EMPLOYMENT

Legal Briefings

Great Lakes ADA Center

Confidentiality Requirements under the ADA

By Equip for Equality[1]

I. Introduction

The Americans with Disabilities Act (ADA) requires people with disabilities, in certain circumstances,[2] to disclose private health information. This requirement can place the person with a disability in a vulnerable position, as they risk negative employment and/or social consequences from the potential exposure of this private information. To address this risk, the ADA includes a confidentiality provision to limit the disclosure of health information once it has been obtained.

This Legal Brief examines how courts have analyzed issues related to the confidentiality of health information under the ADA. The primary focus will be on the Title I employment context, which will include a thorough discussion on the scope of protected information and also the exceptions that permit disclosure. After exhausting Title I, this Legal Brief will touch on confidentiality in the context of Title II and III.

II. Confidentiality of medical records under Title I

Title I of the ADA requires employers to collect all information obtained regarding an applicant or employee's medical condition or history on separate forms and in separate medical files and to treat such information as confidential medical records.[3] This protection covers all applicants or employees, regardless of whether they are a qualified individual with a disability under the ADA.[4] However, the ADA does carve out three exceptions from this general confidentiality mandate: (i) supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations; (ii) first aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment; and (iii) government officials investigating compliance with this provision of the ADA shall be provided relevant information upon request.[5]

Courts have taken this statutory framework and turned it into a three step inquiry for determining whether an employee can recover monetary damages from an employer for violating the Title I confidentiality requirements[6]. The first inquiry asks, as a threshold matter, whether the medical information was received as a result of an employer-initiated medical inquiry or exam. The second inquiry is whether the information was disclosed by the employer or otherwise not kept confidential (or whether an exception applies). The final inquiry is whether the employee suffered a tangible injury as a result of the

disclosure. The following sections will highlight trends in how courts have addressed these inquiries.

A. Employment-Related Medical Inquiry or Exam

The threshold inquiry for any ADA confidentiality case is whether the health information at stake is actually confidential within the meaning of the ADA. The established rule is that health information is only confidential under the ADA if it was provided to the employer in response to a medical inquiry or exam concerning the applicant or employee[7]. This means that information provided to employers either voluntarily or as the result of a non-medical inquiry is not confidential under the ADA and may be disclosed by the employer.

Straightforward examples of medical inquiries or exams where courts found that the solicited information was confidential under the ADA include an employer who requested the employee to provide prescription medication information and submit to a fitness for duty exam,[8] an employer who asked an employee why she was in the hospital,[9] and an employer who required an employee to submit a certificate from a doctor to support FMLA leave.[10] Straightforward examples of disclosures where courts found that the information was not confidential under the ADA include an employee who voluntarily executed releases of information to allow his employer to communicate with his doctors,[11] and an employee who voluntarily informed human resources of his HIV+ diagnosis.[12] Courts have also found that employees who supplement reasonable accommodation requests with medical information on their own accord have made a voluntary disclosure that is not protected by the ADA.[13]

E.E.O.C. v. C.R. England, the case referenced above where the plaintiff voluntarily informed human resources of his HIV+ diagnosis, is a particularly harsh example of the free reign employers have once they obtain health information that is not confidential under the ADA. The plaintiff in this case worked as a trainer for truck drivers. The employer required potential trainees to sign a consent form related to the plaintiff's HIV+ status. The court found no violation of the ADA's confidentiality provision because the plaintiff had voluntarily disclosed his status.

