How Much is Too Much?: Doctors' Notes and Return-to-Work Policies under the Americans with Disabilities Act and the Rehabilitation Act

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An employer's written policies are a prime example of how attention to even minute linguistic choices is of the utmost importance. When properly drafted, these policies achieve, among other significant purposes, a time-, money- and (let us be frank) face-saving goal: insulation from liability. At worst, written policies have precisely the opposite effect – they become detailed records of an employer's violation and function as unintended printed proof of liability.

For this reason, it is important to understand what employers may and may not include in these written policies. The plethora of employer blogs exploring recent case law regarding the safety of employer policies underscores this importance.[2] Employer return-to-work policies are a revealing subset of these written policies. An analysis of case law addressing return-to-work policies affirms the effect that a single term can have on employer liability and the difficulty that courts encounter when interpreting policies that straddle this line between compliance with and violation of the law.[3]

The circuits are divided over the legality of popular return-to-work policies which require employees to submit a doctors' note detailing the nature of their illnesses to their immediate

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[2] *See generally* Ryan E. Bonina, *City of Columbus May Require Employees Returning from Sick Leave to Provide Doctor's Note*, EMPLOYER LAW REPORT (Sept. 5, 2011, 4:07 PM), http://www.employerlawreport.com/2011/02/articles/leave-administration/city-of-columbus-may-require-employees-returning-from-sick-leave-to-provide-doctors-note/#axzz1afzYkZCe; Michael Soltis, COMMON SENSE AND THE ADA, DISABILITY, LEAVE & HEALTH MANAGEMENT BLOG (Sept. 6, 2011, 10:46 AM), http://www.disabilityleavelaw.com/articles/ada/ ; *City may Require Doctor's Note From Workers Returning from Sick Leave, Federal Court Rules*," JACKSON LEWIS, (Sept. 5, 2011 4:13 PM), http://www.jacksonlewis.com/resources.php?NewsID=3562.

[3] *See supra* Part III.

supervisors before they are permitted to return to work.[4] The crux of this dispute focuses on whether requiring doctors' notes with specific details about an employee's illness violates the Americans with Disabilities Act (ADA),[5] which requires that all employers' medical inquiries must be driven by business necessity and be job-related.[6] This issue is further complicated by the relationship between the Americans with Disabilities Act and the Rehabilitation Act.[7]

In *Lee v. City of Columbus, Ohio,*[8] the Sixth Circuit declared valid a policy which required returning employees to give their immediate supervisor a physician's note stating the "nature of the illness" and the employee's capacity to return to work under the Rehabilitation Act.[9] Some employer blogs call *Lee* an "employer-friend" decision.[10] Nine years ago, however, the Second Circuit decided in *Conroy v. New York State Dep't of Correctional Services*[11] that a directive requiring returning employees to supply a doctor's note with a general diagnosis and a statement about the employee's capacity to return to work could tend to reveal a disability and violated the Americans with Disabilities Act.[12] Furthermore, the Supreme Court's recent holding in *Staub v. Proctor Hospital,*[13] addressing the issue of cat's paw liability for employers, further complicates the question of whether employers may lawfully demand that a doctors' note of this kind be delivered to an employee's immediate supervisor.[14]

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[4] *See generally* Conroy v. N.Y. State Dep't of Corr. Servs., 333 F.3d 88 (2d Cir. 2003); Lee v. City of Columbus (*Lee I*), 644 F.Supp.2d 1000 (S.D. Ohio 2009); Lee v. City of Columbus (*Lee II*), 636 F.3d 245 (6th Cir. 2011).
[5] 42 U.S.C. § 12112 (1990).
[6] 42 U.S.C. § 12112(d)(3)(B)(i); *see also* 42 U.S.C. § 12112(d)(4)(C).
[7] 29 U.S.C. § 791 (1973).
[8] 636 F.3d 245 (6th Cir. 2011).
[9] *Lee II*, 636 F.3d 245, 247 (6th Cir. 2011).
[10] *See generally* Ryan E. Bonina, *City of Columbus May Require Employees Returning from Sick Leave to Provide Doctor's Note*, EMPLOYER LAW REPORT (Sept. 5, 2011, 4:07 PM), http://www.employerlawreport.com/2011/02/articles/leave-administration/city-of-columbus-may-require-employees-returning-from-sick-leave-to-provide-doctors-note/#axzz1afzYkZCe.
[11] *Conroy*, 333 F.3d 88 (2d Cir. 2003).
[12] *Id.* at 95--96.
[13] Staub v. Proctor Hosp., 131 S.Ct. 1186 (2011).
[14] *See Id.* at 1189.

