COMMENT

EMPLOYEE RECOURSES TO MANAGER-REVEALED PRIVATE HEALTH INFORMATION

MOLLY THOMSON*

* The author would like to express gratitude to her family and friends for supporting her throughout the completion of this Comment, especially to her husband, Levi.

I. INTRODUCTION

With the dawn of the Affordable Care Act, health insurance and the workplace is a common topic of discussion. While the recent Supreme Court decision in *Burwell v. Hobby Lobby Stores, Inc.*[1] brought the religious concerns of employers to the forefront,[2] with the added concern that employees of such religiously-minded companies will now have narrower healthcare options, employees may have a different worry—the privacy of their medical information.[3] In fact, advocates of the Affordable Care Act speak favorably of the separation it could bring between employment and healthcare.[4] Employees will no longer be tied to a job out of fear of losing their health insurance.[5] Occasionally, employee health information is revealed through a breach of confidentiality between the employer and the employer's health insurance provider nevertheless, the more common instances of unwanted disclosure occur after the employee reveals medical information in the process of requesting workplace accommodations (such as extended leave), or feels compelled to explain a recent need for extended time off.

Medical information in the workplace is heavily regulated with various federal statutes governing what managers can and cannot access and reveal. For instance, employee medical information is protected under the Americans with Disabilities Act,[6] the Family Medical Leave Act,[7] the

1. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).

2. *See id.* at 2781–82 (affirming the Religious Freedom Restoration Act of 1993 that prohibits the federal government from taking any action that substantially burdens religious exercise unless it can be considered the least restrictive means of addressing a compelling government interest).

3. *See* Charles B. Craver, *Privacy Issues Affecting Employers, Employees, and Labor Organizations*, 66 LA. L. REV. 1057, 1071 (2006) (finding that, despite the limitations on medical testing imposed by the ADA, many companies continue to attempt to obtain general medical information about their employees or potential employees); Sharona Hoffman, *Preplacement Examinations and Job-Relatedness: How to Enhance Privacy and Diminish Discrimination in the Workplace*, 49 U. KAN. L. REV. 517, 518 (2001) ("Genetic testing of job applicants and collection of urine samples for drug testing under direct observation are . . . examples of severe invasions of privacy on the part of employers.").

4. *See* William Craig, *Four Reasons the Affordable Care Act is a Boon to Entrepreneurs*, FORBES (June 17, 2014, 9:52 AM), http://www.forbes.com/sites/groupthink/2014/06/17/four-reasons-the-affordable-care-act-is-a-boon-to-entrepreneurs/2/ (discussing how the Affordable Care Act will allow employees to avoid "job lock" and receive quality and affordable healthcare without being tied to jobs solely for insurance benefits).

5. *Id.*

6. *See* 42 U.S.C. § 12112(d) (2012) (describing when an employer may test for disability and how this information may be used); *see also* Robert C. Kellner et al., *Privacy of Medical Information: Employer and Employee Rights and Obligations*, 35 MD. B.J., Jan.–Feb. 2002, at 24, 24–26 (outlining the privacy requirements of the ADA for employers).

7. *See* 29 U.S.C. § 2612 (2012) (detailing an employer's obligation to give leave for family

Health Insurance Portability & Accountability Act,[8] and most recently, the Genetic Information Nondiscrimination Act.[9] While these statutes address a manager's obligations regarding information an employee is *required* to divulge,[10] what happens when an employee *volunteers* medical information to a supervisor?[11] Is this information protected? This Comment addresses resources available to an employee whose manager reveals private health information. Employees want to know what they can expect from supervisors,[12] and employers need to be cognizant of pertinent legal boundaries.[13]

II. PURPOSE STATEMENT

The purpose of this Comment is to explore the legal options available to an employee whose manager reveals private health information within

medical emergencies), *invalidated on other grounds by* Coleman v. Court of Appeals of Md., 132 S. Ct. 1327 (2012).

8. *See* 45 C.F.R. § 164.504(f)(2)(iii) (2015) (describing employer obligations to keep private health information confidential); *see also* Kellner et al., *supra* note 6, at 27–28 (outlining employer privacy obligations under HIPAA).

9. *See* 42 U.S.C. § 1320d-9 (2012) (linking privacy of genetic information to HIPAA privacy regulations); *see also* Daniel Schlein, *New Frontiers for Genetic Privacy Law: The Genetic Information Nondiscrimination Act of 2008*, 19 GEO. MASON U. C.R. L.J. 311, 345 (2009) (describing the regulations of the Genetic Information Nondiscrimination Act).

10. *See generally* Lawrence O. Gostin et al., *The Nationalization of Health Information Privacy Protections*, 37 TORT & INS. L.J. 1113, 1113–16 (2002) (explaining the federal nature of the protection of health information); Kellner et al., *supra* note 6, at 27–28 (detailing the obligations of employers under HIPAA); Konrad Lee, *The Employees' Quest for Medical Record Privacy Under the Family and Medical Leave Act*, 41 SUFFOLK U. L. REV. 49, 50 (2007) (describing the inherent risk to the employee in the FMLA's requirement of detailed medical information); Schlein, *supra* note 9, at 345 (outlining employer obligations under the Genetic Information Nondiscrimination Act); Paul M. Schwartz, *Privacy and the Economics of Personal Health Care Information*, 76 TEX. L. REV. 1, 4 (1997) (detailing the entwinement of medical information with the economics of employment).

11. *See* Sherrer v. Hamilton Cty. Bd. of Health, 747 F. Supp. 2d 924, 931 (S.D. Ohio 2010) (delineating voluntary and involuntary disclosure of medical information).

12. *See generally* Cynthia J. Guffey & Judy F. West, *Employee Privacy: Legal Implications for Managers*, LAB. L.J. 735 (1996) (describing the importance of employees knowing their privacy rights in the workplace and listing specific statutes and constitutional rights).

13. *See HIPAA Privacy Rule—What Employers Need to Know*, TEX. WORKFORCE COMM'N, http://www.twc.state.tx.us/news/efte/hipaa_basics.html (last visited Dec. 16, 2015) (outlining for employers the differences between HIPAA and Texas state laws); Linda McGill & Matthew Tarasevich, *Confidential Personnel Information in the Workplace* (June 22, 2012) (on file with the *St. Mary's Law Journal*) (describing how to handle confidential employee medical information); Janet A. Savage, *Employee Privacy in the Workplace*, DGSLAW (Nov. 10, 2000), http://www.dgslaw.com/images/materials/336613.PDF (describing liability issues for management, particularly in the state of Colorado); Dan Wisniewski, *Can Employees Expect Privacy in the Workplace?*, HRMORNING.COM (Apr. 24, 2013), http://www.hrmorning.com/privacy-workplace (defining what human resource managers need to be aware of regarding employee privacy in the workplace, particularly regarding medical records).

the workplace. Section III discusses the federal statutory options that often cover such an unwanted disclosure.[14] Section IV examines the difficulties employees face in seeking a statutory remedy, particularly the lack of statutory protection for voluntarily shared information.[15] Where an employee voluntarily discloses private health information to her supervisor who then shares it with coworkers, clients, or future employers, an invasion of privacy claim is her only recourse. Section V reviews one alternative: the tort claim of public disclosure of private facts. It also addresses the additional remedial gaps regarding voluntary disclosure stemming from court decisions, which hold that disclosure to a small number of coworkers does not meet the "publicity" requirement for this tort claim.[16] Section VI explains California's Privacy Initiative and asserts its viability as a possible solution to fill the void in coverage left by statutory and traditional tort remedies.

III. STATUTORY LANDSCAPE

In 1990, Congress passed the Americans with Disabilities Act (ADA) in 1990 to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."[17] The ADA covers workplaces with 15 or more employees.[18] While the ADA does not apply to federal employees, they are covered under the Rehabilitation Act.[19] The ADA defines illegal disclosure of medical information in the workplace.[20] The Act allows employee testing only under specific circumstances:

> A covered entity shall not require a medical examination and shall not make

14. *See* 42 U.S.C. § 2000ff-5(a) (2012) (providing for the confidentiality of genetic information); *id.* § 12112(d)(3)(b) (2012) (detailing the confidentiality provisions of the ADA); Family Medical Leave Act, 29 C.F.R. § 825.500(g) (2015) (describing the Act's confidentiality requirements for employers).

15. *See* Kingston v. Ford Meter Box Co., No. 3:07-CV-270 RM, 2009 WL 981333, at *11 (N.D. Ind. Apr. 10, 2009) (listing courts that have found statutory breach of confidentiality does not apply when an employee voluntarily discloses information).

16. *See* EEOC v. C.R. Eng., Inc., 644 F.3d 1028, 1054 (10th Cir. 2011) (rejecting an employee's invasion of privacy claim because a handful of coworkers and trainees did not qualify as "the public"); Eddy v. Brown, 715 P.2d 74, 78 (Okla. 1986) (holding the plaintiff's invasion of privacy claim failed because "*only a small group* of co-workers were made privy to [plaintiff's] private affairs").

17. 42 U.S.C. § 12101(b)(1) (2012).

18. *Id.* § 12111(5).

19. *See* 29 U.S.C. § 791(f) (2012) (connecting the Rehabilitation Act's standards to those of the ADA).

20. *See* Guffey & West, *supra* note 12, at 740 (listing the ADA as a primary source of employee privacy protection, even against the employer's interest in maintaining the safety of the public and the workplace).

> inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity . . . [and a] covered entity may make inquiries into the ability of an employee to perform job-related functions.[21]

Once a test is performed, the ADA requires confidential treatment of the results,[22] which may only be revealed to supervisors who need information to make an accommodation, emergency personnel, or the government in the event the workplace is investigated regarding ADA compliance.[23]

The Health Insurance Portability and Accountability Act (HIPAA) was enacted to proscribe and penalize the disclosure of confidential medical information.[24] HIPAA applies directly to health plans, health care clearinghouses, and health care providers who transmit health information.[25] However, employers who have access to medical information—either as sponsors of health insurance or as business associates of such insurance companies—are also covered under HIPAA.[26] If one's employer is also the insurer of her health benefits, the

21. 42 U.S.C. § 12112(d)(4)(A), (B) (2012).

22. *See id.* § 12112(d)(3)(B) (requiring "information obtained regarding the medical condition or history of the applicant [be] collected and maintained on separate forms and in separate medical files and [be] treated as a confidential medical record"). This confidentiality requirement applies to employees as well as applicants. *Id.* § 12112(d)(4)(C). Additionally, the United States District Court for the Eastern District of Louisiana defined a plaintiff's requirements when making an ADA claim: disclosed information must meet the "confidentiality" requirements of the ADA, released information must have been obtained through a disability-related inquiry or entrance exam, and the plaintiff must have suffered a tangible injury. *See* Franklin v. City of Slidell, 936 F. Supp. 2d 691, 711 (E.D. La. 2013) (explaining why the plaintiff failed to state a claim for an illegal disclosure under the ADA). The legislative history of the ADA describes the reason for confidentiality provisions: Congress realized the stigmatization that could occur from even a seemingly common diagnosis such as cancer, and did not want employees to be subject to shame in the workplace without cause. Hoffman, *supra* note 3, at 528.

23. 42 U.S.C. § 12112(d)(3)(b)(i)–(iii) (2012).

24. *See id.* § 1320d-6(a)(3), (b)(1) ("A person who knowingly and in violation of this part . . . discloses individually identifiable health information to another person . . . shall . . . be fined not more than $50,000, imprisoned not more than 1 year, or both . . . .").