The key question for determining if health information is confidential under the ADA is whether the employer *solicited* the information by making a medical inquiry or exam of the *applicant* or *employee*. This point is exemplified by *Sheriff v. State Farm*[14] and *Allen v. Verizon Wireless.*[15] In *Sheriff*, the plaintiff used to work for an independent insurance agent who sold State Farm insurance. After cutting ties with the independent agent, the plaintiff contacted State Farm's corporate office for assistance in applying for a new

position. At some point, the independent agent disclosed information about plaintiff's medical condition to State Farm. The plaintiff later filed suit against State Farm for an improper disclosure. The Court dismissed the plaintiff's claim, finding that although the plaintiff had not consented to giving his health information to State Farm (and therefore that the disclosure was involuntary), State Farm had obtained it from the independent agent as opposed to soliciting it through a medical inquiry or exam of the plaintiff. In *Allen*, the plaintiff employee submitted medical information concerning her husband at her employer's request so that she could take FMLA leave to care for him. Although the employer solicited the information, the Court found that the health information was not confidential because the husband was not an applicant or employee.

When an employee is absent from work or appears upset on the job, employers sometimes ask general questions such as "is everything okay?" Are these non-specific statements of concern medical inquiries for purposes of the ADA confidentiality provision? *E.E.O.C. v. Thrivent Financial*[16] is instructive in this regard. In *Thrivent*, the employer sent an email to the employee that stated "we need to know what is going on" because the employee had failed to show up to work. The plaintiff responded by explaining that he had a severe migraine. The Court found that the employer's email was not a medical inquiry. In reaching this conclusion, the Court held that in order for an employer's inquiry to constitute a medical inquiry for purposes of the ADA confidentiality provision, the employer must have had preexisting knowledge that the employee was ill. Since Thrivent had no such knowledge, its inquiry was not medical and the plaintiff's response that he had a migraine condition was not confidential.

The preexisting knowledge rule explains why other cases involving general statements of concern have found that such statements are not medical inquiries.[17] However, *Thrivent* leaves open the possibility that such a statement could be considered a medical inquiry if the employer already had knowledge that the employee had a medical condition (for example, by knowing that the employee is in the hospital[18]).

The overall lesson from these cases is that the scope of information protected by the ADA's confidentiality provision is narrower than what first meets the eye. Employees should be aware that employers can freely disclose health information without violating the ADA unless the information was obtained from the employee in response to a request by the employer for medical information, such as a request for a doctor's note to support a reasonable accommodation request, or from an employer-mandated exam such as a fitness for duty. Applicants or employees that are interested in protecting their privacy should therefore always wait for the employer to make a specific request before divulging any information.

B. Improper Disclosures

Once it has been established that health information is confidential under the ADA, the next question is whether the employer disclosed the information or otherwise failed to keep it confidential (or whether there is any exception that justifies disclosure). Clear cut examples where courts have found that the employer violated the ADA's confidentiality provision include an employer who shared the results of an employee's medical exam with a colleague who had no supervisory authority over the plaintiff,[19] an employer who merged employees' medical records with personnel files upon termination,[20] an employer who left a doctor's letter concerning plaintiff's reasonable accommodation request uncovered on a desk where other employees could see it,[21] and an employer who allowed an employee's drug screen to be leaked to the press.[22] Based on these guideposts, it is no surprise that defendants in a recent case opted to settle with the Department of Justice rather than chance the courts when they had disclosed an employee's confidential medical information in a public hearing concerning the employee's job status and then afterwards provided the information to the press.[23]

An interesting question is whether an ADA confidentiality violation can be inferred based on a former employee's inability to obtain a new job. In *Loschen v. Trinity United*,[24] the plaintiff presented evidence that after leaving Trinity, she applied for jobs at ten employers, all of whom failed to hire her. She testified that by her second or third interview, the prospective employers seemed to know of her situation with Trinity and that she had a medical issue. Based on this evidence, the Court found in favor of the plaintiff, holding that there was a question of material fact about whether Trinity disclosed confidential medical information to the prospective employers. The Court's conclusion in this regard was perhaps bolstered by an independent finding that Trinity had also failed to keep the plaintiff's medical information confidential by notating details about her condition on a logbook that was viewable by other employees.

