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Jessica Jones

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Discouraging Voluntary Disclosure: *EEOC v. C.R. England* and Confidentiality Under the ADA

I. INTRODUCTION

Under the Americans with Disabilities Act (ADA), employers who ask for disability information must keep it confidential.¹ However, the statute is silent as to whether employers must also keep voluntary disclosures confidential.²

James Kingston had been working as a supervisor for The Ford Meter Box Company for three years before he was diagnosed with chronic obstructive pulmonary disease.³ This disease progressively made his breathing more difficult when he performed any sort of physical labor, even walking short distances.⁴ After his diagnosis, he disclosed his illness to the plant nurse, who gave him information about requesting medical leave.⁵ After his supervisor requested that Kingston spend more time on the production floor, Kingston responded by telling him about his condition, but he did not ask for any accommodations at that time.⁶

Because his disease continued to worsen in the year after his diagnosis, Kingston had a meeting with the plant nurse and his supervisor to discuss accommodations.⁷ He requested at this time that they keep his condition confidential.⁸ Although his supervisor told him at this time that Kingston could send his assistant to meetings that were located up a floor and across the plant, later conversations with his supervisor made him feel “compelled to go the meetings,” so he did his best to attend rather than send his assistant.⁹ Other coworkers told him that his condition was a topic of conversation at a production meeting that he did not attend.¹⁰ When

1. 42 U.S.C. § 12112(d)(4)(A) (2006).

2. *See id.*

3. *Kingston v. Ford Meter Box Co.*, No. 3:07-CV-270 RM, 2009 WL 981333, at *1 (N.D. Ind. Apr. 10, 2009).

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.* at *2.

8. *Id.*

9. *Id.*

10. *Id.* However, the court notes that the defendant filed affidavits contradicting Kingston’s assertion that other coworkers talked about his condition at a meeting. *Id.* at *3

Kingston brought a lawsuit for disability discrimination, the court held that because he had told his supervisor and the plant nurse about his condition voluntarily before requesting reasonable accommodations, his medical information was not protected under the ADA.¹¹ Thus, the court implied that employees who proactively tell employers about potential problems are not protected, but instead must wait until their job performance suffers, prompting their employers to initiate a disability inquiry or request medical documents.¹²

In a similar case, *EEOC v. C.R. England*,¹³ the Tenth Circuit held that the ADA does not protect an employee's disclosures to his supervisor. Rather than rewarding a proactive employee for telling his supervisor before his condition became a problem, *C.R. England* required the employee to divulge his medical condition to others and restricted his actions. This opinion will discourage voluntary discourse about disabilities between employees and employers, departing from Congress's intent in enacting the ADA. This Note argues that although the ADA does not directly address voluntary disclosures of medical information, the Tenth Circuit should have interpreted the ADA to protect employees' voluntary disclosures even where the employer has not made a special inquiry about the disability.

Part II of this Note first discusses the applicable ADA provisions, their legislative history, and the Equal Employment Opportunity Commission's enforcement regulations and guidance. Next, Part III examines case law leading up to *EEOC v. C.R. England*, and discusses the difficulty in determining whether a disclosure is actually voluntary. As will be apparent from this discussion, the slight distinction between voluntary and involuntary disclosures does not justify the differences in outcome. Part IV discusses the facts and the Tenth Circuit's analysis in *EEOC v. C.R. England*. Part V argues that the Tenth Circuit's holding is contrary to Congress's intent in passing the ADA, contrary to the Equal Employment Opportunity Commission's guidance, and discourages voluntary employee disclosures through bad workplace policy that encourages both employees and employers to remain silent about disabilities, thus

n.3.

11. *Id.* at *11.

12. *See id.* at *9–10 (distinguishing cases holding that the employer initiated the inquiry and thus was legally bound to keep the information confidential).

13. 644 F.3d 1028 (10th Cir. 2011).

leading to a less productive disabled workforce. Part VI proposes two possible solutions: voluntary disclosures about possible disabilities could be treated like confidential medical records under the ADA; Or in the alternative, information could be disclosed only when “job-related and consistent with business necessity.”¹⁴ Part VII concludes.

