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# Employee Privacy Law and the Developmenting Law Relating to Employee Medical Information and "Other" Private Matters†

By David P. Twomey‡

## *I. Introduction*

Workplace privacy law is a prominent matter in society today, and it is extremely broad in scope. This paper sets forth the historical background of the common law right to privacy and presents some discussion of employees right to privacy in the public sector and in the private sector. In the context of these rights, the paper then focuses on the developing law of employee privacy relating to employer use, disclosure of medical information, and disclosure of other private matters, such as exposure to HIV or a homosexual lifestyle.

## *II. Historical Background on Right to Privacy*

In a law review article published in 1890, Samuel D. Warren and Louis D. Brandeis were the first legal scholars to advocate the existence of a right to privacy at common law.[1] Although

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[1] Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

Warren and Brandeis had no prior case law on which to support their proposition, they contended that a limited right to privacy was supported by a reasoned development of common law principles and society's changing circumstances, including the newly developed methods of invading private life through photography and newspapers.[2]

The first court to consider the question of invasion of privacy, however, refused to recognize the right. In *Roberson v. Rochester Folding Box Co.*,[3] a 1902 decision by New York State's highest court, the court refused to grant injunctive relief based on an asserted violation of a young woman's right to privacy. The defendant used a picture of Ms. Abigail Roberson on 25,000 posters advertising Franklin Mills' flour without her consent. The 4-3 court majority indicated that the right to privacy was non-existent at common law, since mention of it was "not to be found in Blackstone, Kent, or any of the great commentators on the law."[4] The majority also stated:

> While most persons would much prefer to have a good likeness of themselves appear in a responsible periodical or leading newspaper, rather than upon an advertising card or sheet, the doctrine which the courts are asked to create for this case would apply as well to the one publication as to the other, for the principle which a court of equity is asked to assert in support of a recovery in this action is that the right of privacy exists and is enforceable in equity.[5]

The dissenting opinion was less fearful of recognizing such a doctrine. It stated:

> Security of person is as necessary as the security of property; and for that complete personal security which will result in the peaceful and wholesome enjoyment of one's privileges as a member of society there should be afforded protection, not only against the scandalous portraiture and display of one's features and person, but against the display and use thereof for another's commercial purposes or gain. The proposition is to me, an inconceivable one that these defendants may, un-

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[2] *Id.* at 195.
[3] Roberson v. Rochester Folding Box Co., 64 N.E. 442 (1902).
[4] *Id.* at 443.
[5] *Id.*

> authorizedly, use the likeness of this young woman upon their advertisement as a method of attracting widespread public attention to their wares, and that she must submit to the mortifying notoriety without right to invoke the exercise of the preventive power of a court of equity.[6]

Outraged by this decision, and persuaded by the thought provoking law review article written over a decade before by Warren and Brandeis, the New York legislature passed a statutory right to privacy in 1903.[7]

The developing common law right of privacy goes beyond the mere unauthorized use of one's portrait. It extends to any unreasonable intrusion on one's private life. The Restatement of Torts provides that, "any person who unreasonably and seriously interferes with another's interest in not having his affairs known to others or his likeness exhibited to the public is liable to the other."[8] However, the common law right to privacy was never intended to interfere with the constitutional guarantees of freedom of speech and freedom of the press, including the public's right to know about matters of legitimate public interest and to be informed about the lives of public figures.[9] Although not specifically spelled out in the U.S. Constitution, the Supreme Court has recognized that there is a federal constitutional right to personal privacy. The Court found in *Griswold v. Connecticut*[10] that the right to privacy is implicit in the Bill of Rights which prohibits various types of unreasonable governmental intrusion upon personal freedom.

The Bill of Rights contained in the United States Constitution, which includes the First Amendment's protection of the freedom to associate and the Fourth Amendment's protection against unreasonable search and seizure, provides a philosophical and legal basis for individual privacy rights for federal employees. The Fourteenth Amendment applies this privacy protection to actions taken by state and local governments affecting their employees. The privacy rights of individuals working in the private sector are not directly controlled by the Bill of Rights,

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6 *Id.* at 450.
7 Civil Rights Law of New York, §§ 50, 51; N.Y. Laws 1903, ch.132, §§ 1, 2.
8 Restatement (First) of Torts § 867 (1991 App.).
9 Warren & Brandeis, *supra* note 1, at 214, 215.
10 *See* Griswold v. Connecticut, 381 U.S. 479 (1965).

however, because challenged employer actions are not governmental actions. State constitutions, statutes, case law, and collective bargaining agreements provide only limited privacy rights to employees in the private sector.[11]

## *III. Public Employees' Privacy Right*

Federal employees have certain protections against disclosures relating to them under the Privacy Act of 1974. Federal and state employees have privacy protection against unreasonable searches under the federal constitution.