In contrast to *Loschen* is *McPherson v. O'Reilly Automotive.*[25] In this case, the plaintiff had a vocational rehabilitation counselor who called O'Reilly and was told that the plaintiff had left because he was disabled. The counselor testified that she was not sure if she had revealed her position as a vocational counselor to O'Reilly but that it was her habit to reveal her position when calling employers on behalf of clients. The plaintiff was unable to find a new job, but the Court found that this evidence was too speculative to conclude that O'Reilly had disclosed confidential information to prospective employers. Taking this case together with *Loschen*, the lesson is that mere inability to find new employment is insufficient to support an inference that the employer unlawfully disclosed confidential

information. Plaintiffs must support such an inference with evidence that is stronger than mere speculation.

Much of the fighting between litigants concerns whether an exception applies. As a refresher, the ADA lists three circumstances in which employers may disclose information that is otherwise confidential: (i) supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations; (ii) first aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment; and (iii) government officials investigating compliance with this provision of the ADA shall be provided relevant information upon request. In addition to these statutory exceptions, courts also consider policy-based exceptions that are not listed in the ADA.

1. Statutory Exceptions

The litigation that has occurred concerning the listed exceptions has centered on the first: whether the disclosure was permissible because it was in the course of informing supervisors or managers of necessary restrictions on the work or duties or of necessary accommodations. The primary lesson from these cases is that the permissibility of the disclosure hinges on whether the supervisor or manager had a legitimate business need to know the information.

The Seventh Circuit, in *O'Neal v. City of New Albany*,[26] explicitly developed this "need to know" principle in the context of applicants who undergo medical testing after receiving a conditional offer of employment. The plaintiff in *O'Neal* had applied to be a police officer but as condition of employment was required by the public employee retirement fund to pass a medical exam. After the plaintiff was unable to pass the exam, he sued, claiming that disclosure of his exam results to two members of the local pension board violated the ADA. In rejecting the plaintiff's claim, the Court cited guidance from the EEOC,[27] which stated that an applicant's medical information could be provided to and used by appropriate decision makers involved in the hiring process (or in other words, to people who "need to know") so that they can make employment decisions consistent with the ADA. In the Court's view, since the local pension board was required by the public employee retirement fund to certify the plaintiff's medical exam results, the two member officers needed to know the information and so the disclosure was permissible.

E.E.O.C. v. Aurora Healthcare[28] is a more recent case that is a straightforward application of the *O'Neal* principle. In this case, plaintiff employee applied to be a nurse. She was required to pass a physical examination as a condition of employment, and the results of her examination were shared with an employee health specialist whose job was to ensure that conditional employees could meet the physical demands of the job. The Court, following *O'Neal*, had no difficulty concluding that the employee health specialist was a supervisor who "needed to know" the results of the plaintiff's exam and therefore that the disclosure was permissible.

Cases outside the conditional employee context have not directly invoked the "need to know" principle, but it still animates courts' reasoning. For example, in *Lee v. City of Columbus*,[29] the employer had a policy of requiring employees to justify sick leave by providing a note to their immediate supervisor instead of human resources. The court found that this per se policy violated the ADA because it would in some cases provide supervisors with information that was not related to necessary restrictions or accommodation and therefore would be information that they did not need to know.

Finally, consider *Foos v. Taghleef Industries.*[30] The plaintiff in this case worked at a factory that used dangerous heavy machinery. After taking a stint of FMLA leave due to injuries that had been incurred during a bar fight, the plaintiff requested additional FMLA leave and in so doing provided a certificate from his doctor indicating that he had alcoholic pancreatitis. The factory's health and wellness manager then disclosed this information to plaintiff's supervisor, concerned that the plaintiff may be arriving to work impaired. The Court found that given the legitimate safety concern of an impaired employee around heavy machinery, this disclosure qualified as notifying a supervisor of a necessary work restriction that was permissible under the ADA. This reasoning is analytically imperfect—there is no indication that the plaintiff had any on-the-job restrictions due to alcoholic pancreatitis—but it is comprehensible when viewed through the lens of the plaintiff's supervisor needing to know the information for purposes of operational safety.