II. SECTION 12112(D) OF THE ADA AND THE CONFIDENTIALITY OF MEDICAL INFORMATION

A. The ADA and What the Legislature Intended

The ADA was meant to herald a new day of understanding for people with disabilities and allow them “the opportunity to compete on an equal basis with others.”¹⁵ Prior to the statute, people with disabilities had been segregated from regular society, treated as worthless or nonexistent, and discriminated against solely on the basis of their disabilities.¹⁶ The legislative history recounted Judith Heumann’s experience, where her elementary school forbade her from attending and entertainment venues asked her to leave because she was confined to a wheelchair.¹⁷ Some employers refused to offer jobs to qualified applicants with disabilities, even where the applicant did not need accommodations and had a “hidden,” or not obviously visible, disability.¹⁸ Some individuals were discriminated against even though they did not consider themselves disabled.¹⁹ The public associated disability with ineptness, leading many disabled individuals

14. 42 U.S.C. § 12112(d)(4)(A) (2006); 29 C.F.R. § 1630.14(c) (2011).

15. See H.R. REP. NO. 101-485(II), at 22–23, 29 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 304, 310. (“The purpose of the ADA is to provide a clear and comprehensive national mandate to end discrimination against individuals with disabilities and to bring persons with disabilities into the economic and social mainstream of American life; to provide enforceable standards addressing discrimination against individuals with disabilities, and to ensure that the Federal government plays a central role in enforcing these standards on behalf of individuals with disabilities.”).

16. *Id.* at 28–29, *reprinted in* 1990 U.S.C.C.A.N. 303, 310–11.

17. *Id.*

18. *Id.* at 72, *reprinted in* 1990 U.S.C.C.A.N. 303, 355. Individuals with a history of or who were successfully treating “hidden” disabilities, such as diabetes, epilepsy, or many emotional or mental illnesses, could still be required to disclose their conditions on job applications before Congress passed the ADA. *Id.*

19. Congress drafted the ADA broadly enough to encompass these individuals, stating that disability is defined independently of any “mitigating measures” taken by the individual, and that those individuals stigmatized by a past history of a disability—even if they physically no longer have it—are also covered under the ADA. *Id.* at 52–53, *reprinted in* 1990 U.S.C.C.A.N. 303, 334–35.

to be under-employed, unnecessarily dependent on others, or indigent.²⁰

Congress passed the ADA to ameliorate these problems. Section 12112 of the ADA forbids employment discrimination: “No covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.”²¹ The statute regulates employers’ inquiries about disabilities at all stages of employment, including before the employment offer, after the offer, and after the person is an employee.²² Employers can inquire only whether an employee can physically perform the job, an inquiry that can take the form of a physical or an employer-instigated inquiry into an employee’s medical history if “job-related and consistent with business necessity.”²³ This inquiry must be about a person’s ability to perform “job-related functions”²⁴ and cannot extend specifically to a person’s disabled status.²⁵ Employers may also make “voluntary medical examinations” available in conjunction with “an employee health program available to all employees at that work site.”²⁶

When an employer obtains health information through these allowed methods, it must be “maintained on separate forms and in separate medical files and is treated as a confidential medical record.”²⁷ But the information can be shared with supervisors to inform them of “necessary restrictions” and “necessary accommodations,” with “first aid and safety personnel” in case of emergency, and with government officials to show compliance with the ADA.²⁸

20. *Id.* at 32–33, *reprinted in* 1990 U.S.C.C.A.N. 303, 314–15.

21. 42 U.S.C. § 12112(a) (2006).

22. *Id.* § 12112(d).

23. *Id.* § 12112(d)(4)(A).

24. *Id.* § 12112(d)(4)(B).

25. *Id.* § 12112(d)(4)(A).

26. *Id.* § 12112(d)(4)(B). This provision was meant to include jobs that require regular physicals or that offer health exams due to hazards found on the job site. H.R. REP. NO. 101-485(II), at 74–75 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 356–58.

27. 42 U.S.C. § 12112(d)(3)(B).

28. *Id.* Practitioners have also added two other instances where the information may be shared. *See infra* note 93 and accompanying text.

