability to require incumbent employees to disclose the nature of their family members’ illnesses if sick leave was taken for that purpose.<sup>80</sup> The only place where the EEOC guidelines mention any disability-related inquiries for family members is contained within a separate section.<sup>81</sup> This section permits an employer to make a disability-related inquiry against an incumbent employee, and *only* an incumbent employee, after receiving information learned from another person, such as a family member.<sup>82</sup> Another mention of family members is made in a footnote, which protects a family member’s genetic information from a disability-related inquiry encompassed within a request for an incumbent employee’s genetic information.<sup>83</sup>

Nothing within the EEOC guidelines would seem to support an employer policy of requiring incumbent employees to disclose the nature of a family member’s illness to an immediate supervisor when sick leave is used to care for a family member. Nevertheless, it was upon an expansive reading of the EEOC guidelines that the Sixth Circuit ultimately determined that the required family member disclosure portion of the Columbus policy was not a violation of the ADA.<sup>84</sup>

Notwithstanding such a liberal interpretation of the EEOC guidelines, the EEOC guidelines are not binding on the courts and merely constitute persuasive authority.<sup>85</sup> Moreover, no language within the EEOC guidelines, the Rehabilitation Act, the ADA, or the ADAAA would have precluded the Sixth Circuit from adopting the majority rule and invalidating portions of the Columbus policy—particularly the portions of the Columbus policy that

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79. *Id.* (“An employer is entitled to know why an employee is requesting sick leave. An employer, therefore, may ask an employee to justify his/her use of sick leave by providing a doctor’s note or other explanation, as long as it has a policy or practice of requiring all employees, with and without disabilities, to do so.”).

80. *Id.*

81. *Id.* The relevant section can be found at Question 6.

82. *Id.*

83. *Id.* The relevant section can be found at both Question 1 and footnote 21.

84. *Lee v. City of Columbus, Ohio*, 636 F.3d 245, 257 (6th Cir. 2011).

85. *See White v. Burlington N. & Santa Fe. Ry. Co.*, 364 F.3d 789, 812 (6th Cir. 2004).

required an incumbent employee's family member to disclose the nature of his or her illness to, in essence, a stranger.

The Sixth Circuit's ruling in *Lee* is also perplexing given the court's history. In several prior opinions, the Sixth Circuit has recognized an abundance of privacy rights in circumstances closely analogous to an incumbent employee's family member's right to medical privacy.

For instance, the Sixth Circuit held in *Kallstrom v. City of Columbus*<sup>86</sup> that the right to privacy protects a person's personal security interests, but the court also recognized a constitutional right to bodily integrity.<sup>87</sup> *Kallstrom* also held that the plaintiff-officers' constitutional rights to privacy and bodily integrity outweighed the City of Columbus's interest in releasing the plaintiff officers' addresses, phone numbers, and driver's licenses to defense counsel in response to a discovery request.<sup>88</sup> The question must be asked: If a constitutional right to privacy protects against the disclosure of an individual's driver's license, phone number, or address, according to the Sixth Circuit, why does that very same right to privacy not protect private medical records and diagnoses?

The Sixth Circuit also held in *Bloch v. Ribar*<sup>89</sup> that a right to privacy extends to a person's sexuality.<sup>90</sup> The *Bloch* court found that an individual's choices about sex are of such an intimate nature that they define an individual.<sup>91</sup> Again, the question must be asked: If a constitutional right to privacy protects a person's sexuality, according to the Sixth Circuit, why are medical diagnoses or conditions that may arise from sexual conduct immune from the very same protection?

For these reasons, the Sixth Circuit's ruling in *Lee* goes too far. Neither the EEOC guidelines, the ADA, nor the ADAAA provide the appropriate legislative framework for the Sixth Circuit to maintain that an employer-mandated medical inquiry policy is not in violation of the ADA. Moreover, nothing within the EEOC guidelines, the ADA, or the ADAAA would have precluded the Sixth Circuit from continuing the trend developing within several circuits to adopt *Conroy* as the majority rule. Furthermore, the Sixth Circuit's ruling in *Lee* unnecessarily tramples the rights of an incumbent employee's family member's right to medical privacy. It definitively upholds the Columbus policy's provision requiring incumbent employees to disclose the nature of a family member's illness when sick leave is used for that purpose. Given the history of the Sixth Circuit, its refusal to invalidate

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86. 136 F.3d 1055 (6th Cir. 1998).