Outside of the three listed exceptions in the ADA confidentiality provision, an implementing regulation of the ADA also implies that an employer can defend an otherwise unjustifiable disclosure by showing that it was required or necessitated by another federal law or regulation.[31] The Seventh Circuit affirmed the likely success of this strategy in *Big Ridge v. Federal Mine Safety and Health Review Commission*.[32] At issue in this case was a Mine Safety Act requirement to allow Mine Safety and Health Administration (MSHA) employees to inspect and copy employee medical records that may be relevant to work-related injuries or illnesses. In considering whether the ADA limited MSHA's authority, the Court cited the above implementing regulation, noted that

Congress did not explicitly state in the ADA that it intended to limit the powers granted to the MSHA, noted that disclosure to the MSHA would not violate employee privacy as the MSHA had its own confidentiality obligations, and also reasoned that such disclosures would be permissible under HIPAA. These considerations overwhelmingly led the Court to hold that the ADA confidentiality provision did not limit MSHA's authority to inspect and copy the relevant employee medical records.

This principle likely also explains the analysis in *Koch v. White.*[33] In this case, the Office of Inspector General (OIG) gained incidental access to an employee's reasonable accommodation request in the course of investigating the employee's emails. The defendants argued that the review of the employee's emails was authorized under the Inspector General Act of 1978. The Court did not explicitly reference the ADA's implementing regulation, but noted that it could not comprehend how the OIG's incidental access to health information while performing a lawful search, in connection with a lawful investigation, could constitute a violation of the ADA's confidentiality provision.

2. Policy Exceptions

In addition to exceptions that are grounded in federal law or regulation, courts have also considered two policy-based exceptions to justify an employer's disclosure of otherwise confidential information: (1) to rectify employee dishonesty; and (2) to participate in litigation.

The context in which the first policy-based exception comes up is when an employee lies about their health on an initial medical exam, and then that dishonesty is uncovered by the employer's human resources or medical staff when the employee later requests an accommodation or leave. Supervisors are informed of the employee's dishonesty, the employee is terminated, and then the employee sues alleging that the disclosure violated the ADA's confidentiality provision.

Courts disagree about whether such dishonesty-motivated disclosures are permissible. One line of cases, highlighted by *Blanco v. Bath Iron Works*,[34] holds that employers may not violate confidentiality even if it is to rectify an employee's dishonesty. The *Blanco* Court reasoned that the ADA protects information, regardless of whether it is accurate, and also that the ADA's listed exceptions do not cover dishonesty. The Court further noted that the ADA's statutory text defeats any policy concerns about protecting a dishonest employee. For all these reasons, *Blanco* refused to create an exception to permit disclosures of an employee's dishonest medical reporting.

The line of cases holding the exact opposite is highlighted by *Dillon v. Norfolk Southern.*[35] The *Dillon* Court noted the Sixth Circuit's interpretation of the ADA confidentiality provision, which was that it was intended to eliminate discriminatory actions by employers on the basis of information gleaned from job-related medical exams or inquiries. With this scope in mind, the *Dillon* Court concluded that the ADA confidentiality provision could not be used to protect an employee from an adverse action that was not due to disability (i.e., dishonesty). The Court also noted that if the opposite conclusion were reached, then employees could lie during their medical examinations with impunity. Accordingly, the Court held that employers could permissibly disclose confidential health information to expose dishonesty.

Since the *Blanco* and *Dillon* analyses are contradictory, it is difficult to predict whether employees should expect to be able to get away with providing dishonest medical information to employers. Until an appellate court weighs in, the outcome will likely depend on whether the trial court can be convinced to confine their analysis to the text of the ADA.