B. EEOC Guidelines Regarding Disability Inquiries

The Tenth Circuit's opinion conflicts with the Equal Employment Opportunity Commission's interpretation of the ADA. Congress authorized the Equal Employment Opportunity Commission (EEOC) to broadly implement and enforce the ADA employment provisions.²⁹ To provide clarity to employers wishing to abide by these provisions, the EEOC promulgated guidelines to provide notice to employers about what kinds of inquiries are acceptable under the ADA.³⁰ The EEOC guidelines first emphasize the aim of the ADA to "protect the rights of applicants and employees to be assessed on merit alone, while protecting the rights of employers to ensure that individuals in the workplace can efficiently perform the essential functions of their jobs."³¹ The guidelines stress that any medical exams and inquiries must be "job-related and consistent with business necessity."³² Notably, the guidelines state that while employers must keep confidential any information gained from employer-initiated disability inquiries, employers are also required to protect any medical information voluntarily disclosed by an employee³³—an area the statute does not clearly address.³⁴ Thus, the EEOC guidelines implement a straightforward standard that is easy to understand and apply.

III. CASE LAW ON VOLUNTARY DISCLOSURES

Although most courts have held that voluntary disclosures are not protected by the ADA, courts disagree on what constitutes a voluntary disclosure. This suggests that courts should discard the distinction between voluntary and involuntary disclosures and simply protect all medical information. Only two circuit courts have ruled on the issue, and numerous district courts have defined voluntary disclosures with varying success. None of these decisions have addressed Congress's intent in passing the ADA or the EEOC's determination that there should be no difference between medical

29. 29 C.F.R. § 1630.1 (2011).

30. *Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act*, EEOC, <http://www.eeoc.gov/policy/docs/guidance-inquiries.html> (last visited February 1, 2012).

31. *Id.*

32. *Id.*

33. *Id.*

34. *See* 42 U.S.C. § 12112(d) (2006).

information gained through an employer inquiry and medical information given voluntarily.

Some courts have held that the confidentiality provisions were meant to be a strict ceiling. In *Ballard v. Healthsouth Corp.*, a court interpreted the ADA confidentiality provisions narrowly and held that an employer need not keep disability information confidential if an employer discovers that information through any means outside of an employer-initiated exam or inquiry.³⁵ Thus, when the employee in *Ballard* told his supervisor about his HIV, the ADA did not apply since the voluntary disclosure of disability “is not a matter that the ADA was designed to handle.”³⁶

However, not all courts have interpreted the statute this narrowly. This strict-ceiling interpretation was directly criticized in *Lanxon v. Crete Carrier Corp.*³⁷ In this case, an employer’s medical review officer “found out about” an employee’s seizures and informed other employees through phone calls and emails about her condition.³⁸ The judge criticized any reliance on the *Ballard* holding, since it would suggest that information gained through an ADA-prohibited inquiry would not need to be kept confidential because the information had not been gained as part of a legal inquiry.³⁹ If those inquiries had been “job-related and consistent with business necessity,” then they may have been permissible under the ADA.⁴⁰ The judge further reasoned that the employer “had no right to obtain the information in the first place” when it was gained outside of employer-initiated inquiries or voluntary wellness programs, implying that information gained outside of those methods should be protected even more strictly.⁴¹

Most courts continue to follow the strict ceiling reasoning found in *Ballard*, holding that employers are not liable for disclosing medical information to other employees, even where the employee discloses a condition when requesting medical leave to treat it.⁴² In *Ross v. Advance America Cash Advance Centers, Inc.*, an employee

35. 147 F. Supp. 2d 529, 534–35 (N.D. Tex. 2001).

36. *Id.* at 535.

37. No. 4:00CV3182, 2001 WL 1589627 at *11 (D. Neb. Dec. 13, 2001).

38. *Id.* at *1–2.

39. *Id.* at *11.