87. *Id.* at 1062–63.

88. *Id.* at 1069. It should be noted that the plaintiff-officers in *Kallstrom* were undercover police officers.

89. 156 F.3d 673 (6th Cir. 1998).

90. *Id.* at 685–86.

91. *Id.* at 685.

the Columbus policy's family member provision is troubling because it evidences a clear departure from the Sixth Circuit's trend of expanding and protecting individuals' constitutionally protected privacy rights.

C. The Majority Rule Would Have Resolved the Conflict in *Lee* Without Requiring Incumbent Employees to Disclose Private Medical Information About Both Themselves or Their Families

1. *Most of the Columbus Policy Would Likely Have Been Upheld Under the Majority Rule*

Had the Sixth Circuit followed the majority approach, the bulk of the Columbus policy would likely have been upheld as being consistent with the ADA's principles and protections against employer discrimination of incumbent employees while continuing to significantly restrict the use of employer-mandated medical examination or inquiry policies. Indeed, had the Sixth Circuit followed the majority rule, the Columbus policy still would likely have permitted the Columbus Police Department to inquire into both the nature of its police officers' use of sick leave and their capability to perform their jobs. At the same time, the Sixth Circuit would have correctly concluded that requiring police officers to disclose the nature of their family members' illnesses was far too intrusive. Had it followed the majority rule, the Sixth Circuit would have invalidated the family-member portion of the Columbus policy.

To review, *Conroy* outlined a two-part disjunctive test to determine whether an employer-mandated medical inquiry satisfied a vital business interest.<sup>92</sup> Under the first part of the test, the Columbus Police Department bore the burden of showing two things: First, that a legitimate, non-discriminatory reason existed to doubt an incumbent employee's ability to perform work-related duties; second, that the medical inquiry was directed to determine whether the incumbent employee could perform work-related duties.<sup>93</sup>

On its face, the Columbus policy appears to meet both elements of the first part of *Conroy*'s disjunctive test, and, therefore, the policy—as it applies to incumbent employees—would likely have been upheld by the Sixth Circuit had it followed the majority rule. In its opinion, the Sixth Circuit recognized that the policy was universal, applying to all incumbent employ-

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

93. *See id.* The second part of the test requires the employer to show that it has a reason to suspect an incumbent employee is abusing the employer's attendance policy. *See id.* Because the Sixth Circuit in *Lee* did not state any facts that would indicate the Columbus policy was enacted for this reason, a review of the Columbus policy's viability under that portion of the test will not be discussed here.

ees regardless of their disability status.<sup>94</sup> Because the Columbus policy was a blanket provision that applied to all incumbent employees, any argument that it was designed to discriminate against incumbent employees with disabilities would not have been persuasive. Furthermore, both the EEOC guidelines and the ADA support the use of employer-mandated medical inquiry programs as long as they apply to all employees and do not single out incumbent employees that the employer suspects of having a disability.<sup>95</sup>

The Columbus policy also satisfies a legitimate, non-discriminatory reason to inquire into an incumbent employee's ability to perform a job. The policy specifically requires that any police officer taking three or more days of sick leave must submit to an immediate supervisor a doctor's note attesting to both the nature of the illness *and* fitness to return to regular duty.<sup>96</sup> Police officers perform very demanding jobs, requiring careful attention to detail and quick decision-making in high-stress situations. Errors in judgment, including errors that result from split-second decisions, can lead to an abundance of problems ranging from wrongful arrest to death.

Under the Eighth Circuit's more objective approach, which held that employer-mandated medical inquiries needed to be reasonably effective to achieve the employer's goals,<sup>97</sup> the Columbus policy appears to be reasonably effective at determining whether police officers returning from extended sick leave are still capable of performing their jobs. Furthermore, even though the Second Circuit was concerned that employer-mandated medical examination and inquiries could tend to reveal a disability,<sup>98</sup> the Columbus Police Department's interest in ensuring that police officers returning to regular duty are still capable of performing their jobs would likely have overridden this concern.