With an analytical framework perforated with such thinly drawn distinctions, should employers really find comfort in the Sixth Circuit's holding in *Lee II*?[15] This Comment addresses what employers are best advised to do regarding the requirement of doctors' notes and return-to-work policies.[16]

Mindful of how important it is for employers to understand what practices are and are not legal, this Comment identifies a two-pronged strategy for how return-to-work policies may remain safely within the requirements of the ADA and Rehabilitation Act.[17] Policies that look to an employee's capacity to return to work rather than inquiring into the nature or general diagnosis of an employee's illness avoid the confusion of the circuit split, while still achieving the main purpose of these medical notes: to unveil whether or not an employee is medically ready to return to the demands of his or her position. Furthermore, providing these notes to Human Resources instead of the employee's immediate supervisor bypasses any complications the Supreme Court's holding in *Staub v. Proctor Hospital*[18] may present while still accomplishing the policy's overall function.

Part II of this Comment presents an overview of the divided holdings of the Second and Sixth Circuits, in addition to a discussion of the relationship between the Americans with Disabilities Act and the Rehabilitation Act. Part III analyzes the two-tiered failings of the Sixth Circuit in *Lee v. City of Columbus*[19]: that the court assumes distinctions without ever establishing their validity, and the fact that this distinction is likely non-existent in practice. Part III then contrasts these failings with the Second Circuit's findings in *Conroy v. New York State Dep't of Correctional Services*.[20] Part III also reveals how *Lee*'s distinction between claims under the Americans with Disabilities Act and the Rehabilitation Act weakens when one explores the

[15] 636 F.3d 245 (6th Cir. 2011).
[16] *See* Parts II, III and IV.
[17] *See* Part V.
[18] 131 S.Ct. 1186 (2011).
[19] *Lee II,* 636 F.3d 245 (6th Cir. 2011).
[20] *Conroy*, 333 F.3d 88 (2d Cir. 2003).

definitions of variant terms of art necessary to its findings.[21] Further, Part III notes how the Sixth Circuit's reliance on guidance and rulings from the Equal Employment Opportunity Commission (EEOC) does not yield particularly persuasive results. Part III then contemplates how the Supreme Court's recent holding in *Staub v. Proctor Hospital*[22] calls into question the permissibility of submitting doctors' notes to immediate supervisors.

Finally, Part IV presents a simple, workable solution for employers to adopt as a means of avoiding disability discrimination liability. Included is an example of the proposed directive's follow-up option. Part IV of this Comment also addresses possible criticisms of the proposed return-to-work policy and rebuts these concerns individually.

Part II: Applicable Statutory Law, Court Decisions and Scholarly Commentary

A. The Relationship between the Americans with Disabilities Act, the Rehabilitation Act, and Return-to-Work Policies

The Americans with Disabilities Act (ADA) is a civil rights law prohibiting discrimination based on disability.[23] It seeks to prevent Americans living with disabilities from being exposed to stigma or unfair stereotyping.[24] Specifically, the ADA prohibits employer discrimination against "qualified individual[s] with a disability because of the disability of such individual[s] in regard to job application procedures, the hiring, advancement, or discharge of employees."[25] With regard to medical inquiries, the ADA allows employers to "make inquiries into the ability of an employee to perform job-related functions."[26] Any information regarding an employee's medical condition must be "collected and maintained on separate forms and in separate medical files" by