### *A. The Privacy Act*

The Privacy Act of 1974 provides federal employees limited protection from the dissemination of personal records without the prior written consent of the employee.[12] Eleven exceptions to the Act exist, including use by officers or employees of an agency which maintains such records when they have a "need to know" the contents of the records in the performance of their agency duties.[13] The Privacy Act also bars disclosure of informa-

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[11] An example of the establishment of privacy rights by a state constitution is found in Article 1, Section 1 of the Constitution of the State of California which was amended in 1972 to provide as follows: "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness and privacy." (emphasis added). CAL. CONST. Art. I, § 1.

[12] The Privacy Act of 1974, 5 U.S.C. § 552a (1989). In American Fed'n of Gov't Employees v. Dep't of Hous. and Urban Dev. and Dep't of Defense, 13 IER Cases 1 (U.S.C.A. D.C. Cir. 1997), Department of Defense employees failed to prove that questions on a security clearance questionnaire asking employees to disclose information concerning arrests, financial difficulties, and mental health or drug and alcohol problems violated their constitutional right to privacy and the Privacy Act. The Court of Appeals held that the employees' privacy interests were diminished where the information was not publicly disseminated and measures existed to protect confidentiality. The court referred to Section 552 a(b) of the Privacy Act which states that no agency shall disclose any records without the prior written consent of the employee except under certain limited exceptions, none of which would permit public dissemination of the information gathered by DOD. *But see* Doe v. U.S., 132 F.3d 1430 (Fed. Cir. 1997), where a military officer was successful in a claim against the United States under the Tucker Act where the Air Force wrongfully obtained information used to discharge the officer in direct violation of a state court protective order restricting all access to the records in question.

[13] In Pippinger v. Rubin, 129 F.3d 519 (10th Cir. 1997) an Internal Revenue Service manager, John Pippinger, was suspended from service without pay because of a romantic relationship with a subordinate. Pippinger appealed the discipline, and some four IRS employees, including the district director and two labor relations specialists reviewed Pippinger's personnel records in considering Pippinger's appeal of the disci-

tion about federal employees unless it would be required under the Freedom of Information Act.[14]

In *U.S. Dep't of Defense v. FLRA*, the Federal Labor Relations Authority directed federal agencies to provide unions with home addresses of all agency employees eligible to be represented by unions, including non-union members.[15] The Department of Defense refused to comply because it believed that such an order violated the Privacy Act.[16] The Supreme Court, applying a balancing test between the privacy interests of employees and the relevant public interest, determined that the non-union members, who for whatever reason have chosen not to give unions their addresses, had a non-trivial privacy interest in non-disclosure which outweighed any public interest in disclosure.[17] The privacy interest of federal employees thus prevailed.

### *B. Property Searches in the Public Sector*

The Fourth Amendment protects federal employees against unreasonable searches and seizures, and the Fourteenth Amendment extends this protection to state employees. In *O'Connor v. Ortega*, the Supreme Court set forth the parameters for property searches in the public sector.[18] This case involved the search of Dr. Ortega's office, desk, and files in connection with possible impropriety in the management of a physician's residency program.[19] The Court majority determined that Dr. Ortega had a reasonable expectation of privacy in his office desk and file cabinets but the state had a public interest in the supervision, control, and efficient operation of the workplace.[20] The Court directed that searches conducted by the public employers be evaluated under a "reasonableness" standard which balances the employee's expectation of privacy against the employer's legiti-

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pline. Pippinger claimed in a federal court action that the district director violated the Privacy Act by disclosing Pippinger's records to the staff members. The trial court and the court of appeals rejected this argument holding that the staff members "needed to know" the information to recommend a disposition of Pippinger's appeal.

14 *See* Freedom of Information Act, 5 U.S.C. § 552 (1989).

15 U.S. Dep't of Defense v. FLRA, 114 S.Ct. 1006, 1009 (1994).

16 *Id.* at 1010.

17 *Id.* at 1015.

18 O'Connor v. Ortega, 480 U.S. 709 (1987).

19 *Id.* at 712-714.