In addition, although the policy in *Conroy* pertained to correctional officers<sup>99</sup>—a similar role to that of a police officer that requires high-stress, quick decision-making—the Sixth Circuit would have acted reasonably if it had distinguished the custodial nature of the prison guards in *Conroy* from the prosecutorial and investigational nature of the police officers in *Lee*. Even if this distinction was dubious at best, the Sixth Circuit could have affirmed the Columbus policy as it applied to police officers on street patrol and exempted the Columbus policy as it applied to dispatchers, desk workers, or other in-house staff who perform the same, or similar, custodial and administrative tasks as correctional officers.

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94. *Lee v. City of Columbus, Ohio*, 636 F.3d 245, 257 (6th Cir. 2011).

95. 42 U.S.C. § 12112 (2006); *EEOC Guidelines*, *supra* note 78.

96. *Lee*, 636 F.3d at 248.

97. *See Thomas v. Corwin*, 483 F.3d 516, 527–28 (8th Cir. 2007).

98. *Conroy*, 333 F.3d at 95.

99. *Id.* at 91.

Nevertheless, the underlying policy of ensuring that police officers returning from extended sick leave are still capable of performing their jobs is still reasonable under *Conroy*'s vital business interests test. Suppose a police officer took time off from work after contracting infectious mononucleosis,<sup>100</sup> or any other illness that may impair a police officer's ability to perform effectively under pressure. Such information is of vital importance to the Columbus Police Department, which would have a strong interest in ensuring the safety of the citizens it has been charged to serve and protect. When confronted with the information that a police officer returning from extended sick leave is suffering from an ailment that may significantly impact his or her ability to perform the high-stress nature of police work, an immediate supervisor would then be able to take corrective action.

Suppose, however, that a police officer took extended sick leave to receive treatment for influenza.<sup>101</sup> Then, the reverse is true. No corrective action would need to be taken; the police officer can return to work. The Columbus Police Department's interest in being able to make this type of judgment call overrides an individual police officer's fear that a disability may be revealed.

The Columbus policy, as it pertains to incumbent employees, also clearly intends to determine whether a police officer could still perform work-related duties. No invidious or arbitrary reason for requiring police officers to comply with the policy appears to exist. Indeed, the policy specifically mentions that police officers are to provide a doctor's note attesting to both the nature of their illness *and* their ability to return to regular duty following a return from extended sick leave.<sup>102</sup> Had the Columbus policy only inquired into the nature of the illness, without also requiring a doctor's certification that a police officer could return to duty, it would have been a clear violation of the ADA under *Conroy*.<sup>103</sup> Because both the nature of the police officer's illness and the fitness to return to duty were under review, howev-

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100. The symptoms of infectious mononucleosis include, but are not limited to, sore throat, fever, malaise, and extreme fatigue. See MURRAY LONGMORE ET AL., OXFORD HANDBOOK OF CLINICAL MEDICINE 389 (7th ed. 2007).

101. Unlike infectious mononucleosis, which can cause illness for an extended period of time, see *id.*, "[m]ost people who get influenza will recover in a few days to less than two weeks . . ." *Seasonal Influenza (Flu)*, CENTERS FOR DISEASE CONTROL AND PREVENTION (last updated Sept. 12, 2013), <http://www.cdc.gov/flu/about/disease/symptoms.htm>. Influenza symptoms are typically less severe, and "estimates of flu-associated deaths in the United States range[d] from a low of about 3,000 to a high of about 49,000 people" between 1976 and 2007. *Id.*

102. *Lee v. City of Columbus, Ohio*, 636 F.3d 245, 248 (6th Cir. 2011).

103. 333 F.3d at 91–92. The policy in *Conroy* only required employees returning from sick leave to submit a general diagnosis, which allowed the Department of Corrections, and not a doctor, to make the determination as to whether the employee was fit to return to duty. *Id.*

er, and because the police officer's attending physician made a determination on both questions, the Columbus policy passes muster—but only with regard to police officers under the department's employ.