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[21] *See generally Lee II*, 636 F.3d 245 (6th Cir. 2011).
[22] 131 S.Ct. 1186 (2011).
[23] 42 U.S.C. § 12112(d)(4)(B) (1990).
[24] S. REP. NO. 101-116, at 20 (1989).
[25] 42 U.S.C. §12112(a).
[26] *Id.*

the employer, and "treated as a confidential medical record, except that… supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and the necessary accommodations."[27] The ADA, however, defines acceptable medical inquiries differently in the context of pre-employment.[28] Employers may require medical exams and even pose disability-related inquiries after providing a conditional job offer to an applicant.[29] While broader inquiries regarding health are permissible regarding job applicants under the ADA,[30] employment decisions made in response to these inquiries must still reflect business judgment and necessity and be directly related to an applicant's ability to perform the specific position in question.[31]

The ADA Amendments Act of 2008 (ADAAA),[32] Congress' response to the Supreme Court's restrictive interpretations of the term "disability,"[33] amended the ADA. Most notably, the ADAAA broadened the ADA's disability coverage, stating that "the definition of disability . . . shall be construed in favor of broad coverage of individuals under this [Act], to the maximum extent permitted by the terms of this [Act]."[34] The ADAAA also specified that the determination of whether an impairment substantially limits a major life activity, and thereby qualifies as a disability, shall be made without consideration of such factors as "medication, medical supplies,

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[27] 42 U.S.C. § 12112(d)(3)(B)(i); *see also* 42 U.S.C. § 12112(d)(4)(C).
[28] 42 U.S.C. § 12112 (1990).
[29] 42 U.S.C.A. §§ 12101-17, 12201-3 (Supp. V 1994).
[30] Note that an employer's return to work policy that satisfies business necessity will pass muster under the ADA. *See generally Indergard v. Georgia–Pacific Corporation,* 582 F.3d 1049 (9th Cir.2009) (a policy requiring employees returning from medical leave to submit to a physical capacity evaluation prior to resuming work was held to violate 42 U.S.C.A. § 12112(d)(4)(A) because employers are to inquire only into the employee's ability to perform job-related functions, unless the employer successfully makes a showing of business necessity. The court in *E.E.O.C. v. Dillard's, Inc.*, 08CV1780-IEG PCL, 2012 WL 440887 (S.D. Cal. Feb. 9, 2012) held this decision analogous to *Conroy.*); *see also* 49 Am. Jur. Trials 171 (Originally published in 1994) (discussing employers' job-related business necessity defense under the ADA). The business necessity defense may be in conversation with the issues addressed here, but emphasis of this defense is not necessary for the analyses of this Comment.
[31] *Id.*
[32] 42 U.S.C. § 12102 (Supp. 2009).
[33] *See* Sutton v. United Airlines, Inc., 527 U.S. 471 (1999).
[34] 42 U.S.C. § 12102(4)(A) (Supp. 2009). *See also* Amelia Michele Joiner, *The Adaaa: Opening the Floodgates*, 47 SAN DIEGO L. REV. 331, 369 (2010).

equipment, or appliances, low-vision devices (which do not include ordinary eyeglasses or contact lenses), prosthetics including limbs and devices, hearing aids and cochlear implants or other implantable hearing devices, mobility devices, or oxygen therapy equipment and supplies."[35]

The Rehabilitation Act prohibits discrimination on the basis of disability in programs conducted by federal agencies, in federal employment generally, and in programs receiving federal funding.[36] It states that "n[o] otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, . . . be subjected to discrimination under any program or activity receiving Federal financial assistance."[37] Note that the ADA prohibits discrimination on the basis of disability.[38] The Rehabilitation Act "prohibits discrimination solely on the basis of disability."[39] Some interpret this dissimilarity to mean that "the Rehabilitation Act permits an employer to make a decision because of the handicap if the handicap is not the sole reason for the decision."[40]

B. The Second Circuit Disapproves of Policies Requiring a "General Diagnosis"

In *Conroy v. New York State Dep't of Correctional Services,*[41] an employee of the New York State Department of Correctional Services (DOCS) sued her employer alleging that DOCS' medical return-to-work certification policy violated the ADA.[42] The certification in question "required employees to submit *general diagnoses* [. . .] following certain absences."[43] Specifically, the diagnosis had to be "sufficiently informative as to allow [the employer] to make a