25. 29 U.S.C. § 1320d-1(a) (2012).

26. *See* 45 C.F.R. § 164.504(f)(2)(iii) (2015) (detailing the obligations of plan sponsors to keep private health information confidential); Kellner et al., *supra* note 6, at 27; *see also* 45 C.F.R. § 160.103(ii)(4)(ii) (2015) (stating plan sponsors are not business associates so long as they are in compliance with 45 C.F.R. § 164.504(f) and keeping employee information separate and confidential); Gostin et al., *supra* note 10, at 1126 n.77 ("Employers utilizing employer-sponsored health plans . . . are not considered covered entities when administering the plan . . . . However, the standard outlines numerous requirements for employer-sponsored health plans, . . . including an agreement that the sponsor will not use or disclose the information for employment decisions.").

employer is deemed a "hybrid" entity; thus, the company's operation that processes health claims is covered by HIPAA.[27]

An employee alleging a HIPAA violation cannot sue the offending party directly, as there is no private right of action provided by HIPAA.[28] Instead, the U.S. Department of Health and Human Services' Office for Civil Rights enforces privacy rights under HIPAA.[29] An employee must file a complaint with the Office for Civil Rights (OCR),[30] and the OCR will investigate the complaint.[31] The OCR resolves civil complaints through voluntary compliance, corrective action, or other agreement, or it will issue a formal finding of a violation.[32] In addition to HIPAA, an array of state statutes serves to protect medical information. However, such statutes are primarily focused on health care providers and do not offer protection to employees whose employer discloses confidential medical information.[33]

The Genetic Information Nondiscrimination Act of 2008 (GINA) was created to bring uniformity to the patchwork of protection covering genetic information, with the specific intent of fighting workplace discrimination.[34] The Act covers employers with 15 or more employees,

27. *Medical Privacy*, WORKPLACE FAIRNESS, http://www.workplacefairness.org/medicalprivacy (last visited Dec. 16, 2015) (outlining an employer's obligations to employees under HIPAA if the employer is also the insurer of the employee).

28. *See* Franklin v. Wall, No. 12-CV-614-WMC, 2013 WL 1399611 at *2 (W.D. Wis. Apr. 5, 2013) (finding the plaintiff did not have a cause of action because there is no statutory language conferring a private right of action under HIPAA); Huling v. City of Los Banos, 869 F. Supp. 2d 1139, 1154 (E.D. Cal. 2012) (finding the plaintiff could not bring a federal claim under HIPAA because HIPAA does not confer a private right of action).

29. *Health Information Privacy*, U.S. DEP'T OF HEALTH & HUM. SERVS., http://www.hhs.gov/ocr/privacy/hipaa/complaints/index.html (last visited Dec. 16, 2015) [hereinafter *HIPAA Complaint*].

30. *Id.*

31. *Health Information Privacy*, U.S. DEP'T OF HEALTH & HUM. SERVS., http://www.hhs.gov/ocr/privacy/hipaa/enforcement/process/index.html (last visited Dec. 16, 2015) [hereinafter *HIPAA Enforcement*].

32. *See Health Information Privacy*, U.S. DEP'T OF HEALTH & HUM. SERVS., http://www.hhs.gov/ocr/privacy/hipaa/news/cignetnews.html (last visited Dec. 16, 2015) [hereinafter *HIPAA News*] (announcing the Department of Health and Human Services issued its first civil money penalty for a HIPAA violation in 2011).

33. *See* Yoder v. Ingersoll–Rand Co., 31 F. Supp. 2d 565, 571 (N.D. Ohio 1997) (finding an Ohio state law prohibiting the disclosure of an individual's HIV/AIDS status only applied to healthcare providers and therefore excluded the plaintiff's employer from liability), *aff'd per curiam*, 172 F.3d 51, (6th Cir. 1998); Pettus v. Cole, 57 Cal. Rptr. 2d 46, 62 (Ct. App. 1996) (discussing the purpose of California's Confidentiality of Medical Information Act is to prohibit a provider of health care from disclosing medical information without a patient's authorization).

34. *See* Genetic Information Nondiscrimination Act of 2008, Pub. L. No. 110-233, § 2(1)–(5), 122 Stat. 881, 881–83 (2008) (describing the intent of GINA).

as well as employment agencies, labor organizations, and training programs.[35] GINA incorporates the ADA's confidentiality provisions by reference,[36] and extends coverage to genetic information in addition to the medical information already covered by HIPAA.[37] GINA's definition of "genetic information" is very broad and includes information about genetic tests, as well as similar information about the individual's family members and whether they have manifested a disease or disorder.[38]

To bring a claim under the ADA or GINA, a plaintiff must first exhaust administrative remedies and then file a complaint with the Equal Employment Opportunity Commission (EEOC).[39] The EEOC will investigate the claim and attempt to resolve the complaint, either by bringing suit or by other means.[40] If the EEOC determines that no grounds exist for the complaint or is unable to resolve it, the plaintiff will receive a "right-to-sue" letter and must file suit within ninety days of receipt to avoid the expiration of the statute of limitations.[41] Additionally, a plaintiff must include all allegations in her EEOC complaint or she will be unable to include them in later litigation.[42] For instance, if an employee files a complaint but does not check the designated box for "genetic information," or "disability," the employee loses the right to sue on those grounds.[43]

35. *See* 42 U.S.C. § 2000ff (2012) (defining GINA's applicability).

36. *See id* § 2000ff-5(a) (tying confidentiality requirements for genetic information to the ADA).

37. *Id.* § 1320d-9.

38. Schlein, *supra* note 9, at 345 (detailing the provisions of GINA). However, courts have declined to extend GINA's protection to information regarding a plaintiff's family member. *See* Conner–Goodgame v. Wells Fargo Bank, N.A., No. 2:12-CV-03426-IPJ, 2013 WL 5428448, at *11 (N.D. Ala. Sept. 26, 2013) (mem.) (finding disclosure of plaintiff's mother's AIDS diagnosis did not meet the requirements for a GINA complaint); Allen v. Verizon Wireless, No. 3:12-CV-482 JCH, 2013 WL 2467923, at *23 (D. Conn. June 6, 2013) (clarifying GINA as only applicable to a family member's genetic information if that information is used to determine an employee's likelihood of sharing the disease).

39. *See* 42 U.S.C. § 2000e-4(g) (2012) (outlining the powers of the EEOC); 29 C.F.R. § 1635.10 (2015) (describing the remedies available to employees experiencing a GINA violation).

40. *See* Macon v. Cedarcroft Health Servs., Inc., No. 4:12-CV-1481 CAS, 2013 WL 1283865, at *6 (E.D. Mo. Mar. 27, 2013) (describing the EEOC's process, which must occur prior to the individual plaintiff's suit).

41. *See id.* at *4 (finding plaintiff–employee's Title VII and ADA discrimination claims were time-barred for failure to bring a claim within ninety days of receiving an EEOC Notice of Right to Sue).

42. *See id.* at *6 (agreeing with the defendant's motion that the plaintiff's complaint failed "to state a claim under GINA").

43. *See id.* at *7 (rejecting the plaintiff's claim because she alleged only ADA and Title VII race discrimination in her EEOC charge form and did not allege genetic discrimination); Robinson v. Starplex/CMS Event Sec., No. CV-10-723-HU, 2011 WL 1541290, at *6 (D. Or. Mar. 15, 2011) (dismissing the plaintiff's GINA claim for failure to exhaust administrative remedies where he had

The Family and Medical Leave Act (FMLA) was passed by Congress in 1993 to address caregivers' need to take leave from work, minimize gender-based discrimination, and accommodate employers' interests.[44] The FMLA covers employers with 50 or more employees, along with state and local government agencies,[45] and the requesting employee must have worked for the employer for the last twelve months.[46] Under this Act, an employer may require an employee seeking time off from work to provide a doctor's notice[47] but must keep such information confidential.[48] This requirement can place an employee in a vulnerable position where he must choose between disclosing a personal medical diagnosis to a supervisor and losing his job.[49] Additionally, it is worth noting the disclosure

not alleged genetic disclosure in his administrative complaint).

44. *See* 29 U.S.C. § 2601(b) (2012) (describing the purpose of the FMLA).

45. *Id.* § 2611(4).

46. *Id.* § 2611(2).

47. *See id.* § 2613(a) (requiring certification of an employee's reason to request leave); 29 C.F.R. § 825.306 (2015) (specifying the contents of medical request forms, which may include detailed information, such as symptoms, diagnosis, hospital and doctor visits, and medications). The medical certification requirement of the FMLA was intended to be voluntary but has become effectively mandatory, as employers will not grant FMLA leave requests without it. *See* Lee, *supra* note 10, at 54 (discussing the problematic nature of the detailed medical certification form). In *Pettus v. Cole*, a California appellate court relied on *Hill* in holding that an employer violated an employee's state constitutional right of privacy by requesting detailed medical information that was used to fire the employee when he would not enroll in a residential alcohol treatment program. *See* Pettus v. Cole, 57 Cal. Rptr. 2d 46, 54 (Ct. App. 1996) (emphasizing the court's strong stance on employee privacy). The California Court of Appeals' decision in *Pettus* contrasts with the FMLA's requirement that an employee turn in a form listing the medical facts surrounding the serious medical condition for which the employee requires extended leave. *See* 29 C.F.R. § 825.306 (describing the details an employer may require from an employee in order to grant leave under the FMLA). Once a physician has declared a serious illness exists, there is no legitimate reason for an employer to learn the intimate details of an employee's medical history because employers are not skilled in determining the seriousness of an illness and should be able to rely on a doctor's opinion in this area. *See* Lee, *supra* note 10, at 54–55 (discussing the lack of a legitimate business purpose behind an employer requiring personal medical facts to grant FMLA leave).

48. *See* 29 C.F.R. § 825.500(g) (2015) (requiring employers to keep employee medical records separate and confidential). Government intrusion into privacy is tolerated because of the attached social benefit, but citizens disclose information to the government with the understanding it will not be made public. *See* Edward J. Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. REV. 962, 999 (1964) (explaining why state statutes requiring citizens to disclose information to the government usually contain a provision expressly prohibiting disclosure, and additional general confidentiality safeguards are implemented for government officials who regularly obtain private information in the course of their employment).

49. *See* Doe v. U.S. Postal Serv., 317 F.3d 339, 344 (D.C. Cir. 2003) (explaining how without the confidentiality provision for FMLA-required information, an employee would be forced to choose between exercising his statutory rights and the disclosure of private health information); *see also* Chandler v. Specialty Tires of Am. (Tenn.), 283 F.3d 818, 826–27 (6th Cir. 2002) (affirming judgment for an employee who took medical leave under FMLA after overdosing in a suicide attempt

requirements of the FMLA do not align with health information privacy protection for employees provided by the ADA and HIPAA.[50]

The Privacy Act of 1974 (Privacy Act) also provides some protection for government employees of federal agencies.[51] Its purpose is to allow individuals to see the information the government maintains about them and to correct any false information.[52] The Privacy Act also prohibits the government from giving information to third parties or other government agencies, with the exception of security agencies and the National Archives.[53] Weaknesses of the Privacy Act include a lack of enforcement[54] and a strict adherence to the requirement that any disclosure be made from a "system of records," which bars liability for disclosures not related to such systems.[55]

Federal constitutional privacy protections are largely outside of the scope of this Comment and only apply to government entities.[56]

and was fired by her employer despite exemplary prior employee reviews). Although the jury decided the employee was fired for taking leave rather than overdosing and the employee won her case, the employer's defense was that he fired her for overdosing, a fact he would not have known had she not felt compelled to inform him of the specific reason for her need to take leave. *Id.* at 825; *see also* Lee, *supra* note 10, at 50 (describing the lack of adequate protection under the ADA and FMLA for employees required to reveal personal medical information to request the benefit of these statutory rights).