40. *Id.*

41. *Id.*

42. *E.g.*, Walker v. Gambrell, 647 F. Supp. 2d 529, 539 n.5 (D. Md. 2009); *see also* Kingston v. Ford Meter Box Co., 3:07-CV-270 RM, 2009 WL 981333 (N.D. Ind. Apr. 10, 2009).

called her supervisor to ask for time off so that she could start taking medication for her bipolar disorder, for which she was recently diagnosed.⁴³ The supervisor then discussed her diagnosis with at least one other employee.⁴⁴ The district court reasoned that while the supervisor's actions were "ill-mannered," mostly because the voluntarily disclosed information involved mental illness, the ADA does not protect self-disclosures.⁴⁵ Rather than err on the side of protecting medical information, the court reasoned that it is an everyday occurrence for an employee to call a supervisor, explain the medical reason for an absence, and then for the supervisor to tell everyone else in the workplace, whether or not the information could be sensitive.⁴⁶

Where an employer requests documents detailing medical information, courts are split on whether the confidentiality provisions of the ADA cover that information. In *Cash v. Smith*—an Eleventh Circuit case and the only other federal circuit case handling this issue—an employee told her supervisor in confidence about a number of health problems.⁴⁷ The employee supplied her supervisor, upon the employer's request, with medical documents detailing her medical conditions.⁴⁸ The supervisor later told other employees about Cash's medical conditions.⁴⁹ Because the employee initiated this inquiry by informing her employer about her medical condition,

43. 605 F. Supp. 2d 1025, 1033 (E.D. Ark. 2009).

44. *Id.* at 1028.

45. *Id.* at 1033–34.

46. *Id.* at 1033 ("An employee may take leave due to influenza, a stomach virus, a broken leg, cancer, congestive heart failure, or some other medical condition and inform the employer of that medical condition; and when that happens it is common for the information to be spread around the workplace. Nothing in the statute or the cases gives reason to believe that the ADA prohibits that kind of disclosure."). *But see* H.R. REP. NO. 101-485(II), at 75 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 357–58 (observing that cancer sufferers are often seen as having a disability, so their medical condition may also be a sensitive matter that they would not want spread around the workplace).

47. 231 F.3d 1301, 1303 (11th Cir. 2000).

48. *Id.* at 1304, 1307. Even though Cash's medical conditions were not held to be a disability because they were managed through medications, the interpretation of the ADA has changed so that mitigating measures are not taken into consideration when deciding if someone has a disability. *See* WILLIAM D. GOREN, UNDERSTANDING THE AMERICANS WITH DISABILITIES ACT 138 (3d ed. 2010) (setting out checklists for trying ADA cases that differentiate between cases before or after Jan. 1, 2009).

49. *Cash*, 231 F.3d at 1308. This case is not always the best confidentiality case because Cash also told others in the office besides her supervisor about her condition, thus contradicting her later claim that she wanted to keep her medical condition a secret. Since the court only examined whether she voluntarily gave the information to her supervisor in making its holding, Cash's decision to tell other employees did not impact its holding.

the court held that her condition did not have to be kept confidential.⁵⁰ This holding contrasts with the holding in *Doe v. U.S. Postal Service*, where a supervisor required an employee to submit a medical certification form to request time off.⁵¹ Although the employee voluntarily submitted the form, the court held that the employer's request for the medical leave certification form was effectively a "job-related" inquiry, and thus that the information should have been kept confidential according to the ADA.⁵²

Even if viewed in terms of the timeline for the employer requests, the difference between voluntary disclosures and employer requests is very narrow. In both cases, the employer requested information from the employee. In *Cash*, the employee requested accommodation first; then her employer asked for her medical records.⁵³ In *Doe*, the employee had to turn in a medical certification form in order to ask for leave in the first place.⁵⁴ In *Cash*, the medical condition disclosure was voluntary;⁵⁵ in *Doe*, the medical condition disclosure was involuntary.⁵⁶ This small chronological difference, requested after initial time-off request versus requested at the same time as initial time-off request, seems too narrow to be an important difference.

These cases suggest that the distinction between voluntary and involuntary disclosures is difficult to determine, leading to the conclusion that courts should not be distinguishing between them. In addition, the strict-ceiling interpretation that the ADA only protects involuntary disclosures connected to employer medical inquiries would not protect other circumstances where employers gain medical information from sources other than the employee. None of these cases address the ADA legislative history or the reasoning behind the EEOC guidelines.