2. *The Majority Rule Would Have Correctly Determined that Requiring Immediate Family Members to Disclose the Nature of Their Illness Violated the ADA.*

The Columbus policy's validity pertaining to a police officer's immediate family is a different matter. Indeed, the portion of the Columbus policy that required the disclosure of a family member's illness when sick leave was taken for that purpose was clearly inapposite of the majority rule.

First, no justifiable rationale appears to exist whereby a police officer's fitness to return to regular duty could be substantially impacted by taking care of an ill family member at home and off the clock. Although a police officer's caring for a family member who is suffering from the sudden onset of a disability or even attending to a family member in the final throes of a terminal illness may have some impact on the officer's ability to perform effectively under pressure, so do a variety of other life-changing events. The death of a family member arguably would have the same impact (or more), as would a child's poor performance in school, a contentious divorce, or a substantial change in the family dynamic such as the loss of a spouse's job. Yet the Columbus policy does not require a police officer to disclose that they have taken sick leave for any of these purposes.<sup>104</sup> Instead, the Columbus policy is only concerned with family members' illnesses or disabilities.

Second, the very nature of the family member portion of the Columbus policy is not necessary to determine whether a police officer could still perform his or her job. It makes little, if any, difference whether a family member suffers from an illness, particularly when the incumbent employee's on-the-job performance remains the best indicator of whether he or she is still capable of performing his or her job. A husband's *actual* and *physical* ability to perform the duties expected of him as a police officer is unlikely to be affected because his wife has terminal cancer. And even if a police officer's family member suffers from a communicable illness, such as HIV, the family member's suffering from the disease is unlikely to impact the police officer's *actual* and *physical* ability to perform his or her job unless the police officer subsequently contracts HIV. If that occurs, the valid portion of the Columbus policy reflecting the majority rule—the portion that applies only to incumbent employees—would then be applicable.

Put another way, only after a police officer has contracted an illness can the police officer's ability to perform his or her job be questioned, and,

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104. See *Lee*, 636 F.3d at 248.

even then, only after the police officer has taken extended sick leave. There is no need to inquire into the health of a police officer's family. No compelling policy interest is served by requiring family members to submit to a policy that has little, if any, effect on a police officer's ability to perform his or her job. Accordingly, had the Sixth Circuit followed the majority rule, the portion of the Columbus policy applying to family members would have been invalidated. This approach would have been preferable because, under the majority rule, only a police officer's fitness to return to duty is at issue. A family member's ability to return to duty in a job that he or she does not occupy is not.

D. The Majority Rule is the Preferable Approach Because It Would Continue to Limit an Employer's Ability to Receive Private Medical Information About Its Employees or Their Families

1. *After Conroy, Legal Scholars Have Expressed Their Support for the Majority Rule*

Legal scholars have supported the majority rule for many of the same reasons as the Second Circuit. These scholars have maintained that the majority rule would continue to prevent an employer from requiring incumbent employees to comply with a policy that may reveal a disability unless it served a rigidly-applied vital-business-interests test.<sup>105</sup> At the same time, the majority rule would prevent employers from creating a record of an incumbent employee's medical history and, thus, potentially misclassifying him or her as having a disability.<sup>106</sup>

In enacting the ADA, Congress recognized that not all discrimination would flow from an incumbent employee's actual disability, but, instead, from other forms of discrimination.<sup>107</sup> Initially, the ADA envisioned protections for incumbent employees under a "regarded as" prong, most often used when an incumbent employee faces discrimination based upon society's misconceived notions about a disability or a disease.<sup>108</sup> The ADA, however, also envisioned protections for incumbent employees under a "record of" prong, which would protect them from being labeled as an individual with a disability—regardless of whether the label was correctly or incorrectly at-

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105. See Alex B. Long, *(Whatever Happened to) The ADA's "Record Of" Prong(?)*, 81 WASH. L. REV. 669, 683–84 (2006).

106. See *id.* at 683 ("[T]he fact that Congress used the ADA to place limitations on the ability of employers to require medical examinations or inquire into the medical histories of job applicants and employees supports the conclusion that [it] was meant to serve at least some role in protecting individuals with conditions associated with stigma.").

107. *Id.* at 680.