50. *See* Lee, *supra* note 10, at 59–60 (arguing the requirement mandating employees to give detailed medical information to supervisors before qualifying for FMLA does not fulfill a business necessity and places employees at risk of disclosure to third parties in addition to adverse employment actions). *See generally* 45 C.F.R. § 164.502(b) (2015) (stating the Department of Health and Human Services' regulations regarding security and privacy).

51. *See Doe*, 317 F.3d at 342 (outlining the goals of the Privacy Act); *see also* Privacy Act of 1974, 5 U.S.C. § 552a(b) (2012) (detailing who may disclose records and under what circumstances).

52. *See Doe*, 317 F.3d at 342 ("Enacted to 'safeguard[] the public from unwarranted . . . dissemination of personal information contained in agency records,' the Privacy Act generally prohibits 'nonconsensual disclosure of any information that has been retrieved from a protected record' . . . ." (1st & 2nd alteration in original) (quoting Bartel v. FAA, 725 F.2d 1403, 1407, 1408 (D.C. Cir. 1984))); York v. McHugh, 850 F. Supp. 2d 305, 310 (D.D.C. 2012) (advancing the rights of both an individual and government agencies under the Privacy Act); Guffey & West, *supra* note 12, at 736 (explaining the "purpose of the Privacy Act").

53. Guffey & West, *supra* note 12, at 736; *see also* Privacy Act of 1974, 5 U.S.C. § 552a(b) (2012) (proscribing the disclosure of information "contained in a system of records" except in particular circumstances).

54. *See* Guffey & West, *supra* note 12, at 736 ("Limitations of the Privacy Act include failure to address privacy problems associated with new technology and lack of enforcement.").

55. *See* 5 U.S.C. § 552a(a)(4)–(5) (defining the type of record and system to which the Act applies); *Doe*, 317 F.3d at 342 (identifying two pieces of evidence to support Doe's claim that his HIV status was obtained from his FMLA form as opposed to a different source not covered by the system of records requirement); *York*, 850 F. Supp. 2d at 311 (acknowledging to recover under the Privacy Act, a plaintiff's information must have been disclosed from "a 'record' contained within a 'system of records'" (quoting Doe v. U.S. Dep't of Treas., 706 F. Supp. 2d 1, 6 (D.D.C. 2009))).

56. *See* Yoder v. Ingersoll–Rand Co., 31 F. Supp. 2d 565, 569 (N.D. Ohio 1997) (denying the

However, they are worth briefly noting to provide context to statutory and tort remedies for disclosure, as well as the background for California's state constitutional privacy provision. The Supreme Court has relied on an array of constitutional amendments in the Bill of Rights to rule on privacy cases.[57] The most concrete rulings have relied on the Fourth Amendment provision against searches and seizures.[58] But the Court has also recognized "penumbral privacy" rights stemming from other sections of the Bill of Rights.[59] However the privacy protection afforded by the federal constitution remains confusing at best[60] and restricts the extent to which the federal government is liable for its actions.

IV. GAPS IN STATUTORY COVERAGE

Despite the existence of a wide range of statutory measures protecting the confidentiality of employee medical information, there are several large holes in the protection of medical information in the workplace.[61] The first and largest of these exist in the context of voluntarily disclosed medical information.[62] Many employees feel compelled to disclose such

plaintiff's Fourteenth Amendment privacy claim because his employer was a private corporation), *aff'd per curiam*, 172 F.3d 51 (6th Cir. 1998); Hill v. NCAA, 865 P.2d 633, 641 (Cal. 1994) (describing the legal source for the right of privacy derived from the U.S. Constitution and common law provisions).

57. *See Hill*, 865 P.2d at 646 ("[A] federal constitutional right, derived from various provisions of the Bill of Rights, . . . took distinct shape in United States Supreme Court decisions in the 1960's safeguarding the rights of individuals and private entities from government invasion.").

58. *See id.* at 651 (identifying the clarity of the Fourth Amendment right as opposed to the "penumbral rights" connected to other amendments).

59. *See* Doe v. Att'y Gen. of U.S., 941 F.2d 780, 795 (9th Cir. 1991) (discussing the two types of privacy interests protected by the Constitution—the individual's interest in avoiding the disclosure of personal information and the individual's interest in making important decisions); *Hill*, 865 P.2d at 651 (discussing the "penumbral" privacy rights derived from the Constitution).

60. *See Hill*, 865 P.2d at 651 ("[T]he murky character of federal constitutional privacy analysis at this stage teaches that privacy interests and accompanying legal standards are best viewed flexibly and in context.").

61. *See* Gostin et al., *supra* note 10, at 1119 (describing the existing legal protection of health information privacy as "inadequate, fragmented, and inconsistent"). Another weakness across statutes is, like constitutional protections (which are tightly interpreted themselves), they apply mainly to governmental entities and often do not confer protection on health information in the private sector. *See id.* at 1119–20 (detailing the limited nature of statutory health privacy protection).

62. *See* EEOC v. C.R. Eng., Inc., 644 F.3d 1028, 1047–48 (10th Cir. 2011) (affirming the district court's summary judgement that an employee was not protected under the ADA because he voluntarily disclosed his HIV positive status); Cash v. Smith, 231 F.3d 1301, 1308 (11th Cir. 2000) (determining an employee's medical information was not confidential because an FMLA request was made after the information was revealed); EEOC v. Prevo's Family Mkt., Inc., 135 F.3d 1089, 1094–95, 1098 (6th Cir. 1998) (concluding an employer was not liable to an employee under the ADA because the employee's continued employment was conditioned on submitting to a medical

information to their supervisor and do not want it revealed to coworkers, clients, or potential future employers.[63] Another large gap in the protection of medical information arises from non-disabled employees seeking protection under the ADA. There is a circuit split regarding whether a non-disabled employee may bring a claim for illegal disclosure under the ADA, while other courts have yet to address the issue.[64] Finally, the ADA has a "tangible injury" requirement, which must be satisfied to succeed in claims for illegal disclosure.[65]

A. *Voluntarily Disclosed Medical Information*

There is an important distinction between information revealed by an employee in the course of requesting ADA or FMLA accommodations and medical information revealed voluntarily. In *EEOC v. Thrivent Financial for Lutherans*,[66] the court performed a thorough analysis of what constitutes a voluntary disclosure.[67] Delineating voluntary and involuntary disclosure, the court stated: "Which party initiates the conversation that leads to a disclosure is not relevant; which party initiates or requests the employee's actual disclosure of medical information is determinative."[68] This distinction is significant because only information collected due to a medical inquiry on the part of the employer is protected.[69] Employees who volunteer their health information may

examination for HIV); EEOC v. Thrivent Fin. for Lutherans, 795 F. Supp. 2d 840, 843, 846 (E.D. Wis. 2011) (concluding voluntarily disclosed medical information was not protected by the ADA's confidentiality provisions), *aff'd*, 700 F.3d 1044 (7th Cir. 2012); Ballard v. Healthsouth Corp., 147 F. Supp. 2d 529, 534–35 (N.D. Tex. 2001) (finding no breach of confidentiality under the ADA when an employee voluntarily disclosed his medical condition).

63. *See Thrivent*, 795 F. Supp. 2d at 846 (denying the claim of a former employee who was turned down from a new job due to health information his former employer revealed during a reference check).

64. *See* Kellner et al., *supra* note 6, at 25–26 (delineating which courts allowed claims by non-disabled parties under the ADA).

65. *Id.* at 26.

66. EEOC v. Thrivent Fin. for Lutherans, 795 F. Supp. 2d 840 (E.D. Wis. 2011), *aff'd*, 700 F. 3d 1044 (7th Cir. 2012).

67. *See id.* at 843–46 (finding medical information voluntarily disclosed was not protected by the ADA's confidentiality provisions).

68. *Thrivent*, 795 F. Supp. 2d at 845.

69. *See* 42 U.S.C. § 12112(d)(3)(B) (2012) (requiring separation and confidentiality of information regarding an employee or applicant's medical condition or history); Cash v. Smith, 231 F.3d 1301, 1307 (11th Cir. 2000) (holding an employee's disclosure of medical information was not confidential because the FMLA request was made after the information was revealed); Sherrer v. Hamilton Cty. Bd. of Health, 747 F. Supp. 2d 924, 932 (S.D. Ohio 2010) (determining an employee was not covered under the ADA because her employer did not make a medical inquiry when asking, "Is everything okay[?]"); Yoder v. Ingersoll–Rand Co., 31 F. Supp. 2d 565, 569 (N.D. Ohio 1997),

forgo all protections, whether under the ADA, FMLA, or GINA.[70]

In *Thrivent*, the plaintiff provided details regarding his migraine condition after his employer inquired into his absence.[71] The court held the employee was not entitled to protections under the ADA confidentiality provisions because his employer had not made a *medical* inquiry.[72] Whereas, in *Fisher v. Harvey*,[73] the plaintiff was asked to provide detailed medical information regarding his hepatitis C status to support his request for leave, which his supervisor left on the break room table.[74] Although the plaintiff survived the defendant–employer's motion for summary judgment, the employer's primary defense was that his supervisor had not made a medical inquiry.[75] Moreover, in *Doe v. U.S. Postal Service*,[76] the defendant–employer argued that the plaintiff–employee's revelation of his HIV-positive status was voluntary because the revelation was made while seeking FMLA leave.[77] The court did not agree and held an employee should not be forced to choose between

(denying the plaintiff's ADA disclosure claim because his disability benefit request did not fall within the specific category of information protected by the ADA), *aff'd per curiam*, 172 F.3d 51, (6th Cir. 1998).

70. *See Cash*, 231 F.3d at 1307 (affirming the district court's summary judgment grant because FMLA does not provide protections for voluntary disclosures); *Sherrer*, 747 F. Supp. 2d at 934 (finding an employee who told her supervisor of her condition was not protected under the ADA from an unwanted disclosure of this condition to coworkers).

71. *Thrivent*, 795 F. Supp. 2d at 842.

72. *Id.* at 846.

73. Fisher v. Harvey, No. 1:05-CV-102, 2006 WL 2370207 (E.D. Tenn. Aug. 14, 2006).

74. *Id.* at *2.

75. *Id.* at *5. Additionally, in *Flamberg v. Israel*, the plaintiff–employee survived summary judgment on a disclosure claim where his supervisor instructed him to see a mental health professional and subsequently told the plaintiff's coworkers that he was mentally unstable. Flamberg v. Israel, No. 13-62698-CIV, 2014 WL 1600313, at *5 (S.D. Fla. Apr. 21, 2014). Due to the narrow parameters of the ADA's confidentiality requirement, it is unclear from the facts if the plaintiff would have survived summary judgment had his supervisor simply told coworkers that he was unstable without ordering him to see a professional. *See id.* (noting the ADA's requirements for a hostile work environment claim to include "suffer[ing] harassment that was sufficiently severe or pervasive to alter the terms and conditions of . . . employment"). Finally, in *Fleming v. State University of New York*, the defendant–employer called the employee while he was in the hospital and requested his diagnosis. Fleming v. State Univ. of N.Y., 502 F. Supp. 2d 324, 326 (E.D.N.Y. 2007). The court agreed with the plaintiff that the telephone call was not a "friendly conversation" as alleged by the defendant, but rather a medical inquiry, which the employer could be held responsible for divulging to a future employer. *Id.* at 338.