20 *Id.* at 717.

mate business needs. [21] Public employer video camera surveillance monitoring hallways, lunchrooms or other public areas would not be a violation of employee privacy under *O'Connor* because there is no reasonable expectation of privacy in those areas. But, the monitoring of rest rooms and dressing rooms would appear to be a violation, absent clear and specific notice of the surveillance to employees.[22]

### *IV. Private Sector Employees' Privacy Rights*

Private sector employers are not subject to the same restrictions imposed by the federal constitution. Thus, private employers are generally less restricted in conducting searches on company property. However, some restrictions exist on employer searches in some states based on state constitutions, statutes, or the common law.

In *K-Mart Corp. v. Trotti*, a Texas court determined that a private sector employer may create a reasonable expectation of privacy in the workplace by providing an employee with a locker and allowing the employee to provide his or her own lock and key.[23] A search of lockers under such circumstances could be an invasion of privacy.[24] In addition, a search of lockers where the employer has a "respect of the privacy rights of employees" policy set forth in its Employees' Handbook could be an invasion of privacy.

An employer may minimize the risk of liability for invasion of privacy if it formulates and disseminates a written company policy to all employees stating that due to security problems, concern for a drug free environment, or other managerial concerns it is company policy that it may search all lockers, desks, purses, briefcases, and lunch boxes as it deems necessary at any time. To avoid an application of the *Trotti* principles, employers should provide all locks used on company property and prohibit the use of employee owned locks. Each employee should be required to acknowledge receipt of the company's search policy.

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[21] *Id.* at 725.

[22] *See* Thorton v. Univ. Aire Serv. Bd., 9 IER Cases 338 (Conn. 1994).

[23] K-Mart Corp. v. Trotti, 677 S.W.2d 632 (Tex. Civ. App. 1984).

[24] *Id.* at 638.

## V. *Confidentiality of Medical Records; Unreasonable Publicity of the Private Life of Another*

The right to privacy protects employees' interests by prohibiting disclosure of personal matters. Medical records, which may contain intimate facts of a personal nature such as alcohol abuse or a history of emotional problems, are considered to be well within the ambit of materials entitled to privacy protection. Unreasonable publicity of the private life of another, such as an employee's disclosure to an employer of his or her HIV exposure or homosexual lifestyle, may be actionable invasions of privacy. The applicable law and recent court decisions involving employee privacy claims of this nature are now considered.

### A. *Confidentiality of Medical Record*

The Americans with Disabilities Act (ADA), which applies to all employers with fifteen or more employees, requires that any information relating to the medical condition or history of a job applicant or employee be collected and maintained by employers on separate forms and kept in medical files separate and distinct from general personnel files.[25] Under the ADA, disclosure of medical records or information is allowed only in three situations: (1) when supervisors need to be informed regarding necessary restrictions on the duties of an employee, or necessary accommodations; (2) when the employer's medical staff needs to be informed about a disability that might require emergency treatment; and (3) when government officials investigating compliance with the ADA request access to such records or information.[26]

In the *U. S. v. Westinghouse Electric Corp.*, the Third Circuit Court of Appeals determined that the constitutional right to privacy extends to employee medical records because the records may contain intimate personal facts.[27] However, the court determined that the right to privacy is limited and that intrusion into privacy concerning medical records is permissible, if the public

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25 Americans with Disabilities Act (ADA) of 1990, 42 U.S.C. § 12112(c)(3)(B) (Supp. 11, 1990).

26 *See id.* at § 12112(c)(3)(B)(i)(ii)(iii).

27 U.S. v. Westinghouse Electric Corp., 638 F.2d 570, 572 (3d Cir. 1980). *See also* Doe v. Town of Plymouth, 825 F. Supp. 1102, 1107 (D. Mass. 1995); Doe v. City of Cleveland, 788 F. Supp. 979, 985 (N.D. Ohio 1991).

interest in disclosure outweighs the privacy interest at risk.[28] Thus, the court allowed the National Institute for Occupational Safety and Health (NIOSH) access to certain employee medical records. In *Doe v. Southeastern Pennsylvania Transp. Auth.* (SEPTA) the Third Circuit expanded the scope of privacy protection under *Westinghouse* beyond medical records to medical prescription records.[29] However, the court overturned a district court judgment of $125,000 in damages for invasion of Doe's privacy by his employer's chief administrative officer.[30] The officer had no need to know the names of employees on a report from its drug supply contractor, but nevertheless highlighted Doe's name when inquiring from staff physicians, one of whom was Doe's supervisor, concerning the auditing of a print-out on employees purchasing HIV related medications.[31] Doe's privacy interest and the harm to Doe was balanced against the public interest in disclosure, so that the public employer could monitor drug costs under its health insurance plan. This minimal intrusion, although an infringement on privacy, was insufficient to constitute a constitutional violation.[32] Circuit Judge Rosen, who wrote the majority opinion, determined that Doe suffered no actual harm.[33] It is strongly urged that employers should not dis-

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28 *Westinghouse Electric Corp.*, 638 F.2d at 577.