108. *Id.*

tached.<sup>109</sup> The ADA's legislative history supports this argument, showing that Congress was concerned with "record of" violations because the misclassification of an incumbent employee as an individual with a disability usually arose from a tangible record of some kind.<sup>110</sup>

Because the potential for discrimination to flow from a tangible record of some kind is possible, an enforcement of the majority rule would resolve this problem. It would preclude an employer from obtaining a "record of" an incumbent employee's alleged disability by foreclosing an employer's opportunity to acquire several doctor's notes after many extended absences. Regardless of the reason for any extended illnesses, an employer would be unable to obtain an extensive record of doctor's notes on incumbent employees, and, by extension, would be less likely to discriminate against incumbent employees for any disabilities, real or imagined, that such an extensive record of doctor's notes would imply.

The policy for preventing discrimination against incumbent employees misclassified as having a disability is a strong one. Legal scholars have argued that misclassified incumbent employees require the same level of protection from discrimination under the ADA as individuals with disabilities.<sup>111</sup> Medical examinations and inquiries create the possibility that an employer may discriminate against an incumbent employee based upon an examination of the incumbent employee's medical history.<sup>112</sup> In addition, the stigma of a misclassified disability is the same as an actual disability, and, as with an actual disability, a misclassified disability may follow incumbent employees throughout their employment at a particular job, thus, providing the potential for discrimination over a long period of time.<sup>113</sup>

Support for the majority rule would also operate as a deterrent to employers, dissuading them from making even passive inquiries into their incumbent employees' medical histories.<sup>114</sup> Under the ADA, incumbent employees without disabilities may sue their employers for inquiring into their medical histories if the inquiry is neither job-related nor consistent with a business necessity.<sup>115</sup> Furthermore, once an employer receives medical information about an incumbent employee under an employer-mandated med-

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109. *Id.* at 681.

110. *Id.* at 681–82. The "record of" prong was also designed to protect individuals who have recovered, either in full or in part, from previous illnesses. *See id.* at 684–85.

111. *See Long, supra* note 105, at 682–84.

112. *Id.* at 684.

113. *Id.* at 682.

114. *See Michelle A. Travis, Lashing Back at the ADA Backlash: How the Americans with Disabilities Act Benefits Americans Without Disabilities*, 76 TENN. L. REV. 311, 345–46 (2009).

115. *Id.* at 345.

ical inquiry policy, the employer is required to comply with stringent confidentiality requirements in the care and custody of that information.<sup>116</sup>

This policy presents significantly higher risks to employers than abandoning employer-mandated medical examination and inquiry policies altogether unless they served a vital business interest. First, employers would be required to consult legal counsel to ensure their policy does not amount to a passive inquiry into an incumbent employee's medical history. Second, employers would be required to consult legal counsel to ensure the policy is job-related and consistent with a business necessity. Third, employers would be required to ensure that any medical information obtained under the policy remains sufficiently confidential, and that stringent safeguards are in place to ensure such medical information does not fall into the wrong hands. These requirements are three potential landmines that expose the employer to significant liability for noncompliance, including expenses related to the defense of a lawsuit and the costs associated with any injunctive relief or with the payment of any damages as ordered by a court. Accordingly, this increased risk of litigation is likely to dissuade employers from enacting employer-mandated medical examination and inquiry policies. For employers with policies already in place, it may encourage them to abandon them altogether.

Some legal scholars have expressed resistance to the majority rule.<sup>117</sup> These scholars argue that employers with incumbent employees in remote locations, or in dangerous jobs, should be entitled to an exception from the majority rule.<sup>118</sup> Such an exception, however, already exists in both a statutory reading of the ADA<sup>119</sup> and in the majority rule as expressed in *Conroy's* vital-business-interests test.<sup>120</sup> Basically, the majority rule would remain applicable to a hypothetical set of facts where an offshore oil driller working on a rig suffers a massive heart attack while on the job, which could potentially cause a major disaster.<sup>121</sup> Under the majority rule, in this scenario an employer is still likely to prevail against any claim that its medical inquiry policy neither preserves a vital business interest nor is unnecessary to protect the health and safety of its workers.