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

77. *See id.* at 344 ("Doe revealed his medical diagnosis to the Postal Service only after the Service, through his direct supervisor, told him in writing that he would face disciplinary proceedings unless he completed either the FMLA form or a medical certificate explaining the 'nature of [his] illness.'" (alteration in original) (citation omitted)).

exercising his statutory rights and disclosure of his medical information.[78]

Despite *Doe*, other courts have sided with employers regarding what constitutes a voluntary disclosure. In *Kingston v. Ford Meter Box Co.*,[79] the plaintiff–employee claimed he revealed his medical diagnosis in the course of requesting statutory relief for a disability.[80] The court ultimately held that was not entitled to relief under the ADA's confidentiality provisions because he disclosed his condition prior to a request from his employer.[81]

Repeated throughout the body of case law outlining the boundaries of "voluntary disclosure"[82] is the understanding that the federal statutes do not protect voluntary disclosures.[83] Thus, an employee who chooses to reveal his or her health status to a supervisor, *without solicitation*, is not statutorily protected.[84] Despite this clarity in the case law, EEOC guidance would enforce a statutory right to confidentiality even where an employee voluntarily discloses his medical information, but this guidance is not binding.[85] Where an employee responds to a supervisor's question by revealing sensitive medical information, statutory protection hinges on the court's interpretation of the inquiry. In *Sherrer v. Hamilton County Board of Health*,[86] the fact that the plaintiff interpreted her supervisor's question as a medical inquiry was not determinative, and the court held she was not protected under the ADA.[87] As discussed above, the plaintiff in *Thrivent*

78. *See id.* ("Under the circumstances of this case, we think Doe's submission of the FMLA form was clearly a response to an employer inquiry, and not a voluntary disclosure.").

79. Kingston v. Ford Meter Box Co., No. 3:07-CV-270 RM, 2009 WL 981333 (N.D. Ind. Apr. 10, 2009).

80. *See id.* at *10 ("Mr. Kingston doesn't dispute that he voluntarily disclosed his medical condition, but says he did so 'during the course of fulfilling his statutory duty to put [Ford Meter] on notice of his disability and to request a reasonable accommodation.'" (alteration in original) (citation omitted)).

81. *See id.* at *11 ("That Mr. Kingston was in the midst of invoking his statutory rights doesn't transform a voluntary disclosure into one that resulted from employer inquiry.").

82. *See* EEOC v. C.R. Eng., Inc., 644 F.3d 1028, 1048 (10th Cir. 2011) (declaring an employer was not liable under the ADA when an employee voluntarily disclosed medical information); Cash v. Smith, 231 F.3d 1301, 1307 (11th Cir. 2000) (noting the disclosure of medical information is not protected where it was not mandated by the employer).

83. *See, e.g.*, *Cash*, 231 F.3d at 1307 (stating "nondisclosure provisions of the ADA, Rehabilitation Act, and FMLA . . . do not govern voluntary disclosures initiated by the employee").

84. *See C.R. Eng., Inc.*, 644 F.3d at 1048 (holding the employee's disclosure claim could not survive summary judgment because he had volunteered his HIV status without the prompting of a supervisor).

85. *See id.* at 1047 n.16 (reviewing EEOC Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act (July 27, 2000)).

86. Sherrer v. Hamilton Cty. Bd. of Health, 747 F. Supp. 2d 924 (S.D. Ohio 2010).

87. *See id.* at 932 ("[The plaintiff's] presumption that [her supervisor] was inquiring into her ability to do her job does not necessarily mean that [her supervisor] was, in fact, making 'inquiries into the ability of [plaintiff] to perform job-related functions' as specified in 42 U.S.C.

found himself in a similar situation after responding to an email from his employer asking why he had not come in to work.[88] An employee who reveals her diagnosis at an earlier date without prompting, but later requests statutory accommodation is likewise not protected.[89] Perhaps most troubling are cases such as *Kingston*, discussed above, where an employee reveals medical information *in the process* of requesting statutory accommodation, yet his medical information is not protected under the statute's confidentiality provision.[90] In one case, however, an employee's claim survived summary judgment where a supervisor confronted the employee and asked for more information over the employee's objection.[91] Thus, it is clearly important for employees to assert their rights early in the process; otherwise, they may not be able to succeed in a legal privacy claim at a later date.

B. *Non-disabled Employees*

In addition to the breach in coverage regarding voluntarily disclosed information, there is a potential gap in coverage for those employees who are not deemed "disabled" by the court.[92] Courts have reached

§ 12112(d)(4)(B).").

88. *See* EEOC v. Thrivent Fin. for Lutherans, 795 F. Supp. 2d 840, 846 (E.D. Wis. 2011) (finding the employer's email was only a request to find out why his employee was absent, rather than a specific request for medical information; therefore, ADA protection was not warranted), *aff'd*, 700 F.3d 1044 (7th Cir. 2012).

89. *See* Cash v. Smith, 231 F.3d 1301, 1307 (11th Cir. 2000) ("In this case, the disclosure that [plaintiff] complains of was not the result of an examination ordered by [her employer], but of a voluntary disclosure . . . ."). In this situation, the employee told her supervisor of her diabetes diagnosis without prompting and later applied for FMLA. *Id.* at 1303–04; *see also* Willer v. Tri-Cty. Metro. Transp. Dist. of Or., No. 07-CV-303-BR, 2008 WL 3871744, at *14–15 (D. Or. Aug. 19, 2008) (finding an employee's disclosure was voluntary despite the employee assuming he had to reveal his on-the-job injury; he could not later make an ADA claim).

90. *See* Kingston v. Ford Meter Box Co., No. 3:07-CV-270 RM, 2009 WL 981333, at *10–11 (N.D. Ind. Apr. 10, 2009) (distinguishing an employer's inquiry from an employee's revelation in the process of requesting accommodation).

91. *See* Doe v. U.S. Postal Serv., 317 F.3d 339, 341, 345 (D.C. Cir. 2003) (holding the employer was not entitled to summary judgment where the employee revealed his HIV status only after he received a letter that he must apply for FMLA or face disciplinary action, and the FMLA paperwork required a detailed medical diagnosis); EEOC v. Ford Motor Credit Co., 531 F. Supp. 2d 930, 933 (M.D. Tenn. 2008) ("[The supervisor] said, 'In order for me to accommodate your schedule, I need to know what's going on.' [The employee] told [supervisor] that he had been diagnosed with HIV." (citation omitted)); Cripe v. Mineta, No. Civ. A. 03-2206 (RWR), 2006 WL 1805728, at *5 (D.D.C. June 29, 2006) (determining the employer was not entitled to summary judgment where "disclosure allegedly occurred after plaintiff, in response to defendant's demand for additional medical information regarding plaintiff's accommodation request, sent a letter to [his supervisor] detailing his HIV status and health problems").

92. *See* Sullivan v. River Valley Sch. Dist., 197 F.3d 804, 812 (6th Cir. 1999) (noting that

conflicting conclusions as to whether ADA provisions apply in situations where the employee does not have a disability but has endured a medical inquiry.[93] Although the EEOC would have the courts apply the confidentiality obligations to all employees, such guidance is non-binding.[94] While the EEOC's position is supported by the Eighth, Ninth, and Tenth Circuits, it has been rejected the Fifth Circuit.[95] In *Cossette v. Minnesota Power & Light*,[96] the court distinguished between a discrimination claim, for which disability is required, and an illegal disclosure claim, for which disability is not required.[97]

C. *Tangible Injury Requirement*

If a plaintiff is able to overcome the obstacles of voluntary disclosure

undergoing a mental examination does not deem one mentally disabled), *cert. denied*, 530 U.S. 1262 (2000); Thompson v. City of Arlington, 838 F. Supp. 1137, 1151 (N.D. Tex.) (balancing reasonably warranted intrusions with compelling government interests).

93. *See Sullivan*, 197 F.3d at 812 (exploring whether an employee is covered under the ADA when he is not disabled); Green v. Joy Cone Co., 278 F. Supp. 2d 526, 535 (W.D. Pa. 2003) (describing two different theories courts have used to answer the question of whether a non-disabled individual may bring a claim under the ADA: one theory being that only "qualified individuals with a disability" may bring a claim, and the other theory that any individual who has endured an ADA violation may have a cause of action (citation omitted)), *aff'd*, 107 F. App'x 278 (3d Cir. 2004); Kellner et al., *supra* note 6, at 25–26 (detailing which circuits have allowed claims under the ADA by non-disabled parties and the Third Circuit's refusal to rule on the subject). A U.S. District Court for the Northern District of Texas found that a defendant–police department not allowing the plaintiff–police officer to return to active duty did not constitute a disability of the type protected by the ADA, because the plaintiff was not substantially limited in one or multiple major life activities. *See Thompson*, 838 F. Supp. at 1152 (finding the plaintiff could not state a claim under the ADA because she was not disabled).

94. *See* EEOC, ENFORCEMENT GUIDANCE: DISABILITY-RELATED INQUIRIES AND MEDICAL EXAMINATIONS OF EMPLOYEES UNDER THE AMERICANS WITH DISABILITIES ACT (2000), http://www.eeoc.gov/policy/docs/guidance-inquiries.html (describing the EEOC's position that all employees are protected from medical inquiries by the ADA, not only those with a disability); Kellner et al., *supra* note 6, at 25 (describing the EEOC's guidance with respect to which employees the ADA applies).

95. *See* O'Neal v. City of New Albany, 293 F.3d 998, 1010 (7th Cir. 2002) (declining to extend ADA protection to a disclosure for a non-disabled applicant regarding post-offer testing); Cossette v. Minn. Power & Light, 188 F.3d 964, 969 (8th Cir. 1999) (relying on the Ninth and Tenth Circuits to allow an employee to bring a claim for illegal disclosure under the ADA without being disabled (citing Fredenburg v. Contra Costa Cty. Dep't of Health Servs., 172 F.3d 1176, 1182 (9th Cir. 1999))); Griffin v. Steeltek, Inc., 160 F.3d 591, 594–95 (10th Cir. 1998) (noting the Fifth Circuit's holding "that a non-disabled plaintiff could not proceed with a suit for being asked impermissible medical questions on an employment application"), *cert. denied*, 526 U.S. 1065 (1999)); Kellner et al., *supra* note 6, at 25–26 (delineating which courts have followed the EEOC's guidance and allowed claims by non-disabled parties under the ADA).

96. Cossette v. Minn. Power & Light, 188 F.3d 964 (8th Cir. 1999).

97. *See id.* at 969 ("[I]t is only discrimination itself (and not illegal disclosure) that requires a showing of disability.").

and disability status, some courts will still require proof of a tangible injury to succeed in an illegal disclosure claim under the ADA.[98] In *Shoun v. Best Formed Plastics, Inc.*,[99] the plaintiff carried this burden by showing that prospective employers refused to hire him and that he had suffered emotional distress after a supervisor made a social media post regarding his disability.[100] The plaintiff in *Cossette* was also able to survive summary judgment due to the issue of whether she did not receive a new job as a result of her supervisor's revelation of private medical information.[101] In *EEOC v. Ford Motor Credit Co.*,[102] the Sixth Circuit held shame, embarrassment, and depression met the tangible injury requirement.[103] The plaintiff in *Ford Motor Credit Co.* took medical leave following the disclosure of his HIV positive status to coworkers, providing strong evidence of his injury.[104] In jurisdictions requiring tangible injury, this may prove an insurmountable obstacle to a plaintiff who was merely embarrassed by disclosure of his private medical information.