29 Doe v. Southeastern Pennsylvania Transp. Auth., 72 F.3d 1133 (3d Cir. 1995).

30 *Id.*

31 *Id.*

32 *Id.* at 1143.

33 *See Doe*, 72 F.3d at 1140-1141. John Doe was employed by the Southeastern Pennsylvania Transportation Authority (SEPTA), a state operated transportation authority, as the Manager of the Employee Assistance Program. Dr. Richard Press was the head of the Medical Department and was Doe's supervisor. Judith Pierce was SEPTA's Chief Administrative Officer, Jacob Aufschauer served as Director of Benefits and Dr. Louis Van de Beek was an employee in the Medical Department. Doe was HIV-positive, and before using the SEPTA prescription plan to fill a prescription for AZT, an antiviral drug used exclusively to treat HIV illness, he was assured by an informed SEPTA official that names would not be associated with the drugs employees were taking. Judith Pierce did not have a need to know the names on the report of the railroad's drug supply contractor, Rite Aid, but Pierce continued to look at names, and as a result Doe's diagnosis was disclosed to her. Dr. Van de Beek told Doe the he had received a call from Judith Pierce who appeared to be reading from a list of Doe's medications. Dr. Van de Beek also told Doe that he had concluded that as a result of the conversation, Pierce now knew that Doe was HIV-positive. Dr. Press told Doe that Pierce had asked him to audit a list of prescriptions which contained employees' names and which had HIV medications, including Doe's highlighted. Doe sued SEPTA and Pierce under 42 U.S.C. § 1983 for deprivation of his constitutional right to privacy.

Judge Greenberg wrote a concurring opinion, agreeing that the public interest outweighed Doe's privacy interest, but recognizing contrary to Judge Rosenn, that the

close a list containing the specific medications being used by named employees because such a list may reveal the nature of employee illnesses.[34]

### B. *California's Confidentiality of Medical Information Act (CMIA) and Constitutional Privacy Law*

Some laws may require employers and health care providers to establish and maintain appropriate procedures to ensure that employee medical information remains confidential. Such laws may prohibit disclosure of medical information without a signed authorization from the employee. Not only must the employer protect the confidentiality of employees' medical records in its possession, but providers of health care services paid by the employer to make medical evaluations of employees cannot divulge details of employees' personal lives to the employer without the employees' written consent. The providers can with the functional limits of patients. The California Confidentiality of Medical Information Act (CMIA) is the prototypical law protecting employee privacy concerning medical information.[35] The Act

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jury's verdict for Doe, might well reflect its agreement with Doe's assertions the Pierce's motivations, as well as her conduct were improper. *Id.* at 1144. Judge Lewis, in his dissent, pointed out that the names were not necessary to the particular review and the harm to Doe outweighed the employer's interests. *Id.* at 1146, 1147.

As to the harm done to Doe please consider the following excerpts from the district court's opinion, 10 IER Cases 1532-1533 (1995).

Doe also testified that he was angry and frightened of what Pierce might do with the information. The jury could have inferred that learning that Pierce knew of his illness was particularly upsetting to Doe because he had consciously decided that he did not want her to know. He felt that Pierce was capricious and demonstrated a "marked lability in her emotions." Doe testified that he perceived Pierce's attitude and behavior toward him to change after the incident, albeit subtly. Doe is a trained psychologist. When he recognized himself to be suffering from depression shortly after the incident, he asked his physician to prescribe an anti-depressant medication, and the physician did so . . .

Specifically, Doe testified that he was concerned that a proposed expansion of his job duties would not take place, which it did not. He also testified that he was afraid he might be forced to stop seeing patients because of the hysteria regarding HIV-positive health care workers. Finally, he was afraid that he would be fired.

"Doe explained that the term "labile" or "lability" meant, "in layman's terms, (that) she would be calm one moment and screaming at you the next screaming obscenities."

"Doe testified that Pierce canceled several scheduled meetings with him, three one day, and that although she promised to visit him in the hospital while he was recovering from heart surgery, she did not."

[34] For example, certain drugs, like AZT, are used exclusively to treat HIV infections.