IV. *EEOC v. C.R. ENGLAND*

The Tenth Circuit continued this trend of holding that the ADA does not protect an employee's voluntary disclosures to his supervisor. It reasoned that even if the disclosed information gives

50. *Id.* at 1307–08.

51. 317 F.3d 339, 341 (D.C. Cir. 2003).

52. *Id.* at 344–45.

53. 231 F.3d at 1304, 1307.

54. 317 F.3d at 341.

55. 231 F.3d at 1307.

56. 317 F.3d at 341.

other employees the opportunity to discriminate or harass, voluntary disclosures are still not protected.

A. Facts

Walter Watson was diagnosed with HIV in 1999 and started working for the trucking company C.R. England (CRE) in 2002.⁵⁷ He signed an agreement to become an independent contractor and began leasing a truck from CRE's sister company about one month after beginning work at CRE.⁵⁸ Watson voluntarily told CRE's human resources manager, Carrie Johansen, that he was HIV positive, mainly because he believed that a driver with whom he had had a confrontation had already informed her,⁵⁹ perhaps in an effort to control the damage.

Although she had previously assured Watson of confidentiality, Johansen pulled him aside during his "train-the-trainer" sessions to express her concerns and later arranged a meeting with both Watson and CRE's legal counsel.⁶⁰ Legal counsel suggested that potential trainees should know about Watson's HIV-positive status and asked for Watson's input on how this could be accomplished.⁶¹ Watson suggested a form, which CRE's attorney later drafted, that informed potential trainees that their trainer was HIV positive.⁶² This form did not specifically name Watson.⁶³ Potential trainees would have the opportunity to reject the HIV-positive trainer without knowing specifically who it was, but those who signed the form would be assigned to Watson,⁶⁴ thus suggesting that Watson was the trainer with HIV. Watson never told CRE about any objections to telling others about his HIV or about using the trainee form.⁶⁵ His one trainee, Eddie Seastrunk, signed the form without complaint.⁶⁶ However, Watson's first trip as a trainer did not go well and he was fired one week after being assigned a trainee.⁶⁷

57. EEOC v. C.R. England, Inc., 644 F.3d 1028, 1032 (10th Cir. 2011).

58. *Id.*

59. *Id.* at n.1.

60. *Id.* at 1033.

61. *Id.*

62. *Id.*

63. *Id.*

64. *See id.* (showing that only Watson's potential trainees were given the opportunity to sign the form and it was not given to every trainee).

65. *Id.*

66. *Id.*

67. *Id.* at 1033-34.

Watson filed a complaint with the EEOC, which in turn found that CRE violated Watson's rights under the ADA by disclosing his HIV and by requiring Watson to disclose it to potential trainees.⁶⁸ However, the district court granted summary judgment in favor of CRE.⁶⁹

B. Tenth Circuit Analysis

The Tenth Circuit ultimately upheld the summary judgment in favor of CRE, holding that the ADA does not apply to voluntarily disclosed medical information, even if it relates to a disability.⁷⁰ Although the court made eight holdings in this case, only the decision regarding whether the ADA protects voluntary disclosures will be discussed in this Note. The court interpreted § 12112 of the ADA, stating that it was meant to cover "medical examinations and inquiries"⁷¹ performed "(a) preemployment; (b) post-offer; and (c) during the employment relationship."⁷² The court also reasoned that any medical information gathered as part of a legitimate inquiry has to be treated as a confidential medical record and "maintained on separate forms and in separate medical files."⁷³ Any disclosure of that confidential medical record would be actionable under the ADA.⁷⁴

In this case, however, the court held that Watson's voluntary admission made those statute sections inapplicable.⁷⁵ The only *voluntary* information that the statute protects, according to the court's interpretation, is information "elicited during an authorized employment-related medical examination or inquiry."⁷⁶ The court reasoned that because the statute does not address voluntarily given information from an employee, "it perforce cannot be interpreted as extending the protections of 102(d)'s confidentiality restrictions."⁷⁷ The court explained that although the "co-worker consent policy" may have violated the ADA,⁷⁸ the voluntary disclosure and lack of

68. *Id.* at 1035.

