Should Our Employers Be Privy to Our Medical/Genetic Conditions?

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Overview

- The Issue
  - Should employees have to disclose their private medical information to employers?
  - Should employers be able to screen for genetic defects?

- Our Approach
  - To supply a range of views and case studies (actual and hypothetical)
  - To present the issue in a graded format, i.e., from arguing for total non-disclosure to total disclosure
Why Employees Should Not Have to Disclose Medical/Genetic Conditions

- Invasion of privacy
- Discrimination in hiring (due to fear, money, or prejudice)
- Possible loss of employment and, therefore, medical insurance
- Differential treatment by coworkers
- Some medical problems are race, class, and gender related (e.g., sickle cell anemia)
- Not all medical problems interfere with job performance
- We cannot always change (fix or improve) our medical problems, and can never change our genetic composition
Hypothetical case: a college professor is being treated for depression

Relevant questions and issues

- Does employer knowledge of the professor’s depression help the students, employer, or professor himself/herself?
- Women suffer from depression three times as often as men [1].
- Many leaders, teachers, and academics have suffered from depression [2].
  - Winston Churchill, Michel Foucault, Buzz Aldron, Steven Hawking, Abraham Lincoln, Bertrand Russell, and others

Case study: Typhoid Mary works in a cafeteria

Background: An Irish immigrant in the early 1900s who was a carrier of typhoid in NYC, but in denial [3]

Relevant Questions and Issues

Is this woman sane?

One person in millions is an exception, not the rule.

Total Non-Disclosure: What If...

- Hypothetical Case: Used-car salesman has diabetes

- Relevant Questions and Issues
  - Does the salesman’s condition interfere with his job performance?
  - Is selling cars a profession in which his condition puts his clients and coworkers in danger?
Hypothetical Case: A physician is HIV-positive

Consider the consequences of disclosure

- Possible loss of patients, employment, health insurance, and respect
- Invasion of privacy
- Constitutes a slippery slope towards our medical histories and genetic composition dictating what we can and cannot do with our lives
HIPAA (1996)

- Provision of current US law that regulates information healthcare providers are allowed to disclose
- Privacy Rule: individual confidentiality
  - Patient consent to view record
  - Limiting access so information does not fall into the wrong hands
- However, medical testing in the workplace is commonplace
2004 AMA Survey of members and customers

![Bar chart showing the percentage of U.S. firms conducting various types of medical testing.](image)
Questions Remain

- When is workplace testing justified and when is it an invasion of privacy?
- Where do we draw the line between tests for work-related diseases and extraneous testing?
- Do employers have the right to refuse employment to those who do not meet their health expectations?
- Slippery-slope towards discrimination?
Example #1: Burlington Northern Case (2000)

- Genetic Testing w/o Consent or Knowledge
  - The test was for predisposition towards Carpal Tunnel Syndrome
  - “DNA Discrimination”
- Workers, their unions, and EEOC filed suit
- Points of interest:
  - Nondisclosure nature of test
  - Inappropriate use of employee medical information by employer—conflict of interests
Example #2: Leonel v. AA (2005)

- American Airlines was sued after conducting comprehensive screening of applicants for flight attendant positions, including test revealing HIV-positive status.

- Points of interest:
  - Relationship between HIV status and ability to perform tasks on the job—why test in the first place?
  - Discriminatory effect of awareness of HIV status
  - Nondisclosure of nature of tests
Example #3: Healthcare Occupations

- Hippocratic Oath: first do no harm
- Should physicians be allowed to practice if they have a potentially deadly disease (HIV, hepatitis, etc.) that could be transferred onto a patient?
- Is the combination of deadly transferable disease and profession, in this case, an accident waiting to happen?
- Charging physician with crime he or she has not yet committed?
- Taking the necessary precautions to ensure the health of the patient?
The Employers’ Options

- Embrace genetic testing
  - Becoming more precise and affordable
  - DM/CM Programs become more effective
  - Inundation from litigation

- Neglect genetic testing
  - Increased healthcare costs
  - Regulatory violations
  - Liability
Pro-Privacy, Pro-Employee... Anti-Healthcare?

Change in Premium Costs and Earnings, 2000 to 2005

- Average Growth in Family Premium: $4,442
- Average Growth in Worker Contribution to Family Premium: $1,094
- Average Growth in Earnings for Non-supervisory Workers: $4,389

Saving Safety/ Saving Money or Saving Privacy/ Risking Money

- Employee negligence claims could lead to tort liability
- Worker’s comp programs might not cover genetic predispositions
- OSHA regulations

**Bottom Line**

- Minimize Tort Liability → Maximal Exposure to Discrimination/Privacy Suits
- Minimal Risk of Discrimination/Privacy Suits → Maximal Risk of Tort Liability

Source: Duke Law & Technology Review iBRIEF
The Law Today

- Civil Rights Act of 1964, Title VII
- Clinton’s Executive Order 13145
- Americans with Disabilities Act of 1990
- Health Insurance Portability and Accountability Act of 1996 (HIPAA)
- HIPAA National Standards to Protect Patients’ Personal Medical Records 2002

Source: Oak Ridge National Laboratory, “Genetic Privacy and Legislation”
In the Congressional Trenches

- Genetic Privacy and Nondiscrimination Act of 2005
  - Pertaining to employer use of genetic information
  - Pertaining to employer acquisition of genetic information
- Equal Rights and Equal Dignity for Americans Act of 2003
  - Also pertains to employer use of genetic information

Source: The Library of Congress, THOMAS
Adjudication of Testing/Privacy Cases

- Burlington v. EEOC
- Leonel v. American Airlines
  - Hiring practices in question
  - The Ruling
- Norman-Bloodsaw v. Berkeley Laboratory
  - Race and Gender Discrimination
  - The Ruling
Medical Mishaps

- French woman has surgery, gets HIV
- Floridian dentist infects six patients with HIV
- French orthopedic surgeon accidentally got and transmitted HIV

- Is there any way that more disclosure can help?
Medical History/ Propensity
Proactive Employer

- **Reduce Occupational Disease**
  - Awareness → Prophylactic care
- **Avoid intractable hazard exposure**
  - Sensitive to employee condition
- **Mitigate disease health costs**
  - Physical, emotional, financial
Mitigating Employee Injury

- Employers provide a safe workplace
  - Good business
- OSHA – Hazardous Materials
  - Protect Hypersensitive Employees
- Employee makes informed decision
  - Better manage health care
  - Reduce health costs
  - Reproductive/adoption decisions
  - Awareness → Relief/probability adjustment
  - Extended family implications
Employer Issues

- Litigation of hazardous worksites
- Disease management programs
  - Manage developing conditions
- Global competition → Productivity
  - Absenteeism
  - Employee turnover
  - Workers comp claims
Health Promotion & Disease Management

Source: Hewitt’s Survey, “Health Promotion/Managed Health Provided by Major U.S. Employers in 2002-2003”
Society Benefits

- Reduced health care costs
  - Social Security Payments
  - Medicare, Medicaid, Public Assistance
- Fully employable status
- Overall Benefits: Win – Win
  - Employees, Employers, Society
Employee/ Employer Rights

- Employee has choice of employers

- Employers want:
  - Healthy, productive workforce
  - Policies protect interests, investments
  - Aware of sensitivity employees

- Failure → Negligence
Summary

- Non-Disclosure
  - Invasion of privacy
  - Leads to hiring discrimination
  - Differential Treatment:
    - Coworkers, Clients

- Disclosure
  - Safer workplaces
  - Increased productivity
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