Indeed, the majority rule is malleable, and depends on the facts of the case under review.<sup>122</sup> The majority rule contemplates that there may be cer-

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116. *Id.*

117. See Jarod S. Gonzalez, *A Matter of Life and Death—Why the ADA Permits Mandatory Periodic Medical Examinations of “Remote-Location” Employees*, 66 LA. L. REV. 681, 716 (2006).

118. *Id.*

119. See 42 U.S.C. § 12112(d) (2006).

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

121. See Gonzalez, *supra* note 117, at 682–83.

122. See *Conroy*, 333 F.3d at 98.

tain jobs, such as the hypothetical oil driller, that permit an employer to inquire further into an incumbent employee's present ability to perform essential work-related tasks. Courts need not run the risk of creating additional restraints on the ADA's effectiveness by creating additional exceptions to the statute when such exceptions already exist in both the statute itself and in the majority of court opinions interpreting the statute's applicability.

2. *All Individuals, Including Incumbent Employees and Their Family Members, are Entitled to a Reasonable Expectation of Medical Privacy That the Majority Rule Would Protect*

In 1983, the Sixth Circuit held that "a person possesses no reasonable expectation that his medical history will remain *completely* confidential"; however, the Sixth Circuit acknowledged that "a person has [an] interest in protecting, to some extent, the confidentiality of his medical records."<sup>123</sup> Since then, a right to medical privacy has been consistently recognized in other courts. The Third Circuit has acknowledged that an incumbent employee's medical records, records of prescription medication, and other personal medical information are all entitled to privacy protections.<sup>124</sup>

Some courts have gone further than the Third Circuit, holding that both individuals infected with AIDS *and their family members* have a constitutional right to privacy regarding that diagnosis.<sup>125</sup> In reaching this conclusion, the *Doe* court<sup>126</sup> relied upon *Whalen v. Roe*,<sup>127</sup> which held that the U.S. Constitution recognized an "interest in avoiding the disclosure of personal matters."<sup>128</sup> Similarly, the Massachusetts Supreme Court stated that a right to privacy could prevent the disclosure of a family member's medical condition.<sup>129</sup>

Although a universal theory on whether individuals, or their family members, possess a right to privacy protecting their medical records from involuntary disclosure has yet to develop, any judicial opinion that constructively erodes this right is an unfavorable policy to uphold. This notion is especially true in the case of heavily stigmatized, feared, or otherwise mis-

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123. *In re Subpoena Served Upon Zuniga*, 714 F.2d 632, 641 (6th Cir. 1983).

124. *See* *United States v. Westinghouse Elec. Corp.*, 638 F.2d 570, 577 (3d Cir. 1980). *But see* *Doe v. Wigginton*, 21 F.3d 733, 740 (6th Cir. 1994) (holding that no right to confidentiality regarding medical records existed).

125. *See* *Doe v. Barrington*, 729 F. Supp. 376, 382 (D.N.J. 1990).

126. *Id.* (citing *Whalen v. Roe*, 429 U.S. 589, 599–600 (1977)).

127. 429 U.S. at 599–600.

128. *Id.* at 599.

129. *See* *Hansen v. J.L. Hammett Int'l, Inc.*, No. A 9800849, 1999 WL 1073649, at \*3 (Mass. Sup. Ct. Sept. 2, 1999). *But see* *Fitch v. Voit*, 624 So. 2d 542, 543 (Ala. 1993) (holding "that the right to privacy is a personal right" and that no "relational right of privacy" extends to family members).

understood illnesses.<sup>130</sup> In the same vein, public sentiment and judicial backlash against the ADA have been eroding the protection of incumbent employees against discrimination in a manner that Congress did not intend.<sup>131</sup> The Sixth Circuit's ruling in *Lee* has the operative effect of continuing this erosion in a manner inconsistent with Congress's intent. Although the business-necessity exception is still sound policy, the threat of incumbent employee discrimination still exists if the incumbent employee is required to disclose the nature of his or her family member's illness.

For example, assume that a husband needs to take a week off from work to tend to his wife who is suffering from HIV or AIDS. It is not difficult to imagine the husband's employer will now assume that the husband also suffers from HIV or AIDS, despite not having any information to corroborate that belief. Given the continued stigma that accompanies individuals with HIV or AIDS, a judicial policy that departs from the majority rule is unsound.