V. THE ALTERNATIVE TO FEDERAL STATUTORY REMEDIES: THE TORT CLAIM OF INVASION OF PRIVACY

"There can be no question that an employee's medical records, which may contain intimate facts of a personal nature, are well within the ambit of materials entitled to privacy protection."[105] In the case of voluntarily

98. *See id.* at 970 (requiring tangible injury to succeed on an ADA disclosure claim); Shoun v. Best Formed Plastics, Inc., 28 F. Supp. 3d 786, 790 (N.D. Ind. 2014) (requiring tangible injury to avoid dismissal of an ADA claim and describing various types of injury which could meet this requirement); EEOC v. Ford Motor Credit Co., 531 F. Supp. 2d 930, 941 (M.D. Tenn. 2008) (outlining the tangible injury requirement by the Eighth Circuit). *But see id.* at 942 n.11 (requiring only *non-disabled* plaintiffs to show tangible injury (citing O'Neal v. City of New Albany, 293 F.3d 998, 1007 (7th Cir. 2002))).

99. Shoun v. Best Formed Plastics, Inc., 28 F. Supp. 3d 786 (N.D. Ind. 2014).

100. *See id.* at 790 (finding emotional suffering and refusal of prospective employers to hire were sufficient to meet the tangible injury requirement under the ADA's breach of confidentiality provision).

101. *See Cossette*, 188 F.3d at 971 (finding an issue of material fact regarding the tangible injury requirement where the applicant had circumstantial evidence of not being hired due to an illegal disclosure by her current supervisor).

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

103. *See id.* at 941 ("Mr. Doe suffered shame, embarrassment, and depression as a result of the disclosure of his HIV status to his coworkers. These are tangible injuries." (footnote omitted)).

104. *Id.* at 943 ("The fact that the plaintiff had to take a medical leave of absence shortly following the disclosure also supports his allegation of emotional distress.").

105. United States v. Westinghouse Elec. Corp., 638 F.2d 570, 577 (3d Cir. 1980) (declaring employee medical records are subject to privacy protection); *see* Pettus v. Cole, 57 Cal. Rptr. 2d 46, 72 (Ct. App. 1996) (determining as a matter of law that the plaintiff had a privacy interest in his detailed medical information); Guffey & West, *supra* note 12, at 738 (listing inappropriate sharing of a medical

disclosed medical information, an employee's only recourse may be a tort claim for invasion of privacy. The relevant invasion of privacy claim is publicity given to private life, or public disclosure of private facts, which the Restatement (Second) of Torts defines in this way:

> One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public.[106]

Although tort law is state-based, many states have adopted the Restatement (Second) formation of invasion of privacy in some form.[107]

Employees who bring a workplace privacy claim often file suit under the invasion of privacy tort in addition to seeking statutory remedies. Although this claim is sometimes successful, employees face the same difficulties as under statutory remedies, particularly where an employee voluntarily disclosed their private health information.[108] In *Thrivent*, the plaintiff may have been successful under an invasion of privacy claim despite having not survived summary judgment on his ADA claim.

A. *Difficulties in Using the Public Disclosure Tort for Workplace Privacy Claims*

The difficulty in establishing a workplace claim for public disclosure of private facts lies in defining "publicity."[109] Most courts have defined

condition as the prime example of the tort of public disclosure in the workplace); William L. Prosser, *Privacy*, 48 CALIF. L. REV. 383, 392 (1960) (mentioning confinement to a hospital bed in certain contexts is private). There is something unique about a person's physical characteristics and vulnerability while sick or in surgery that connote a clear right of privacy. *See id.* at 397 n.120 (illustrating the offensive and objectionable requirement for public disclosure with a publication of x-rays of a woman's pelvic region and pictures of a caesarian operation). Sickness is given particular attention in the right to privacy, even from an early date. *See* Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 205 (1890) (noting an English court's ruling from 1820 that an engraving of King George III on his sickbed could not be circulated because if the King's doctor had kept a diary of what had gone on in the King's chambers during his sickness, the court would not have permitted him to publish it (citing Prince Albert v. Strange, 41 Eng. Rep. 1171, 1179 (1849))).

106. RESTATEMENT (SECOND) OF TORTS § 652D (AM. LAW INST. 1997); *see also* Warren & Brandeis, *supra* note 105, at 205 (articulating a unique and separate right to privacy—protection of "thoughts, sentiments, and emotions"—the right to be "let alone").

107. *See, e.g.*, McSurely v. McClellan, 753 F.2d 88, 111–12 (D.C. Cir. 1985) (per curiam) (describing Kentucky's adoption of the Restatement).

108. *See* Cash v. Smith, 231 F.3d 1301, 1308 (11th Cir. 2000) (dismissing a public disclosure claim, in addition to ADA and FMLA claims, because the plaintiff did not treat her diabetes diagnosis as a private matter).

109. *See* TORTS § 652D cmt. a (discussing what constitutes publicity); VINCENT R. JOHNSON, STUDIES IN AMERICAN TORT LAW 1025 (5th ed. 2013) (describing the majority approach to "publicity," as well as the minority "special relationship" test).

publicity based on the number of people who have obtained the private information, requiring wide dissemination of the private information.[110] Others have applied a "special relationship" test, allowing a public disclosure claim to succeed even if few people learned the private information.[111] In *Beaumont v. Brown*,[112] the Supreme Court of Michigan clearly laid out that public disclosure of private facts does not require the information to have been made known to the general public, but rather to a person or group of people of importance to the plaintiff.[113] In *McSurely v. McClellan*,[114] the court employed the *Beaumont* analysis of public disclosure, labeling it the "special relationship" test.[115] Courts in varying jurisdictions have applied the special relationship test.[116]

110. *See* EEOC v. C.R. Eng., Inc., 644 F.3d 1028, 1054 (10th Cir. 2011) (concluding an employee's invasion of privacy claim failed because a handful of coworkers and trainees did not qualify as "the public"); Yoder v. Ingersoll–Rand Co., 31 F. Supp. 2d 565, 570 (N.D. Ohio 1997) (holding the plaintiff could not recover under common law public disclosure claim because after his form requesting extended time off and containing a doctor's note indicating his AIDS diagnosis ended up in the hands of plaintiff's mother and, therefore, failed to meet the publicity requirement), *aff'd per curiam*, 172 F.3d 51 (6th Cir. 1998); Eddy v. Brown, 715 P.2d 74, 78 (Okla. 1986) (holding public disclosure requires information be revealed to more than a few persons); Prosser, *supra* note 105, at 393–94 (outlining the public disclosure tort and stating that "it is no invasion to communicate that [the plaintiff owes a debt] to the plaintiff's employer, or to any other individual, or even to a small group, unless there is some breach of contract, trust or confidential relation which will afford an independent basis for relief"). In cases where only one or a few persons are made aware of the plaintiff's information, a breach of duty may be more at issue than a tortious invasion of privacy. *See* Bloustein, *supra* note 48, at 979–80 (dissecting Prosser's connection of the defamation and public disclosure torts because defamation only requires sharing false information with one person, while public disclosure requires mass publication—if the plaintiff gave the discloser the information on the understanding it would remain private, then disclosure to even one person would be a violation, and it would be the breach of confidence which created the violation as opposed to the disclosure itself); Guffey & West, *supra* note 12, at 739 (arguing employees should be able to expect the same confidentiality from managers that patients expect of doctors and clients expect of attorneys, but the courts have offset this expectation due to managers' need to maintain control and security in the workplace).

111. *See* Pachowitz v. LeDoux, 2003 WI App 120, ¶ 23, 265 Wis. 2d 631, 666 N.W.2d 88 (using the "special relationship" test rather than the number-of-persons test to determine public disclosure).

112. Beaumont v. Brown, 257 N.W.2d 522 (Mich. 1977), *overruled on other grounds by* Bradley v. Saranac Cmty. Sch. Bd. of Educ., 565 N.W.2d 650 (1997).

113. *See id.* at 531 (describing the type of audience that would cause actual embarrassment to an individual if private information was revealed). The court in *Beaumont* stated: "Such a public might be the general public, if the person were a public figure, or a particular public such as fellow employees, club members, church members, family, or neighbors, if the person were not a public figure." *Id.*

114. McSurely v. McClellan, 753 F.2d 88 (D.C. Cir. 1985) (per curiam).

115. *See id.* at 112 ("[T]he publication requirement also may be satisfied by proof of disclosure to a very limited number of people when a *special relationship* exists between the plaintiff and the 'public' to whom the information has been disclosed."(emphasis added)).

116. *See* Chisholm v. Foothill Capital Corp., 3 F. Supp. 2d 925, 940 (N.D. Ill. 1998) (holding the publicity requirement could be satisfied with an audience of two due to the presence of a special

Where publicity is based on the number of persons to whom the information is revealed, it can be difficult for a plaintiff to establish such a claim based on a workplace situation. Despite the limited number of persons involved, such a disclosure of private medical information can be humiliating to the employee. The rationale behind this special relationship rule is that the disclosure "may be just as devastating to the person even though the disclosure was made to a limited number of people."[117] While originally there seems to have been some discrepancy regarding whether an oral communication qualified for a public disclosure claim, this issue seems largely settled in favor of oral disclosures qualifying for an invasion of privacy claim.[118] This is helpful in the employment context where it is

relationship—because the information was shared with potential clients of the plaintiff, the court held the defendant's sharing of embarrassing information regarding the plaintiff's affair with a married man might be able to meet the publicity prong despite only two persons hearing the disclosure); *Pachowitz*, 666 N.W.2d at 96–97 (reviewing decisions that held a special relationship would suffice for the publicity prong and finding the "disclosure of private information to one person or to a small group does not . . . fail to satisfy the publicity element of an invasion of privacy claim[,] . . . [but the publicity element] depends upon the . . . nature of plaintiff's relationship to the audience"); *see also* Miller v. Motorola, Inc., 560 N.E.2d 900, 903 (Ill. App. Ct. 1990) (applying the special relationship test, thus reversing the trial court's ruling that disclosure of the plaintiff's mastectomy to a limited number of her coworkers did not amount to a public disclosure tort claim). Cases regarding debtor publicity may also help in the context of medical disclosure in the workplace due to the shared idea of humiliation. *See* Santiesteban v. Goodyear Tire & Rubber Co., 306 F.2d 9, 10 (5th Cir. 1962) (applying Florida law and ruling for a plaintiff in an invasion of privacy claim where, even though the plaintiff was current on his tire payments, the tire company removed the tires from his car at his place of employment, leaving his car sitting on the rims in full view of his coworkers and causing great embarrassment to the plaintiff and his family). Courts have generally recognized a right to privacy in debtors, even where a legitimate debt exists. *See id.* at 11 (reviewing the law regarding privacy as related to debt collection); Biederman's of Springfield, Inc. v. Wright, 322 S.W.2d 892, 894 (Mo. 1959) (holding the plaintiff–waitress had an invasion of privacy claim against a debt collector who entered the cafe where she worked on three separate occasions and announced not only that she had a debt but also that he thought she had never intended to pay such debt); Prosser, *supra* note 105, at 392 (noting the first application of public disclosure as a separate tort was in 1927 in Kentucky, where a creditor posted at his place of business, a past-due notice, which included the plaintiff's name and amount owed, seen by all who entered the store (citing Brents v. Morgan, 299 S.W. 967, 971 (Ky. Ct. App. 1927))). The plaintiff–waitress in *Biederman's* suffered great harm to her reputation as a result of the debt collector's publicity; the court recognized the enormous effect of the publicity on plaintiff's employment despite the limited nature of the communication. *See Biederman's*, 322 S.W.2d at 896 (concluding the waitress could counterclaim against the debt collector for the tortious nature of his actions).