69. *Id.* at 1036.

70. *Id.* at 1046.

71. *Id.* (quoting 42 U.S.C. § 12112(d) (2006)) (internal quotation marks omitted).

72. *Id.* (citations omitted).

73. *Id.* (citing 29 C.F.R. §§ 1630.14(c)(1), (d)(1) (2011)).

74. *Id.* at 1046–47.

75. *Id.* at 1047.

76. *Id.*

77. *Id.*

78. *Id.* at 1042.

adverse employment action in this particular case absolved CRE from liability.⁷⁹

V. ANALYSIS AND POLICY IMPLICATIONS

The Tenth Circuit's holding is contrary to congressional intent, agency interpretation, and public policy. Because Congress specified that the ADA would protect people who self-identified as disabled to prove ADA compliance, it seems that Congress might have wanted to protect all voluntary disclosures. The court rejected the easy-to-apply EEOC guidelines that do not draw distinctions between voluntary and involuntary disclosures; its holding will instead add to the current confusion about what disclosures are protected. Finally, its holding will discourage voluntary disclosure because those with medical problems will not share that information with their employer in the early stages before problems arise. This will lead to a less productive disabled workforce, which is against public policy.

A. *Contrary to Congressional Intent*

The Tenth Circuit's holding that voluntary disclosures are not protected under the ADA is contrary to Congress's intent. The legislative history indicates that Congress intended medical information to stay confidential; employers could not use the medical information to "prevent[] occupational advancement."⁸⁰ Legislators were also concerned that employees would be stigmatized if employers could ask about health status without a legitimate purpose.⁸¹ The ADA permits employers to ask employees to self-identify as a person with a disability for purposes of showing compliance with the ADA or other government programs, but any solicitation for these identifications must note that the disability information will be kept confidential.⁸² The requirement that employers keep this self-identifying information confidential seems to suggest that Congress might have wanted to protect all voluntary

79. *Id.* at 1039–40, n.12.

80. H.R. REP. NO. 101-485(II), at 75 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 357.

81. *Id.* at 75–76, *reprinted in* 1990 U.S.C.C.A.N. 303, 357–58. As an example, Congress noted that if a person started losing hair, it would be inappropriate for the employer to require the employee to be tested for cancer unless that test was "job-related." *Id.* at 75, *reprinted in* 1990 U.S.C.C.A.N. 303, 357. Since people suffering from cancer are viewed as disabled, this unnecessary inquiry would make the employee feel the "blatant and subtle stigma" from being labeled disabled. *Id.*, *reprinted in* 1990 U.S.C.C.A.N. 303, 358.

82. *Id.*

disclosures about disabilities. Although many companies have private policies that condemn disclosures of private employee information,⁸³ Congress still wrote confidentiality provisions into the ADA, suggesting that Congress believed federal protection of disability information was necessary because private employer actions were inadequate.

While there may be some argument that Congress did not intend to bind employers when employees voluntarily disclose medical information, certain employee actions already trigger ADA consequences without the employer taking the first step.⁸⁴ Congress hoped that employees and employers would engage in “an interactive process that requires participation by both sides” when working out reasonable accommodations for disabilities,⁸⁵ a process that necessarily demands trust on both sides. Thus, an interpretation of the ADA that gives employees reason to trust their employers when deciding whether to divulge confidential disability information prior to asking for a reasonable accommodation seems more in line with congressional intent.

B. Contrary to Agency Interpretation

By interpreting the ADA contrary to agency interpretation, the Tenth Circuit has chosen to reinforce a confusing outcome at the expense of a simple solution. Because the statute was silent in regards to medical information gained outside of employer-instigated inquiries, the EEOC interpreted the statute as protecting voluntary disclosures.⁸⁶ Protecting all disclosures of medical information provided an easier-to-apply standard that trying to decide when the disclosure was truly voluntary and thus covered under the ADA.