The other policy exception, which has essentially garnered universal acceptance, is that employers may disclose otherwise confidential information in the course of litigation. The likely principle behind this exception is the interpretation that the ADA confidentiality provision is meant to ensure that information disclosed pursuant to an employer's medical inquiry spreads no farther than necessary to satisfy the legitimate needs of both employer and employee.[36] This policy view appears to be another manifestation of the "need to know" principle that explained how courts apply the statutory exceptions.

Thus, in *Floyd v. SunTrust Banks*,[37] the Court held that it was permissible for an employer to disclose an employee's medical information to its attorneys so that the employer could defend itself against the employee in ongoing litigation. The Court reasoned that preserving and obtaining documents for the purpose of defending oneself in ongoing litigation is a legitimate purpose, and that limiting disclosure to the attorneys working on the case was no further than necessary.

In re National Hockey League Players' Concussion Injury Litigation[38] provides another example. In this case, plaintiffs, former NHL players, served a subpoena on the defendant NHL teams for information concerning head trauma and brain disease amongst its players. The teams objected, citing the ADA confidentiality provision. The court held that the teams had to answer the subpoena, noting that the plaintiffs had a legitimate need for the information. The Court also required some of the information to be de-identified, ensuring that the disclosure went no further than necessary.

C. Tangible Injury

Once a plaintiff has proven that the defendant violated the ADA's confidentiality provision, the final showing needed to obtain monetary damages from the court is to show a "tangible injury" that resulted from the unlawful disclosure. In other words, a technical violation of the confidentiality provision will not give rise to damages liability.[39] The most obvious example of a tangible injury to support monetary damages is economic harm, such as job termination.[40]

Plaintiffs may also prove tangible injury with non-economic harm, such as emotional distress.[41] However, the claim must amount to more than a bare allegation. For example, the Court in *Koch v. White*[42] found that the plaintiff did not endure any tangible injury, even though he had pled emotional harm, because the plaintiff had already disclosed his medical information in public lawsuits prior to the alleged improper disclosure in the current case. Given the prior public disclosures, the Court found it incredible to believe that the plaintiff had suffered any shame or embarrassment.

III. Confidentiality of medical records under Titles II and III

Title II of the ADA, which applies to State and Local Governments, and Title III of the ADA, which applies to private businesses and other places of public accommodation, do not contain specific confidentiality provisions. This is likely because covered entities under Titles II and III (mostly) do not have the same right as employers to solicit health information. There is no need, for example, to bring a doctor's note before utilizing the service animal relief area in an airport, or to request a descriptive captioning device at a movie theater.

However, one area where confidentiality concerns do arise is in the context of reasonable accommodations in higher education. For example, consider *Department of Fair Employment and Housing v. Law School Admission Council.*[43] This case concerned the Law School Admission Council's policy of flagging test results of applicants who had received reasonable accommodations. The court's analysis does not address whether "flagging" was a violation of confidentiality, but instead whether it violated other provisions of the ADA relating to measuring aptitude as opposed to disability[44] and coercing/discouraging applicants from seeking reasonable accommodations.[45] This suggests that the ADA contains tools to protect privacy even in the absence of a designated confidentiality provision. It is also worth noting that the Family Educational Rights and Privacy Act (FERPA) protects the confidentiality of students in schools and universities. This may further explain why there is no specific ADA confidentiality provision tied to accommodations in the education context.

In summary, confidentiality of health information generally does not arise in the Title II or III context. To the extent that it does, litigants can use other provisions of the ADA to indirectly protect their privacy, or alternatively, rely upon other privacy statutes.

IV. Conclusion

The interplay between the ADA and confidentiality is primarily centered in the Title I employment context. The ADA requires employers to keep confidential the medical information of applicants and employees, but only if they solicit the information through a medical inquiry or medical exam. If an applicant or employee wishes to keep their health information private, it is therefore paramount to wait for the employer to make a specific request before revealing any information. Even when information is required to remain confidential, there are both statutory and policy-based exceptions that permit employers to make disclosures, generally in circumstances where a party has a legitimate need to know the information. Courts do not award damages for technical violations of the ADA confidentiality provision, so plaintiffs must also prove a tangible injury from an unlawful disclosure, such as termination or emotional distress.