[35] CAL. CIV. CODE §§ 56 (West 1981).

prevents providers of health care from disclosing medical information without written authorization from the patient unless the information falls under one of several limited exceptions.[36] The "authorization" requirements are detailed and demanding, reflecting the Legislature's interest in assuring that medical information may be disclosed only for a narrowly defined purpose, for an identified party, and for a limited period of time.[37] For an authorization to be valid, it must be handwritten or typed, in language clearly separate from any other language on the same page, and properly signed and dated by the patient or one of the permissible substitutes enumerated under the Act.[38] The signature must serve no other purpose than to execute the authorization.[39]

Article I, Section 1 of the California Constitution contains a privacy clause and creates a right of action for invasion of privacy against private as well as government entities.[40] In *Pettus v. Cole*, the CMIA and the state constitutional privacy theory were considered by the court of appeals in the following factual context.[41] Louis Pettus was employed by the DuPont Company for some twenty-two years, when he sought time off from work under the company's short term disability leave policy due to work-related stress.[42] As required by company policy, in order to qualify for the leave, Pettus had to submit to an examination by a DuPont-selected doctor to confirm the necessity for the leave.[43] This company selected doctor recommended that Pettus be evaluated by a psychiatrist Dr. Cole, and Dr. Cole recommended that Pet-

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36 CAL. CIV. CODE § 56.10 (a) (West 1981), provides that: "No provider of health care shall disclose medical information regarding a patient of the provider without first obtaining an authorization, except as provided in subdivision (b) or (c)."

37 CAL. CIV. CODE § 56.11 (West 1981).

38 *Id.*

39 CAL. CIV. CODE § 56.11(a)(c) (West 1981).

40 Hill v. NCAA, 26 Cal Rptr. 2d 834, 842 (1994). Article 1, section I of the California Constitution provides: "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and *pursuing and obtaining* safety, happiness, and privacy." (Italics added.) *See also* Feminist Women's Health v. Superior Court, 61 Cal. Rptr. 2d 187 (Cal. App. 3 Dist. 1997) where the court of appeal held that the center's requirement that health workers perform cervical self-examinations in front of other females was a reasonable condition of employment and did not violate the state constitutional right to privacy.

41 Pettus v. Cole, 57 Cal. Rptr. 2d 46 (Cal. App. 1 Dist. 1996).

42 *Id.* at 54, 55.

43 *Id.* at 55.

tus see a chemical dependency specialist Dr. Unger.[44] Drs. Cole and Unger submitted reports to DuPont stating Pettus's stress condition might be caused by misuse of alcohol.[45] Dr. Cole telephoned Pettus's supervisor after his evaluation of Pettus, and Dr. Unger prepared a written report sent to DuPont's employee relations manager containing information about Pettus's family and work histories, his drinking habits, and his emotional condition.[46] When Pettus refused to enter a thirty day inpatient alcohol rehabilitation program, DuPont terminated him.[47] Thereafter, Pettus contacted the employer to say he had changed his mind and would now enter the program, but was informed by the employer that it was too late.[48]

The court of appeals held that Drs. Cole and Unger had violated the statutory duty of confidentiality codified in the CMLA by disclosing details of Pettus's personal life for scrutiny by his employer, without written patient authorization.[49] The physicians in this case could disclose to the employer the functional limits of the patient that may entitle the patient to leave from work for medical reasons. The court also determined that Pettus made a prima facie showing of invasion of his state constitutional right to privacy against the two doctors when they disclosed his medical history and psychological profile to the employer.[50] However, the issue to be resolved on remand was whether Pettus waived his constitutional claim against the doctors by voluntarily disclosing much of the sensitive personal information to his supervisors at DuPont.[51]

### *C. Other Actionable Employer Disclosures*

In addition to medical records, employers and non-medical agents of employers may be informed about medical conditions or private lifestyle matters which should not be unreasonably publicized by the employers. Invasion of privacy by the unreasonable publicity given to the private life of another is a recog-

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44 *Id.*
45 *Pettus*, 57 Cal. Rptr. 2d at 55.
46 *Id.* at 61.
47 *Id.*
48 *Id.*
49 *Pettus*, 57 Cal. Rptr. 2d at 70.
50 *Id.*
51 *Id.*

nized tort in some thirty jurisdictions that have considered this question.[52] The Restatement (Second) of Torts § 652 D provides that: "One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of 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."[53] Critical to this particular claim of invasion of privacy is that disclosure concerns the "private" life of the plaintiff and would be highly offensive to a reasonable person. Thus, disclosure and publicity by an employer of the private facts of a private person's exposure to the HIV virus or his homosexual lifestyle may be an actionable tort.