The Tenth Circuit reasoned that this interpretation was not correct because it was contrary to the plain language of the statute.⁸⁷ While the court acknowledged that the EEOC’s interpretation “constitute[s] a body of experience and informed judgment to which

83. *See, e.g.*, *Ross v. Advance Am. Cash Advance Ctrs., Inc.*, 605 F. Supp. 2d 1025, 1028 (E.D. Ark. 2009) (concluding that Ross’s supervisor violated company policy when he disclosed her condition).

84. *See C.R. England*, 644 F.3d at 1048–50 (analyzing whether Watson’s actions invoked the need for CRE to offer reasonable accommodations).

85. *Bartee v. Michelin N. Am.*, 374 F.3d 906, 913 (10th Cir. 2004) (quoting *Templeton v. Neodata Servs. Inc.*, 162 F.3d 617, 619 (10th Cir. 1998) (internal quotation marks omitted)).

86. EEOC, *supra* note 30.

87. *C.R. England*, 644 F.3d at 1047 n.16.

courts and litigants may properly resort for guidance,”⁸⁸ that was not enough to persuade the court to protect voluntary disclosures. Rather than discussing how the court’s interpretation created better outcomes than the EEOC’s, the Tenth Circuit only states that the agency interpretation is not controlling and appears to be internally inconsistent.⁸⁹

C. Contrary to Public Policy

The Tenth Circuit’s holding creates bad policy for employees and employers. Disabled employees, fearing the stigma of coworkers, will not openly discuss their medical conditions until their job performance starts to suffer. Its holding also insulates employers who enable discrimination and harassment through sharing information. Finally, only bad public policy would hold that an employee forfeits all interests in confidentiality by telling their supervisor about a potential problem.

Holding that an employer has no obligation under the ADA to keep voluntarily-disclosed information confidential discourages employees from seeking reasonable accommodations and might lead to decreased workplace effectiveness for those who need accommodations. Employees receive accommodations to help them perform their jobs. If employees know that their employer has no duty to keep their information private, those who fear stigma and harassment will not approach their supervisors. Thus, they will not get the accommodations they need to perform their jobs well. Rather than opening the discourse with their employer early, trusting in the ADA’s confidentiality protection, these employees will only ask for a reasonable accommodation as a last resort. Work performed without the reasonable accommodation will be less effective than work performed with the needed accommodation.

In addition, this holding insulates employers who distribute information that permits other employees to discriminate on the basis of disabilities. Sharing medical information allows other employees to discriminate based on information they would not have otherwise had. Discrimination often leads to harassment,⁹⁰

88. *Id.* (quoting *Smith v. Midland Brake, Inc.* 180 F.3d 1154, 1165 n.5 (10th Cir. 1999)).

89. *Id.*

90. *See, e.g., Shaver v. Independent Stave Co.*, 350 F.3d 716 (8th Cir. 2003) (where coworkers called Shaver “platehead” and treated him condescendingly after his supervisor disclosed Shaver’s medical information).

something that employers should be held liable for facilitating through information distribution. While the Tenth Circuit acknowledged that this situation might violate the ADA in certain circumstances,⁹¹ its holding clearly allows this very type of situation to occur.

It is also bad public policy to argue that employees forfeit all interests in confidentiality when they speak confidentially to supervisors about medical problems. Employees have the greatest claim to confidentiality when an employer solicits information, as seen in the number of cases protecting medical information even when the employee is not necessarily disabled.⁹² But employees do not authorize a supervisor to share that information purely because they proactively told their supervisors about potential problems before their employer asked. Regardless of whether the employer or the employee initiated the conversation regarding disabilities, the possible stigma connected to disability remains the same.

Since the Tenth Circuit's holding in *EEOC v. C.R. England* is contrary to congressional intent, agency interpretation, and good workplace public policy, future circuit courts examining whether the ADA protects voluntary disclosures should approach the issue differently. Future holdings that examine congressional intentions, and account for agency interpretations will result in better workplace public policy.

VI. POSSIBLE SOLUTIONS

Future courts examining whether the ADA protects medical information should choose solutions that protect employee medical information while still giving employers easy-to-apply standards with predictable results. One obvious solution is for employers to keep all medical information, especially about potential disabilities, confidential according to the guidelines set out by the EEOC. Practitioners have interpreted the provisions allowing disclosure to include the following recipients: 1) other supervisors, who may be told about the disability as needed to provide reasonable accommodations or allow medical leave; 2) emergency personnel, who may know for purposes of medical treatment; 3) government officials, who may obtain information to investigate compliance with the ADA and state workers' compensation laws; and 4) insurance

91. *C.R. England*, 644 F.3d at 1042.