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[35] 42 U.S.C. § 12102(4)(E)(i) (Supp. 2009).
[36] 29 U.S.C. § 794 (1973).
[37] 29 U.S.C. § 794(a) (1973).
[38] 42 U.S.C. §12112(a).
[39] 29 U.S.C. § 794(a) (1973).
[40] Hudson v. Potter, 1:10-CV-701, 2011 WL 6209988 (W.D. Mich. Dec. 14, 2011) (quoting Burns v. City of Columbus, Dep't of Public Safety, 91 F.3d 836, 841-42 (6th Cir. 1996)).
[41] 333 F.3d 88 (2d Cir. 2003).
[42] *Id.* at 91-92.
[43] *Id*. at 92 (emphasis added).

determination concerning the employee's entitlement to leave or to evaluate the need to have an employee examined by [the Employee Health Service] prior to returning to duty."[44] DOCS claimed that, since the certification merely required a "general" diagnosis, its inquiries did not aim to reveal whether an employee has a disability.[45] The plaintiff, on the other hand, argued that the policy did trigger the protections of the ADA because DOCS' inquiry tended to reveal her disability.[46]

Finding for the plaintiff, the Second Circuit concluded that "since general diagnoses may expose individuals with disabilities to employer stereotypes, the [p]olicy implicates the concerns expressed in [the] provisions of the ADA."[47] The court clarified that while the ADA does not prohibit all medical inquiries, it does prohibit those "as to whether such employee is an individual with a disability or as to the nature or severity of the disability."[48]

Furthermore, the Second Circuit stated that the Equal Employment Opportunity Commission's (EEOC) definition of "disability-related inquiry" also discredited DOCS' argument. The court cited *Questions and Answers: Enforcement Guidance on Disability–Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act (ADA)*[49] which states, "a 'disability-related inquiry' is a question that is likely to elicit information about a disability, such as asking 'employees about: whether they have or ever had a disability; the kinds of prescription medications they are taking; and, the results of any genetic tests they have had."[50] Furthermore, the EEOC clarifies which inquiries are allowable, including "asking employees about their general well-being; whether they can perform job functions; and about their current illegal use

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[44] *Id*.
[45] *Id.* at 95.
[46] *Id.*
[47] *Conroy*, 333 F.3d 88, 95-96 (2d Cir. 2003).
[48] *Id*. at 95.
[49] EEOC Notice 915.002 (Jul. 27, 2000).
[50] *Id.*

of drugs."[51] After determining that a general diagnosis may tend to reveal a disability, the court held that requiring a general diagnosis is sufficient to trigger the protections of the ADA.[52]

D. The Sixth Circuit Approves of Directives Demanding a "Nature" Description under the Rehabilitation Act

The district court of the Southern District of Ohio in *Lee I*[53] agreed with the Second Circuit's ruling in *Conroy*.[54] The City of Columbus' policy in question, Directive 3.07 § III(H)(1)(c), required "returning employees to submit a copy of their physician's note, stating the 'nature of the illness' and whether the employee is capable of returning to regular duty" to the employee's immediate supervisor.[55] The directive also required a doctor's note stating the "nature" of a family member's illness if the employee was absent from work to care for a relative.[56] The district court held that the directive wrongfully provided supervisors with confidential medical information.[57] There was no need for direct supervisors to have such information since the city's human resources department could be used to "ensure confidentiality and create a barrier between employees, supervisors, and sensitive medical information."[58]

While concerned with the improper possession of medical information by direct supervisors, the thrust of the district court's decision was that directives of this kind are over-intrusive under the ADA.[59] The district court deemed the city's "argument that it is not in control of the extent or accuracy of the diagnoses the treating physician chooses to impart on the return to