117. *Chisholm*, 3 F. Supp. 2d at 940 (quoting Miller v. Motorola, Inc., 560 N.E.2d 900, 903 (Ill. App. Ct. 1990)).

118. *See Santiesteban*, 306 F.2d at 11 (holding by clear weight of authority, where oral communication is accompanied by sufficient publicity, such exposure may qualify for a public disclosure claim); *Biederman's*, 322 S.W.2d at 898 ("We believe that the oral publication over the three-day period in a public restaurant with numerous customers present satisfies any reasonable requirement as to publicity."); Prosser, *supra* note 105, at 394 (stating although Warren and Brandeis

rare to find a paper trail communicating an employee's medical diagnosis to her coworkers.

B. *Would the Plaintiff in* Thrivent *Have Met the Elements for an Invasion of Privacy Tort?*

As previously discussed, the plaintiff in *Thrivent*, George Messier, responded to his supervisor's request explaining his absence with a lengthy email detailing his history of migraines.[119] After he left his position and sought other employment, he learned that his supervisor revealed his migraine history to potential future employers, which likely cost him several jobs.[120] The first prong Messier would have to meet would have been publicity.[121] Under the traditional definition, the supervisor's revelation to a handful of potential employers would not satisfy this prong because the potential employers were not the "general public," but were few in number.[122] Messier's claim might have survived if the special relationship test had been applied.[123] Although he did not have a

envisioned limiting the public disclosure tort to written disclosures, it is now common to include oral disclosures among the invasions protected). There is no reason for producing different legal results regarding an oral communication and a written disclosure where both may produce the same result—the oral communication may cause even greater damage to the plaintiff's reputation. *See Biederman's*, 322 S.W.2d at 897 (holding counterclaims for oral publicity sufficient). In *Miller v. Motorola*, the defendant argued the plaintiff's claim failed on account of oral rather than written publicity, but the court relied on the Restatement (Second) of Torts, stating a radio broadcast or speech to a large audience would suffice to meet the publicity claim and therefore oral communication could constitute a public disclosure. *See Miller*, 560 N.E.2d at 903 (holding oral publicity was sufficient to sustain the plaintiff's claim (citing RESTATEMENT (SECOND) OF TORTS § 652D cmt.a (AM. LAW INST. 1977))). The question of oral communication was only recently settled in California by *Ignat v. Yum! Brands, Inc.* *See* Ignat v. Yum! Brands, Inc., 154 Cal. Rptr. 3d 275, 276 (Ct. App. 2013) (reversing the trial court's summary judgment for the defendant because the decision was based solely on the fact that the disclosure was not in writing and the plaintiff–employee had brought suit for public disclosure of private facts after her supervisor disclosed the plaintiff's bipolar condition to her coworkers). The court of appeals concluded limiting liability to written disclosures was an outmoded rule that interfered with the right of privacy without any policy reason, and the court recognized that oral disclosures may be just as harmful. *See id.* at 276–83 ("We conclude that limiting liability for public disclosure of private facts to those recorded in a writing is contrary to the tort's purpose, which has been since its inception to allow a person to control the kind of information about himself made available to the public . . . .").

119. EEOC v. Thrivent Fin. for Lutherans, 795 F. Supp. 2d 840, 842 (E.D. Wis. 2011), *aff'd*, 700 F.3d 1044 (7th Cir. 2012).

120. *Id.* at 842–43.

121. *See* Beaumont v. Brown, 257 N.W.2d 522, 526–27 (Mich. 1977) (focusing on criteria examined to determine if the publication requirement is met in relation to invasion to privacy), *overruled on other grounds by* Bradley v. Saranac Cmty. Sch. Bd. of Educ., 565 N.W.2d 650 (1997).

122. *See* EEOC v. C.R. Eng., Inc., 664 F.3d 1028, 1054 (10th Cir. 2011) (reasoning public disclosure is based on the number of people exposed to the disclosure).

123. *See* McSurely v. McClellan, 753 F.2d 88, 109 (D.C. Cir. 1985) (per curiam) (affirming the

longstanding relationship with the potential employers, the revelation of his health history to them could be considered devastating due to the loss of reputation and potential earnings.[124] If Messier's claim would have survived the publicity prong, he would then have had to meet the "highly

lower court jury instructions that included the statement: "A person who unreasonably and seriously interferes with another's interest in not having his affairs known to others, is liable to that person. Disclosure to the general public is not necessary to complete the wrong of invasion of privacy."). Wisconsin courts have concluded as a matter of law that disclosure to a small group, or even one person, does not fail to satisfy the publicity prong of the invasion of privacy claim—instead the publicity element must be decided based on the specific facts of the case and the plaintiff's relationship with the audience to whom the private information was disclosed. *See* Pachowitz v. LeDoux, 2003 WI App 120, ¶¶ 21–22, 265 Wis. 2d 631, 666 N.W.2d 88 (concluding a claim against an EMT who disclosed confidential medical information to one person could survive summary judgment because the third party then told the plaintiff's coworkers—the plaintiff's public disclosure claim then hinged on the character of the third party and whether or not she was a gossip or could be relied on to keep the information confidential).

124. *See Beaumont*, 257 N.W.2d at 529 (overturning the court of appeals' decision regarding what constituted publicity and siding instead with the dissent in an earlier Michigan case, which said the offense was not based on numerical measurements but on the lifting of the curtain of privacy (citing Hawley v. Prof'l Credit Bureau, Inc., 76 N.W.2d 835, 841 (Mich. 1956))). The court in *Beaumont* drew on two cases, where oral and demonstrative publicity occurred and an invasion of privacy was declared, and found the common denominator to be unnecessary publicity given to plaintiff's conduct. *See id.* at 531 (finding the first two prongs of the public disclosure claim—(1) unnecessary publicity and (2) unreasonable and serious interference with the plaintiff's interest in not having his affairs known to others—negated the final two prongs—(3) communication to the public in general or to a large number of people and (4) communication to the general public as opposed to a few— because unnecessary publicity and unreasonable interference do not require publication to the general public and publication to a particular public would be enough to constitute a public disclosure of private facts claim). Prosser compared the public disclosure branch of the invasion of privacy tort with defamation; the difference is that truth is not a defense in a public disclosure tort. *See* Prosser, *supra* note 105, at 398 ("The interest protected is that of reputation, with the same overtones of mental distress that are present in libel and slander."). *But see* Bloustein, *supra* note 48, at 979 (arguing the right invaded by public disclosure is one uniquely of privacy rooted in individuality and dignity, as opposed to harm to reputation—public disclosure plaintiffs are not complaining the public has adopted a certain attitude about them but that their life has been subjected to societal scrutiny). The tort of defamation may also provide privacy protection for employees when a supervisor disseminates false information to other employees, or to potential employers, but this remedy will not work when the information exposed is true. *See* Guffey & West, *supra* note 12, at 738 (describing defamation as one of the stronger remedies available to employees seeking privacy protection). Medical privacy in the workplace affects both reputation and human dignity—while revelation of a cancer diagnosis may not affect an employee's reputation, revelation of an AIDS diagnosis may have a negative effect on the employee's image in the eyes of his coworkers. *See* Bloustein, *supra* note 48, at 979 (arguing the right affected in privacy cases is human dignity rather than reputation by using the example of unwanted publicity given to a couple's deformed child—no one will think less of the couple for their misfortune—their reputation has not been harmed, but there is still an invasion of privacy). The fact that publicity of an AIDS diagnosis was more quickly and more easily recognized as an invasion of privacy gives credence to Prosser's reputation basis for the tort over Bloustein's individual dignity basis.

offensive" requirement for public disclosure.[125] Again, whether his claim could continue would depend on the court's interpretation of the highly offensive prong.[126] He also might have been able to meet this prong due to the seriousness of his loss of prospective employment.[127] However,

125. RESTATEMENT (SECOND) OF TORTS § 652D (AM. LAW INST. 1997).

126. *Compare* Chisholm v. Foothill Capital Corp., 3 F. Supp. 2d 925, 941 (N.D. Ill. 1998) (defining "highly offensive" to mean the court must find the disclosure deeply shocking, not merely embarrassing and painful; the court considers "the context, conduct, and circumstances surrounding the publication" in addition to the publication itself (quoting Green v. Chi. Tribune Co., 675 N.E.2d 249, 254 (Ill. App. Ct. 1996))), *with* Levias v. United Airlines, 500 N.E.2d 370, 374 (Ohio Ct. App. 1985) (declaring Ohio law does not require a debilitating injury for recovery for invasion of privacy). Texas requires the disclosure to be "highly offensive to a reasonable person of ordinary sensibilities." *See* Polansky v. Sw. Airlines Co., 75 S.W.3d 99, 104–05 (Tex. App.—San Antonio 2002, no pet.) (comparing the "highly offensive" requirement of an invasion of privacy tort to those of intentional infliction of emotional distress and slander and stressing "a certain threshold of offensiveness" must be met as a matter of law). Prosser's *Privacy* discusses the requirement of extreme outrage for the tort of intentional infliction of emotional distress but not for intrusion, which is a similar claim. *See* Prosser, *supra* note 105, at 422 ("Where such mental disturbance stands on its own feet, the courts have insisted upon extreme outrage, . . . [b]ut once 'privacy' gets into the picture, . . . such guarantees apparently are no longer required."); *see also* Thompson v. City of Arlington, 838 F. Supp. 1137, 1154–55 (N.D. Tex. 1993) (holding, first, the plaintiff's intentional infliction of emotional distress claim failed because the defendants' conduct was not "utterly intolerable in a civilized community," and second, the plaintiff's invasion of privacy claim failed on the "highly offensive" element under Texas law because a reasonable person would not find it highly offensive for a police department to seek the mental health information of a police officer prior to her returning to active duty). A flight attendant won her invasion of privacy claim after her employer's medical examiner disclosed her menstrual complications to her flight supervisor, appearance supervisor, and husband, none of whom had a compelling reason to know it. *See Levias*, 500 N.E.2d at 374 (concluding plaintiff's substantial emotional distress supported an award of compensatory damages). Kentucky courts have recognized the nature of the right of privacy as relative to the customs of the day. *See McSurely*, 753 F.2d at 111–12 (adopting the Restatement (Second) of Torts but insisting the invasion of privacy tort is not one of precise definition—Kentucky has continued to promote flexibility in the application of the invasion of privacy tort and has consistently found egregious conduct to be actionable despite inexact fits with the contours of the tort as defined by the Restatement). *See generally* Prosser, *supra* note 105, at 409 (stating no special damages must be proven to recover for public disclosure, and presumed mental distress, even lacking proof, may lead to an award for substantial damages). Prosser found liability was more easily granted when publicity was given to acts the community found intolerable, as opposed to publicity that would not have bothered an ordinary person. *Id.* at 397. *Compare* Melvin v. Reid, 297 P. 91, 93 (Cal. Dist. Ct. App. 1931) (finding a reformed prostitute could recover for an invasion of privacy when her story was made into a movie and her past was disclosed without her consent, thus ruining her new life), *with* Sidis v. F-R Publ'g Corp., 34 F. Supp. 19, 21, 25 (S.D.N.Y. 1938) (finding no legitimate privacy right existed when the *New Yorker* published an account of a young child prodigy's life, which was entirely true, but caused great embarrassment simply due to unwanted publicity), *aff'd*, 113 F.2d 806 (2d Cir. 1940).