In *Borquez v. Ozer P.C.*, Robert Borquez was hired by the Ozer law firm as an associate in May 1990, and did not disclose his sexual orientation to Ozer or to anyone else at the firm.[54] Also, because he was concerned about Ozer's acknowledged dislike of homosexuals, he kept his personal life confidential.[55] Borquez was well-respected, liked, and performed capably as an attorney with the firm. He was awarded three merit raises in his salary, including one just eleven days before he was fired. On February 19, 1992, Borquez learned for the first time that his companion had been diagnosed with AIDS. Upset by the news and having been advised by his physician that he should be tested immediately for AIDS, Borquez concluded that he could neither represent a client effectively in a deposition that afternoon, nor could he participate in an arbitration hearing the following day.[56] In an effort to locate another attorney to handle the deposition and hearing, Borquez discussed the matter with Ozer and disclosed facts to him about his personal life including his sexual orientation, his homosexual relationship, and his need for immediate AIDS testing.[57] Borquez asked Ozer to keep this information confidential, but Ozer made no reply. However, Ozer agreed to handle the deposition and hearing. Shortly thereafter, Ozer told his wife, who is another shareholder in the

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52 Borquez v. Ozer P.C., 923 P.2d 166 (Colo. App. 1995).
53 *Pettus*, 57 Cal. Rptr. 2d at 172.
54 *Borquez*, 923 P.2d at 169, 170.
55 *Id.* at 170.
56 *Id.*
57 *Id.*

firm, as well as others of Borquez's disclosures. Within two days, all employees and shareholders in the firm had learned of Borquez's personal life and his need for AIDS testing.[58] Two days later, Ozer met with Borquez and told him that he had not agreed to keep the disclosures confidential and also made derogatory comments about people with AIDS.[59] On February 26, Ozer fired Borquez. The reason for the firing was disputed, with Ozer maintaining that it had been for economic reasons stemming from a pending bankruptcy which had been filed by the Ozer law firm in August 1991.[60] The Colorado Court of Appeals affirmed a verdict in favor of Borquez, determining that the information regarding Borquez's sexual preference and, in particular, his exposure to HIV clearly constituted a "private" matter as defined by the Restatement.[61] The court stated that: "as both courts and commentators have noted, the disclosure of this information would be highly objectionable to a reasonable person because a strong stigma still attaches to both homosexuality and AIDS. Moreover, the information was not a matter of legitimate concern for the public."[62] Although the shareholders of the law firm had a qualified privilege to discuss information regarding Borquez's sexual orientation among themselves, particularly in light of their asserted recent decision to discharge him, the court determined that there was evidence presented to the jury that defendants abused that privilege by communicating the information to others at the firm who did not have a legitimate reason to learn this information.[63] Accordingly, the jury was properly instructed regarding defendant's affirmative defense of privilege and based upon conflicting evidence, rejected it.

## *VI. Conclusion*

Employers must be alert to protect the privacy interests of their employees at all times. As seen in *Southeastern Pennsylvania Transp. Auth.*, a list of names with specific medications being used by named employees can reveal the nature of an em-

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58 *Borquez*, 923 P.2d at 170.
59 *Id.*
60 *Id.*
61 *Id.*
62 *Borquez*, 923 P.2d at 173.
63 *Id.* at 175, 176.

ployee's illness to those who do not need to know this private information. No manager should know this information, even the chief administrative officer, if it is in regard to a necessary accommodation or otherwise required by the ADA.

Employers and providers of medical information must be knowledgeable about federal and state statutes that restrict medical information disclosures such as the Americans with Disabilities Act and the California Confidentiality of Medical Information Act. Employers should monitor developing case law and follow EEOC guidance on what is meant by the terms "treated as a confidential medical record."[64]

Cognizant of Warren and Brandeis' structural contentions in their law review article that the right to privacy is supported by a reasoned development of common law principles and society's changing circumstances, employers today must do their utmost to maintain the privacy of matters that come to their attention as employers, and not unreasonably publicize the private life of one of their employees. Indeed, the hostility and indifference interwoven in the facts of *Borquez v. Ozer P.C.* is indicative of poor management as well as being an actionable tort.

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[64] Americans with Disabilities Act of 1990, 42 U.S.C. § 12112 (c)(3)(B), (Supp.11, 1990).