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[51] *Id.*
[52] *Id*. at 92. *See also* U.S. E.E.O.C. v. Dillard's Inc., 08CV1780-IEG PCL, 2012 WL 440887 (S.D. Cal. Feb. 9, 2012) (Holding that the employer's "[a]ttendance [p]olicy, on its face, permitted supervisors to conduct impermissible disability-related inquiries under § 12112(d) (4)(A). The Policy required an employee to disclose "the nature of the absence (such as migraine, high blood pressure, etc ....)" and "the condition being treated." This is substantially similar to the "brief general diagnosis" the Second Circuit in *Conroy* found to be impermissible. Such inquiry by Dillard's "may tend to reveal a disability.").
[53] *Lee I*, 644 F.Supp.2d 1000, 1009 (S.D. Ohio 2009).
[54] *Conroy*, 333 F.3d 88 (2d Cir. 2003).
[55] *Lee II*, 636 F.3d 245, 247 (6th Cir. 2011).
[56] *Id.* at 248.
[57] *Id.*
[58] *Id.*
[59] *Id.*

work document" irrelevant.[60] Thus, *Lee I*[61] followed the Second Circuit's reasoning in *Conroy*,[62] and held that the directive could tend to reveal a disability under the ADA and, by incorporation, the Rehabilitation Act.[63] Since the city failed to show a valid business necessity for the policy, the district court granted the employee permanent injunctive relief.[64]

When the case went before the Sixth Circuit in *Lee II*,[65] the Sixth Circuit began its analysis by noting that the Rehabilitation Act "addresses the confidentiality of medical records only in the limited context of *pre*-employment examinations."[66] The Sixth Circuit did, however, mention that the ADA's limitations on medical inquiries[67] are incorporated by reference into the Rehabilitation Act.[68] With this interpretation of the law, the court declared the plaintiff had to show that the city's policy constituted a prohibited inquiry into the plaintiff's medical disability as defined by the ADA in order to constitute a violation of the Rehabilitation Act.[69]

Next, the Sixth Circuit distinguished *Conroy*.[70] Agreeing that a policy requiring the doctor's note to specify an employee's general diagnosis would be in violation of the ADA "since general diagnoses may expose individuals with disabilities to employer stereotypes," the court nevertheless found that theory inappropriate in the case at bar.[71] The Sixth Circuit emphasized a distinction between a claim brought under the ADA and the present claim brought under the Rehabilitation Act by way of the latter's prohibition of discrimination based "solely" on disability. The Sixth Circuit did not "find the requirement that an employee provide a general diagnosis – or

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[60] *Lee I*, 644 F.Supp.2d at 1012.
[61] *Id.*
[62] 333 F.3d 88 (2d Cir. 2003).
[63] *Id.* at 101.
[64] *Id.*
[65] *Lee II*, 636 F.3d 245 (6th Cir. 2011).
[66] *Id.* at 252 (emphasis added) (referencing 28 C.F.R. § 42.513).
[67] 42 U.S.C. § 12112(d) (1990).
[68] *Lee II*, 636 F.3d at 252,
[69] *Id.*
[70] *Id.* at 252-53.
[71] *Id.* at 253.

in this case, an even less specific statement regarding the "nature" of an employee's illness" – to be tantamount to an inquiry "as to whether such employee is an individual with a disability or as to the nature or severity of the disability under § 12112(d)(4)(A)."[72]

The Sixth Circuit further clarified that, by merely requesting a general diagnosis that "*may tend to lead"* the note's reader to an awareness of an employee's disability, an employer's inquiry falls short of proving discrimination "solely" on the basis of disability, as required under the Rehabilitation Act.[73] The Sixth Circuit then defined the appropriate inquiry for cases of this nature as "whether a medical inquiry is *intended* to reveal, or *necessitates revealing* disability, rather than whether the inquiry may merely *tend to* reveal a disability."[74] The Sixth Circuit found that a note detailing the "nature" of illness neither "necessitated revealing" nor "intended to reveal" an employee's disability.[75] Hence, it held the directive was not a prohibited inquiry about an employee's disability as defined by the Rehabilitation Act and, by incorporation, the ADA.[76]