127. *See Levias*, 500 N.E.2d at 373–74 (ruling in favor of a flight attendant on her invasion of privacy claim after her employer's medical examiner disclosed her menstrual complications and further concluding her substantial emotional distress, which included anxiety embarrassment, headaches, rise in blood pressure, and negative impact on her marital relations were "sufficient to support a jury verdict for compensatory damages"). By analogy, the plaintiff in *Thrivent* could have argued there was no compelling reason for future employers to know the details of his migraine

because Messier himself revealed the information to his former supervisor, he might not have been able to meet this standard.[128] Additionally, migraines are not typically considered as personal as, for example, an HIV diagnosis.[129] The court could have potentially concluded revelation of a migraine diagnosis does not have the same weight of embarrassment carried by a diagnosis with more stigma attached. Finally, Messier would have needed to show his migraine condition was not of legitimate concern to the public.[130] Here again, the court could have decided that this

diagnosis, and this information had a negative impact on his future employment.

128. *See Chisholm*, 3 F. Supp. 2d at 940–41 (finding the plaintiff could not survive summary judgment on a public disclosure claim because the information in question—disclosure that the plaintiff was dating her current husband while he was still married—was not private, due to the fact that plaintiff was open about her relationship, they had appeared in public together, she testified that she was not trying to hide the fact that she had moved in with him, and the date of her husband's divorce was a matter of public record). In certain situations, voluntary disclosure may bar an intrusion of privacy claim but not a public disclosure claim. *See* Miller v. Motorola, Inc., 560 N.E.2d 900, 903–04 (Ill. App. Ct. 1990) (ruling the plaintiff's allegations did not meet the requirements for an intrusion claim because she had volunteered the information regarding her mastectomy to the company nurse who then disclosed it, but finding that the plaintiff's disclosure claim could survive summary judgment). The nature of an intrusion upon seclusion claim requires the situation to be private: "It is clear also that the thing into which there is prying or intrusion must be, and be entitled to be, private." *See* Prosser, *supra* note 105, at 391–92 (stating the protected interest is primarily mental and is used to fill in gaps left by other tort and constitutional remedies); *see also* Eddy v. Brown, 715 P.2d 74, 77 (Okla. 1986) (dismissing the employee's intrusion claim because the information regarding plaintiff's psychiatric visits was part of his employment medical records; therefore, it was "of legitimate concern to his supervisor"); *Polansky*, 75 S.W.3d at 107 (denying plaintiffs' privacy claim due to the non-specific nature of the information disclosed and the fact that the plaintiffs had initiated the publicity rather than the defendant). Many of the disclosure cases rely on the authority of the intrusion cases and the reverse is true as well. *See* Bloustein, *supra* note 48, at 982 (arguing for a dignity basis to unite the invasion of privacy torts). Prosser, however, recognized that separate prongs of the privacy tort addressed separate privacy concerns: intrusion-based tort law generally protects against mental distress, while public disclosure tort law protects the plaintiff's reputation. *But see id.* at 965–66 (refuting Prosser's analysis by explaining what a court recognizes in intrusion cases is an affront on the plaintiff's individuality; it is primarily the individual's dignity, which has been affected, and any mental or emotional distress stems from the assault on his individuality and dignity as opposed to the mental distress itself being the root of the right).

129. *See* Doe v. Att'y Gen. of U.S., 941 F.2d 780, 796 (9th Cir. 1991) (declaring "a reasonable government official" would know that an HIV-status would constitute personal, private health information due to its sensitive nature).

130. *See* Beaumont v. Brown, 257 N.W.2d 522, 527–28 (Mich. 1977) (overturning the court of appeals' decision, which stated the facts disclosed were not "private ones," because the plaintiff's supervisor did not have a duty to disclose multiple specific negative comments to the plaintiff's reserve officer—they were not an essential part of the request for information when his supervisor only sought to discover if the plaintiff was on reserve duty at the time he requested leave), *overruled on other grounds by* Bradley v. Saranac Cmty. Sch. Bd. of Educ., 565 N.W.2d 650 (1997). For the "public interest" prong, Wisconsin courts require the defendant must have acted recklessly or unreasonably regarding the question of public interest, or with actual knowledge that there was no legitimate public interest in the matter disclosed. *See* Pachowitz v. LeDoux, 666 N.W.2d 88, 94 (Wis. Ct. App. 2003)

information was relevant to future employers and therefore his former supervisor had a right to reveal this information in reference checks.[131]

VI. A POTENTIAL SOLUTION: CALIFORNIA'S PRIVACY INITIATIVE

The Privacy Initiative was voted in by ballot in 1972[132] and added the word "privacy" to the inalienable rights section of California's state Constitution.[133] In *Hill v. National Collegiate Athletic Ass'n*,[134] the Supreme Court of California held that this privacy protection applied to private as well as public entities.[135] The court articulated three threshold requirements for plaintiffs bringing a privacy claim: "(1) a legally protected privacy interest; (2) a reasonable expectation of privacy in the circumstances; and (3) conduct by [the] defendant constituting a serious invasion of privacy."[136] The court held that a defendant could prevail by

(articulating Wisconsin's four requirements for a public disclosure claim).

131. *See Levias*, 500 N.E.2d at 374–75 (declaring the "discloser has no privilege unless he has reason to believe that the recipient has a real need to know, not mere curiosity" (citing RESTATEMENT (SECOND) OF TORTS §§ 605, 652(G) (AM. LAW INST. 1997))).

132. Hill v. NCAA, 865 P.2d 633, 641 (Cal. 1994).

133. CAL. CONST. art. I, § 1; *see also Hill*, 865 P.2d at 641 (describing the result of California's Privacy Initiative). California is not the only state to include privacy among its constitutionally protected rights. *See* Hoffman, *supra* note 3, at 563 (listing "Alaska, Arizona, Florida, Hawaii, Illinois, Montana, South Carolina, and Washington" as states with similar constitutional privacy provisions); Ivo Becica, Note, *Privacy—State Constitutional Privacy Rights Against Private Employers: A "Hairy" Issue in Alaska.* Miller v. Safeway, Inc.*, 102 P.3d 282 (Alaska 2004)*, 37 RUTGERS L.J. 1235, 1237 (2006) (describing the essential role of state constitutions in expanding the right of privacy). Some states provide a greater right of privacy than that afforded by the U.S. Constitution, despite lacking explicit language protecting such a right in their respective constitutions. *See* Thompson v. City of Arlington, 838 F. Supp. 1137, 1150 (N.D. Tex. 1993) (finding the Texas Constitution provides a greater right of privacy: the government defendant must survive strict scrutiny and prove there is a compelling government aim that cannot be achieved by less intrusive or more reasonable means). In *Thompson*, the court held that to meet the requirements for a federal constitutional right to privacy, the plaintiff's "privacy interest in her mental health records" must be balanced against the police department's interest in obtaining a thorough understanding of her mental state. *Id.* at 1146. Although the court reached the same conclusion using both the state and federal constitutional standards in this case, there is the potential for significantly differing outcomes using the U.S. Constitution "legitimate interest" balancing test as opposed to the "less intrusive means" test.

134. Hill v. NCAA, 865 P.2d 633 (Cal. 1994).

135. *See id.* at 642 (interpreting California voters' desire to approve the Privacy Initiative to include constitutional protection against private businesses). While California is not the only state to provide for privacy protection in its constitution, it is the only state that has applied this protection to private and public entities. *See* Hoffman, *supra* note 3, at 564 & n.338 (describing California's unique stance to grant expressly constitutional privacy rights against nonpublic entities (citing Larry O. Natt Gantt, II, *An Affront to Human Dignity: Electronic Mail Monitoring in the Private Sector Workplace*, 8 HARV. J.L. & TECH. 345, 389 (1995))); *see also* Becica, *supra* note 133, at 1239 (commenting on the state action doctrine as a bar to recovery in all states with an explicit privacy right, with the exception of California).

136. *Hill*, 865 P.2d at 657.

disproving any of these three elements, or through an affirmative defense justifying the privacy invasion on the basis that it furthered a countervailing interest.[137] However, if the defense presents a countervailing interest, the plaintiff may respond with alternative courses of conduct causing lesser invasion of privacy.[138] The rigidity of the standard is criticized by concurring and dissenting opinions and subsequent court decisions, which advocate for a balancing approach as opposed to the majority's framework in *Hill*.[139]

Due to California's unique legislative structure—which allows voters, through ballot measures, to directly place words into the state constitution—the court in *Hill* thoroughly investigated voter intent to reach its interpretation of the Privacy Initiative.[140] To determine voter intent, the court examined the official ballot pamphlet's arguments for and against the proposition.[141] After finding a ballot-backed intent to curb both government and business use of individuals' private information, the court concluded that the Privacy Initiative applied to both private and public entities.[142] In addition to the ballot pamphlet, the court also

137. *Id.*

138. *Id.*

139. *See id.* 865 P.2d at 672 (George, J., concurring and dissenting) (disagreeing with the majority's framework on the basis that it is too rigid with regard to the seriousness of the privacy invasion and the plaintiff's reasonable expectation of privacy and fearing such a framework will weaken state constitutional privacy protections); *id.* at 679–80 (Mosk, J., dissenting) (arguing against any threshold measures when it comes to privacy rights because the judiciary must respect the law as created by California's voters with the Privacy Initiative); *see also* Sheehan v. S.F. 49ers, Ltd., 201 P.3d 472, 480 (Cal. 2009) (indicating the court will not second-guess all private security measures).

140. *See Hill*, 865 P.2d at 641 ("The Privacy Initiative is to be interpreted and applied in a manner consistent with the probable intent of the body enacting it: the voters of the State of California.").

141. *See id.* at 642 (indicating the court would consider the pamphlet language because the language of the measure itself did not resolve questions of its interpretation).