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[1] This legal brief was written by Pflaum, Staff Attorney/Dentons Fellow, Barry C. Taylor, Vice President of Systemic Litigation and Civil Rights, and Rachel M. Weisberg, Staff Attorney/Employment Rights Helpline Manager, Equip for Equality. The authors would like to thank Colby Alexis, PILI Fellow, for his valuable assistance with this Legal Brief. Equip for Equality is the protection and advocacy system for the State of Illinois and is providing this information under a subcontract with the Great Lakes ADA Center.

[2] The parameters for soliciting health information will be addressed in a forthcoming Legal Brief in the fall of 2018 on medical examinations and inquiries.

[3] Americans with Disabilities Act, 42 U.S.C. § 12112(d)(3)(B); §12112(d)(4)(C).

[4] *McPherson v. O'Reilly Automotive, Inc.*, 491 F.3d 726 (8th Cir. 2007).

[5] Americans with Disabilities Act, 42 U.S.C. § 12112(d)(3)(B)(i)-(iii).

[6] *Shoun v. Best Formed Plastics, Inc.*, 28 F.Supp.3d 786, 788-89 (N.D. Ind. 2014)(citing *Franklin v. City of Slidell*, 936 F.Supp.2d 691, 710-11 (E.D. La. 2013)).

[7] *Taylor v. City of Shreveport*, 798 F.3d 276 (5th Cir. 2015)(citing *E.E.O.C. v. Thrivent Financial for Lutherans*, 700 F.3d 1044 (7th Cir. 2012)). *See also, E.E.O.C. v. C.R. England, Inc.*, 644 F.3d 1028, 1046-1048 (10th Cir. 2011).

[8] *Hambright v. Bartow County, Georgia*, 2017 WL 6460246 (N.D. Ga. July 11, 2017).

[9] *Fleming v. State Univ. of New York*, 502 F.Supp.2d 324 (E.D.N.Y. 2007). It is worth highlighting that this case is not technically under Title I, but is instead under § 504 of the Rehabilitation Act, which incorporates the ADA confidentiality provision.

[10] *Doe v. U.S. Postal Service*, 317 F.3d 339 (D.C. Cir. 2003). See also, *E.E.O.C. v. Ford Motor Credit Co.*, 541 F.Supp.2d 930 (M.D. Tenn. 2008).

[11] *Sheets v. Interra Credit Union*, 2016 WL 362366 (N.D. Ind. Jan. 29, 2016)(aff'd by *Sheets v. Interra Credit Union*, 671 Fed.App'x 393 (7th Cir. 2016)).

[12] *E.E.O.C. v. C.R. England*, 644 F.3d 1028 (10th Cir. 2011).

[13] *Dean v. City of New Orleans*, 2012 WL 2564954 (E.D. La. July 2, 2012); *Kingston v. Ford Meter Box Co., Inc.*, 2009 WL 981333 (N.D. Ill. April 10, 2009).

[14] *Sheriff v. State Farm Ins. Co.*, 2013 WL 4084081 (W.D. Pa. Aug. 13, 2013).

[15] *Allen v. Verizon Wireless*, 2013 WL 2467923 (D. Conn. June 6, 2013).

[16] *E.E.O.C. v. Thrivent Financial for Lutherans*, 700 F.3d 1044 (7th Cir. 2012).

[17] *See, e.g., Perez v. Denver Fire Department*, 243 F.Supp.3d 1186 (D. Colo. 2017).

[18] *See, e.g., Fleming v. State Univ. of New York*, 502 F.Supp.2d 324 (E.D.N.Y. 2007).