3. *The Majority Rule is the Favorable Approach Because It Would Also Have a Positive Effect on Family Caregivers, or, at a Minimum, It Would Not Discourage Individuals from Assuming a Caregiving Role*

As a policy matter, the holding in *Lee* is likely to have a negative effect on family caregivers, who often take time off of work to tend to close family members. A policy requiring incumbent employees to disclose the nature of their family members' illnesses after taking extended sick leave is likely to discourage incumbent employees from assuming a caregiving role.

The role of a caregiver is an important role in today's society. Nearly everyone has been required to, or knows someone who has been required to, take time off from work to care for a loved one suffering from an illness or a disability. Policies benefiting caregivers have a positive impact on society as a whole. Such impacts include the absence of neglect for children who do

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130. See Tony R. Maida, Note and Comment, *How Judicial Myopia is Jeopardizing the Protection of People with HIV/AIDS Under the ADA*, 27 AM. J.L. & MED. 301, 303 (2001). Mr. Maida also mentions that individuals diagnosed with HIV or AIDS will always be a protected class because of the ADA's "record of" prong. *Id.* at 320. Specifically, the "record of" prong applies to individuals with HIV or AIDS because they have a "record of" a disability through their HIV-positive diagnosis. *Id.* This diagnosis follows them indefinitely until a cure is found. *Id.* Such an analysis dovetails with a similar analysis by Long, who found that judicial erosion of the ADA had a particularly profound effect on "record of" claims. See Long, *supra* note 105, at 676 ("[T]hrough a string of restrictive interpretations by the federal courts involving all three prongs of the ADA's definition of disability, the 'record of' prong is almost the vestigial definition of discrimination under the ADA, serving no independent purpose in the eyes of most ADA plaintiffs.").

131. See Maida, *supra* note 130, at 302-03.

not have the presence of a caregiver at home, especially when the absence of a caregiver often has negative effects on both the child and the child's family.<sup>132</sup>

Legal scholars have continually supported policies that favor caregivers, particularly for individuals who perform dual roles of full-time employee on the job and full-time caregiver at home.<sup>133</sup> Individuals who perform the dual role of both often violate their employer's attendance policy.<sup>134</sup>

The decision to become a caregiver is not always voluntary. Sometimes individuals are "forced into [the] role[] because of the sudden [onset of an] illness, injury, or disability of a loved one."<sup>135</sup> More often than not, those that fill the role of caregiver tend to be women,<sup>136</sup> and any judicial enforcement of employer-friendly attendance policies that dissuade caregivers from tending to their duties at home is likely to include an additional element of gender discrimination.<sup>137</sup> Rigid attendance policies compound the problem.<sup>138</sup>

It does not have to be this way. Judicial policy can be geared toward favoring caregivers, and court opinions can be constructed within the framework of the ADA to give employers an incentive to provide caregivers with reasonable accommodations.<sup>139</sup> By using the ADA as its backbone, judicial reforms can ameliorate the effects of discrimination against women, who traditionally perform the role of caregiver.<sup>140</sup> Court opinions can also assist in curing the cognitive bias, a form of stereotyping, that typically attaches to female caregivers<sup>141</sup> but may also attach in a more invidious way to

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132. See Porter, *supra* note 13, at 410–11.

133. See *id.* at 357.

134. *Id.*

135. *Id.* at 380.

136. *Id.* at 357–58.

137. See *id.* at 362 ("Prevailing workplace practices remain firmly anchored to an ideal-worker norm that embodies the traditional life patterns of men.") (citing Joan C. Williams & Stephanie Bornstein, *Caregivers in the Courtroom: The Growing Trend of Family Responsibilities Discrimination*, 41 U.S.F. L. REV. 171, 173–74 (2006)); *id.* at 363 ("The number of women affected by stringent attendance policies is staggering, and most of these women are in the lowest income brackets.") (citing *Enforcement Guidance: Unlawful Disparate Treatment of Workers with Caregiving Responsibilities*, THE U.S. EQUAL EMP'T OPPORTUNITY COMM'N (May 23, 2007), available at <http://www.eeoc.gov/policy/docs/caregiving.html>).