142. *See id.* (detailing ballot arguments for and against greater privacy measures); Ballot Pamp., Proposed Amend. to Cal. Const. with arguments to voters, Gen. Elec. 26–27 (Nov. 7, 1972) (arguing for constitutional privacy protection against business as well as the government). Moreover, the concurring opinion in *Sheehan* v. *S.F. 49ers, Ltd.* emphasized the importance of enforcing the privacy right against nonpublic entities because this was what the voters wanted. *See Sheehan*, 201 P.3d at 482 (Werdegar, J., concurring) (disagreeing with the majority's less restrictive approach to private entities: "I am unwilling to substitute for the constitutional right the people endorsed a reflexive faith in the governmental and private actors [the voters] deemed wanting."). California's stance goes against the general interpretation that the principal nature of constitutions is to curtail only government action. *See* Becica, *supra* note 133, at 1245 (describing the ongoing justification of the state action doctrine). *But see* Young v. W. & A.R. Co., 148 S.E. 414, 417 (Ga. Ct. App. 1929) (applying the state constitutional right to be free from unreasonable searches and seizures, in a rare decision, against a private railroad company). In *Melvin v. Reid*, a California court conducted a thorough analysis of the privacy right and concluded that no explicit right of privacy was needed (such a right did not exist in California at the time) but that the court could rely on the state constitution in finding a violation of

looked to the common law tort of invasion of privacy to define the interest protected.[143] Among the four common law categories of invasion of privacy, the court found the common denominator to be "improper interference . . . with aspects of life consigned to the realm of the 'personal and confidential' by strong and widely shared social norms."[144] Notably, the court found the Privacy Initiative was not limited by the common law definition of invasion of privacy, but was intended to cover any misuse of information used to embarrass the individual.[145]

In *Ingat v. Yum! Brands, Inc.*,[146] the court of appeals clarified the difference between California's state constitutional privacy right and the common law tort of invasion of privacy.[147] Despite their close relationship, the common law invasion of privacy claim and the state constitutional right are separate claims.[148] The constitutional privacy right focuses on institutional record keeping; specifically, wide dissemination of the information in question is not required.[149] In contrast, the common law tort of invasion of privacy requires a substantial degree of publicity rather than publication to a few people.[150] Additionally, a public disclosure claim necessitates the facts disclosed be "offensive or objectionable to a reasonable person," whereas California's state constitutional privacy right may be violated by disclosure of any private record intended to be kept confidential—even information as harmless as a college transcript.[151] Hinging on the basis of intended confidentiality, California's constitutional privacy right is much more widely applicable to Californians than is the common law claim for invasion of privacy.

the plaintiff's right to the pursuit of happiness against a private movie producer. *See* Melvin v. Reid, 297 P. 91, 92–94 (Cal. Dist. Ct. App. 1931) (finding the plaintiff had a right to not have her new, reformed life ruined by a movie about her past actions). *Melvin* included a thorough analysis of the right to privacy that it has been referred to as one of the first cases recognizing the public disclosure tort. *See* Ignat v. Yum! Brands, Inc., 154 Cal. Rptr. 3d 275, 280 (Ct. App. 2013) (illustrating *Melvin* relied on the state constitutional right rather than tort law); Prosser, *supra* note 105, at 397 (using *Melvin* to discuss the contours of the public disclosure tort).

143. *See Hill*, 865 P.2d at 646 (searching for a historical understanding of the word "privacy").

144. *Id.* at 647.

145. *See id.* at 648–49 (opining the common law tort does not circumscribe the state constitutional right because it was not the intention of the voters to allow claims only where disclosure was widely publicized).

146. Ignat v. Yum! Brands, Inc., 154 Cal. Rptr. 3d 275 (Ct. App. 2013).

147. *Id.* at 284–85.

148. *Id.* at 285.

149. *Id.*

150. *See id.* ("Liability for the common-law tort requires publicity; disclosure to a few people in limited circumstances does not violate the right.").

151. *Id.*

A. *The* Thrivent *Plaintiff's Cause of Action Under the California Privacy Initiative*

The plaintiff in *Thrivent* would stand the best legal chance under California's Privacy Initiative.[152] In doing so, he would first need to articulate a legally protected privacy interest.[153] This would not present an obstacle, as courts have long recognized an individual's privacy interest in health information.[154] The most difficult obstacle for Messier to overcome would be whether he waived a reasonable expectation of privacy by volunteering his health information.[155] Because he revealed his migraine diagnosis without further prompting from his supervisor, a court could hold that he surrendered any reasonable expectation of privacy in

152. *See* Hoffman, *supra* note 3, at 572 ("California residents thus may sue nongovernmental, private parties for violations of their constitutional right to privacy, and several have done so successfully in the employment context.").

153. Hill v. NCAA, 865 P.2d 633, 657 (Cal. 1994).

154. *See* United States v. Westinghouse Elec. Corp., 638 F.2d 570, 577 (3d Cir. 1980) (discussing the long-held weight given to privacy of individual medical information). In *Pettus v. Cole*, the plaintiff succeeded on appeal in his California state constitutional privacy claim against his former employer who sought the plaintiff's medical records and required him to enter an alcohol treatment program as a condition to keep his job. Pettus v. Cole, 57 Cal. Rptr. 2d 46, 54 (Ct. App. 1996). Drawing extensively from the opinion in *Hill*, the court determined that informational privacy was the central goal of the Privacy Initiative, and in addition, the type of extensive medical profile at issue in *Pettus* was exactly the type of information the voters intended to protect from both government and business interests when they voted to approve the ballot measure. *See id.* at 72 (discerning voter intent for the state constitutional privacy amendments in the Privacy Initiative). Further, the court of appeals found that an employee can reasonably expect to shield the specifics of her personal life from her employer's scrutiny. *See id.* at 73 (applying the rationale underlying the purpose of the Privacy Initiative to the facts of the *Pettus* case). The *Pettus* opinion goes on to discuss a particular California statute governing medical privacy, upon which the plaintiff could rely, and ultimately concluded that the employer-hired psychologist could only reveal information regarding plaintiff's mental state that was particularly relevant to the employer's decision regarding whether or not he was entitled to short-term disability. The court noted:

> There is no reason in law or policy why an employer should be allowed access to detailed family or medical histories of its employees, or to the intricacies of its employees' mental processes, except with an individual employee's freely given consent to the particular disclosure or some other substantial justification.

Id. at 75.

The court of appeals recognized the importance to employees of maintaining informational privacy against employers, stating: "The 'employee' mask is one that helps workers maintain an aura of competence, efficiency, professionalism, social propriety, seriousness of purpose, etc., allowing them to perform their duties to the satisfaction of their employers but simultaneously to protect their job security and, thus, their economic well-being." *Id.* at 80.

155. *See id.* at 77 (exploring a serious question regarding the plaintiff's waiver of a California state constitutional claim in light of his voluntarily disclosure of information to supervisors, significant portions of which were sensitive personal information for a plaintiff to assert a privacy right).

that information.[156] However, revealing this information to his supervisor does not mean the plaintiff wanted this medical information revealed to potential future employers.[157] Here, the subsequent loss of potential employment is Messier's strongest argument under the Privacy Initiative. The third prong for consideration is the seriousness of the defendant's privacy invasion.[158] Courts have held loss of employment to constitute a tangible injury, indicating that such a disclosure on the part of Messier's former supervisor could be considered serious.[159] To overcome these three elements, Messier's former employer would have to prove his conduct furthered a countervailing interest.[160] Given Messier only missed one day of work due to his migraine condition, the defendant does not have a good public policy argument for disclosing plaintiff's condition to potential employers during a reference check. If Messier's former employer were able to prove a strong countervailing interest in revealing his private health information to future employers, Messier would still succeed in his claim under the Privacy Initiative, as long as he can show alternative courses of conduct causing lesser invasions of privacy.[161] In this case, Messier's former supervisor could have simply stated that Messier failed to call into work one day when absent, as opposed to

156. Warren and Brandeis articulated that "a private communication of circulation for a restricted purpose" falls outside of the definition of publications, which cause an individual to lose his right to privacy. *See* Warren & Brandeis, *supra* note 105, at 218 (describing the boundaries of the right to privacy; in general, there is no right to privacy once the individual has published the facts himself, or he consents to their publication).

157. *See Pettus*, 57 Cal. Rptr. 2d at 84 (holding a misuse of information obtained properly for a separate purpose may also be the basis of a claim for violation of California's state constitutional privacy right—medical information given to supervisors for the purpose of determining disability could not rightfully be used to discipline or terminate the plaintiff–employee); Prosser, *supra* note 105, at 419–20 (stating consent is a chief defense and will bar the plaintiff's recovery as in any other tort but revealing information for one purpose does not mean it can be used for any purpose).

158. *See Pettus*, 57 Cal. Rptr. 2d at 75 (finding the plaintiff had experienced a serious invasion of privacy as required to meet the third prong of a violation of Article I, Section 1 of the California Constitution because the disclosure of detailed psychological examinations to his employer caused great damage to his professional reputation and to his self-esteem).

159. For example, the Court in *Paul v. Davis* held:

> While we have in a number of our prior cases pointed out the frequently drastic effect of the "stigma" which may result from the defamation by the government in a variety of contexts, this line of cases does not establish the proposition that reputation alone, apart from some more tangible interests such as employment, is either "liberty" or "property" by itself sufficient to invoke the procedural protection of the Due Process Clause.

Paul v. Davis, 424 U.S. 693, 701 (1976).

160. *See Pettus*, 57 Cal. Rptr. 2d at 86 (evaluating the countervailing interests and applying a stringent test to determine if defendant's interference with plaintiff's interest was justified).

161. *Id.* at 73 (acknowledging the plaintiff had placed his mental state at issue with his request for leave but contending his employer did not need the level of detail in the reports he requested).

responding to a reference check by disclosing Messier's migraine diagnosis. Such a course of conduct by the defendant would not constitute an invasion of privacy in the same way that revealing the plaintiff's medical information did.

VII. CONCLUSION

Employees who voluntarily reveal their private health information may have to turn to private action rather than seeking statutory protection. The available protection hinges on the interpretative definition of "voluntarily." An employee who discloses a medical condition to her supervisor as an explanation of missed work may not consider the disclosure voluntary, but the law may very well view it as such.[162] Because employees often feel compelled to share private health information in order to retain employment, stronger legal protection of disclosed medical information is needed. Typically, an offended plaintiff tries to conform the offending disclosure to one of the statutory remedies, only to find that they cannot because the plaintiff is not considered disabled, did not suffer a tangible injury, or their supervisor's inquiry is not considered "medical."

Although a few courts have recognized the special relationship test for invasion of privacy claims, a plaintiff seeking redress under tort law will often find themselves blocked by the publicity requirement, despite facing extreme social difficulty in one of the most important areas of their life: the workplace. For this reason, California's Privacy Initiative offers the best model of privacy protection for employees.[163] The Privacy Initiative provides the flexibility necessary to protect an employee who may not have been subject to a specific "medical inquiry,"[164] yet has provided his employer with medical information that could be used against the employee in the future, causing embarrassment him or crippling new employment prospects. While it is ideal for employees to refrain from voluntarily discussing private health information with supervisors, such discussions inevitably occur, and employees deserve a legally reliable and

162. *See* EEOC v. Thrivent Fin. for Lutherans, 795 F. Supp. 2d 840, 846 (E.D. Wis. 2011) (holding the employee could not recover for illegal disclosure because he had volunteered his medical information in response to a general inquiry), *aff'd*, 700 F.3d 1044 (7th Cir. 2012); *see also* Sherrer v. Hamilton Cty. Bd. of Health, 747 F. Supp. 2d 924, 927, 932–34 (S.D. Ohio 2010) (deciding an employee could not succeed in her ADA claim because she had revealed her cancer in response to the question "Is everything okay[?]" rather than in the course of a medical inquiry).

163. *But see* Becica, *supra* note 133, at 1248 (outlining the reduced need for constitutional privacy protection against nonpublic entities due to common law remedies in tort law).

164. *See* Hill v. NCAA, 865 P.2d 633, 651 (Cal. 1994) ("[P]rivacy interests and accompanying legal standards are best viewed flexibly and in context.").

flexibly constructed means by which to assert their privacy in the workplace.