[19]*Henderson v. Borough of Baldwin*, 2016 WL 5106945 (W.D. Pa. Sept. 20, 2016). See also, *Gascard v. Franklin Pierce University*, 2015 WL 1097485 (D. N.H. Mar. 11, 2015).

[20] *Equal Employment Opportunity Commission v. ValleyLife*, 2017 WL 227878 (D. Ariz. Jan. 19, 2017).

[21] *Cripe v. Mineta*, 2006 WL 1805728 (D.D.C. June 29, 2006).

[22] *Giaccio v. City of New York*, 502 F.Supp.2d 380 (S.D.N.Y. 2007).

[23] https://www.ada.gov/new_albany/new_albany_sa.html.

[24] *Loschen v. Trinity United Methodist Church of Lincoln*, 2009 WL 2902956 (D. Neb. Sept. 9, 2009).

[25] *McPherson v. O'Reilly Automotive, Inc.*, 491 F.3d 726 (8th Cir. 2007).

[26] *O'Neal v. City of New Albany*, 293 F.3d 998 (7th Cir. 2002).

[27] https://www.eeoc.gov/policy/docs/preemp.html

[28] *E.E.O.C. v. Aurora Healthcare, Inc.*, 2015 WL 2344727 (E.D. Wis. May 14, 2015).

[29] *Lee v. City of Columbus, Ohio*, 2008 WL 2557255 (S.D. Ohio June 24, 2008).

[30] *Foos v. Taghleef Industries, Inc.*, 132 F.Supp.3d 1034 (S.D. Ind. 2015).

[31] 29 C.F.R. § 1630.15(e).

[32] *Big Ridge, Inc. v. Federal Mine Safety and Health Review Com'n*, 715 F.3d 631 (7th Cir. 2013).

[33] *Koch v. White*, 35 F.Supp.3d 37 (D.D.C. 2014)

[34] *Blanco v. Bath Iron Works Corp.*, 802 F.Supp.2d 215 (D. Maine 2011). See also, *Tamburino v. Old Dominion Freight Lines, Inc.*, 2012 WL 526426 (D. Or. Feb. 16, 2012); *Stark v. Hartt Transp. Systems, Inc.*, 37 F.Supp.3d 445 (D. Maine 2014).

[35] *Dillon v. Norfolk Southern Ry. Co.*, 35 F.Supp.3d 896 (E.D. Mich. 2014). See also, *E.E.O.C. v. Aurora Healthcare, Inc.*, 2015 WL 2344727 (E.D. Wis. May 14, 2015).

[36] For an exposition of this interpretation, see *Doe v. United States Postal Service*, 317 F.3d 339 (D.C. Cir. 2003).

[37] *Floyd v. SunTrust Banks, Inc.*, 878 F.Supp.2d 1316 (N.D. Ga. 2012). See also, *Johnson v. Melton Truck Lines, Inc.*, 2016 WL 8711494 (N.D. Ill. Sept. 30, 2016).

[38] *In re National Hockey League Players' Concussion Injury Litigation*, 120 F.Supp.3d 942 (D. Minn. 2015).

[39] *Giaccio v. City of New York*, 502 F.Supp.2d 380 (S.D.N.Y. 2007).

[40] *McCarthy v. Brennan*, 230 F.Supp.3d 1049 (N.D. Cal. 2017). The related economic harm of not being able to find new employment was substantiated in *Loschen v. Trinity United Methodist Church of Lincoln*, 2009 WL 2902956 (D. Neb. 2009).

[41] *E.E.O.C. v. Ford Motor Credit Co.*, 531 F.Supp.2d 930 (M.D. Tenn. 2008).

[42] *Koch v. White*, 35 F.Supp.3d 37 (D.D.C. 2014).

[43] *Department of Fair Employment and Housing v. Law School Admission Council Inc.*, 896 F.Supp.2d 849 (Sept. 18, 2012).

[44] 42 U.S.C. § 12189 and 28 C.F.R. § 36.609

[45] 42 U.S.C. § 12203.