92. *See* 29 C.F.R. § 1630 n.1 (2011) (citing cases that have held that plaintiffs have a cause of action under ADA if information from an acceptable inquiry is divulged).

companies, who may know for insurance purposes.⁹³ These narrow exceptions would allow the employee to control who would know about the disability and provide legal remedy for workplace harassment.⁹⁴

Another possible solution is to allow employers to divulge voluntarily disclosed medical information only if it is “job-related and consistent with business necessity.”⁹⁵ Thus, employers can tell fellow employees about the condition where there are safety concerns due to specific job conditions. Employer actions, such as the emergency protocol for seizures in *Lanxon v. Crete Carrier Corp.*,⁹⁶ could possibly fit the job-related requirement, helping more employers feel comfortable about working with those who have disabilities because they can inform other employees about a particular disability when it is a business necessity without violating the ADA. Having this requirement in place would discourage employer divulgements that serve no purpose except providing fodder for workplace gossip, such as the “ill-mannered” disclosure of an employee’s mental illness in *Ross v. Advance America Cash Advance Centers, Inc.*⁹⁷

Here, even if CRE had argued that the disclosure forms were related to a business necessity, that of keeping other drivers from contracting a contagious disease, this would be a flimsy excuse at best. The EEOC states that a “direct threat due to a medical condition must be based on *objective evidence* obtained, or reasonably available to the employer” and specifically addresses the objective threat posed by an employee with HIV.⁹⁸ *EEOC v. C.R. England* did not have any of those justifications for requiring HIV disclosure.⁹⁹

93. GOREN, *supra* note 48, at 41; *see also* Scott L. Fast, Comment, *Breach of Employee Confidentiality: Moving Toward a Common-Law Tort Remedy*, 142 U. PA. L. REV. 431, 433 (1993) (discussing the need for employees to feel that they have some control over the sensitive information held by their employers).

94. For examples of workplace harassment for disabilities that do not rise to the level of actionable “hostile environment,” *see* MARK C. WEBER, *DISABILITY HARASSMENT* 34 (2007). While many courts have recognized that there is a cause of action available under the ADA for a hostile work environment, few cases survive summary judgment. Brian L. Porto, Annotation, *Actions Under Americans with Disabilities Act (42 U.S.C. §§ 12101 et seq.), to Remedy Alleged Harassment or Hostile Work Environment*, 162 A.L.R. FED. 603 (2011).

95. 42 U.S.C. § 12112(d)(4)(A) (2006); 29 C.F.R. § 1630.14(c) (2011)

96. *See supra* text accompanying notes 37–38.

97. *See supra* text accompanying notes 43–46.

98. EEOC, *supra* note 30.

99. *See id.*

VII. CONCLUSION

In holding that an employee's voluntary disclosures about disabilities are not confidential, the Tenth Circuit discouraged voluntary discourse about disabilities, leading to a less-effective disabled workforce in general. Its holding betrays the intentions of Congress in passing the Americans with Disabilities Act, which envisioned open communication and interaction about disabilities between employers and employees. Its holding also creates bad incentives for employees, who might delay telling supervisors about disabilities for the fear of stigma brought about if an employer divulges the information. If, instead, the Tenth Circuit had held that medical information obtained from voluntary disclosures must be protected like medical information obtained through accepted methods, then employees would have more control over who receives their information. Alternatively, the Tenth Circuit could have held that voluntarily-disclosed medical information can be shared when the justification is "job-related and consistent with business necessity," allowing employers to share the information more readily, but still allowing some protection to the employee. Future courts who consider whether the ADA protects voluntary disclosures should consider congressional intent, the reasoning behind the EEOC guidelines, and the public policy that their decisions will encourage.

*Jessica Jones**

* J.D. candidate, April 2013, J. Reuben Clark Law School, Brigham Young University.