138. See Porter, *supra* note 13, at 362 ("Some employers allow as few as six to eight absences or partial-day absences in an entire year regardless of the reason.")

139. See Rachel Arnow-Richman, *Public Law and Private Process: Toward an Incentivized Organizational Justice Model of Equal Employment Quality for Caregivers*, 2007 UTAH L. REV. 25, 39–40 (2007).

140. *Id.* at 37. Professor Arnow-Richman concedes, however, that reform is unlikely to come from the courts, but, instead, from Congress. *Id.* at 38.

141. *Id.* at 40.

men.<sup>142</sup> Moreover, any complaints that an employer's policy favoring caregivers is likely to be cost-prohibitive are unpersuasive.<sup>143</sup> Indeed, it is likely that any cost for these policies will be "offset by increased employee morale, loyalty, and retention."<sup>144</sup>

Judicial opinions inapposite of the majority rule are likely to counter these favored policy approaches to family caregivers. Individuals who are considering becoming a caregiver are unlikely to assume the role if an employer's attendance policy is stringent or unfavorable to them. Imagine how these individuals would react when that policy also requires disclosure in explicit detail for why they are taking extended sick leave. Some parents would like their children's ailments, illnesses, or disabilities to remain private. Others may not be prepared to disclose to their employer that their spouse is dying. Many may be disinclined to confess that one or more parents have had to move in with them because they are no longer able to take care of themselves. Or, perhaps, some people would prefer that matters involving their family stay in the family. *Lee's* departure from the majority rule prevents all of the above.

#### IV. CONCLUSION

Has the Sixth Circuit gone too far in allowing employers to require incumbent employees to provide a doctor's note after returning from extended sick leave? Arguably, yes. Prior to *Lee*, the Second Circuit's ruling in *Conroy* was well-established as the majority rule. Circuit courts following the Second Circuit's approach in *Conroy* agreed that the majority rule best served the ADA's mission by preventing employers from passively discovering an incumbent employee's disability through involuntary medical examination and inquiry programs. The majority rule is also sufficiently malleable with regard to employees in remote locations or dangerous jobs, and, therefore, it is likely that a substantial portion of the Columbus policy would have been upheld had the Sixth Circuit followed the majority rule.

Because the Sixth Circuit departed from this standard, several issues arise under its analysis. As a practical matter, the ruling drastically expands an employer's ability to compel the disclosure of private medical information about both incumbent employees and their families. In so doing, the Sixth Circuit's ruling goes against the preferable policy approach on this issue. Although employers are likely to applaud the ruling for preventing

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142. *Id.* at 41 ("Some have suggested that men who deviate from the stereotypical male work pattern by assuming significant caregiving responsibilities encounter explicit harassment.").

143. *Id.*

144. Nicole Buonocore Porter, *Synergistic Solutions: An Integrated Approach to Solving the Caregiver Conundrum for "Real" Workers*, 39 STETSON L. REV. 777, 856 (2010).

incumbent employees from abusing their attendance policies, such a victory comes at too great a cost.

The Sixth Circuit's departure from the majority rule goes against an already-established approach to employer-mandated medical examinations and inquiries that legal scholars have championed as being aligned with the ADA's broader goals and objectives. Moreover, the Sixth Circuit's ruling will erode both incumbent employees', and their family members', more than reasonable expectations of a right to medical privacy. A refusal to follow the majority rule is also likely to have a significant impact on family caregivers. Indeed, a further ratification of the majority rule would have had a positive effect on family caregivers, thus, encouraging people to (or, at the very least, not discouraging people from) assuming the role of a family caregiver.

*Thomas H. Wyatt\**

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\* J.D. expected May 2013, University of Arkansas at Little Rock, William H. Bowen School of Law; Bachelor of Arts, University of California at Riverside. I dedicate this note first to my family—Tom, Sally, Richard, and Sarah—for always being my biggest cheerleaders; and also to my guardian angel—Briana Thorpe—for inspiring me to take this journey to fulfill my dream of becoming a lawyer, for making me a better man, and for teaching me that life is not a dress rehearsal.