The Sixth Circuit also criticized *Conroy* for painting with such "a broad brush, and finding suspect any routine or general inquiry simply because it 'may tend to reveal' an employee's disability."[77] It held the Second Circuit's interpretation "unnecessarily swept within the statute's prohibition numerous legitimate and innocuous inquiries that are not aimed at identifying a disability."[78] While asking an employee for a list of prescriptions drugs he or she is taking, or inquiring about an employee's prior illnesses would trigger the protections of the ADA and

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[72] *Id*. at 254.
[73] *Id.* at 255 (emphasis in original); *contra* Dillard's Inc., 08CV1780-IEG PCL, 2012 WL 440887 at *5.
[74] *Lee II*, 636 F.3d 245, 255 (6th Cir. 2011) (emphasis added).
[75] *Id.* at 255.
[76] *Id.* at 261.
[77] *Id.* at 254.
[78] *Id*.

Rehabilitation Act, the court reasoned that asking a returning employee simply "to describe the "nature" of his illness […] is not necessarily a question about whether the employee is disabled."[79]

Even if this was a disability inquiry, the Sixth Circuit held the directive was applied even-handedly to all employees of the police division, and therefore, could not be in violation of the ADA.[80] According to the Sixth Circuit, the ADA does not prohibit workplace policies that equally apply to all employees.[81] The Sixth Circuit also looked to the EEOC: Enforcement Guidance in support of its holding.[82] Citing *Questions and Answers*,[83] the court noted that "an employer is entitled to know why an employee is requesting sick leave […and] may ask an employee to provide a doctor's note or other explanation as long as it has a policy or practice of requiring all employees to do so."[84]

The court also invoked EEOC administrative rulings in support of its holding.[85] Specifically, the Sixth Circuit noted *White v. Potter,*[86] where the EEOC determined that "commission guidance makes clear that an employer may ask an employee to justify his/her use of sick leave by providing a doctor's note or other explanation, as long as it has a policy or practice requiring all employees."[87] It also cited *Donohugh v. Nicholson,*[88] where the EEOC determined that even when an employee put her supervisor on notice that she required medical leave prior to taking time off, a supervisor was still entitled to require reasonable medical documentation.[89]

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[79] *Id*.
[80] *Lee II*, 636 F.3d 245, 255 (6th Cir. 2011); *contra* Dillard's Inc., 08CV1780-IEG PCL, 2012 WL 440887 (S.D. Cal. Feb. 9, 2012).
[81] *Id.*
[82] *Id.* at 255-56.
[83] *Questions and Answers: Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees under the Americans with Disabilities Act (ADA*), 2000 WL 33407183, at *4.
[84] *Lee II*, 636 F.3d 245 at 255 (citing 2000 WL 33407183, at *4).
[85] *Lee II*, 636 F.3d at 256-57.
[86] 2002 WL 31440931.
[87] *Id.* at *4 n.2.
[88] 2007 WL 2907575.
[89] *Id.* at *4 (citing EEOC Enforcement Guidance on Disability-Related Inquiries, Notice 915.002, at question 5).

Finally, the court found *McGill v. Munoz*[90] supportive because it held that, so long as a policy is equally applied to all employees, the policy is appropriate.[91] Since the City of Columbus' directive was universal, the court found it consistent with the above authorities and deemed it an acceptable inquiry under § 12112(d)(4)(A) of the Rehabilitation Act.[92]

Finally, the court briefly addressed whether it was appropriate for an employer to ask employees to submit the doctors' note to a direct supervisor.[93] The Sixth Circuit found that the plaintiffs could not challenge the directive on the mere speculation that immediate supervisors might violate the statute's confidentiality provisions.[94] Furthermore, the Sixth Circuit criticized the lower court for attempting to draw a distinction between the impermissibility of providing doctors' notes to immediate supervisors and the permissibility of providing them to Human Resources departments.[95] Thus, *Lee II* held: "there is no language in either the Rehabilitation Act or the ADA that, with regard to the processing of medical inquiries, differentiates between employers based on the size or organizational structure of the work force or the existence of a separate human resources department."[96]

The Sixth Circuit once again turned for support to EEOC Guidance, which states: "The approval of sick leave is a responsibility of the supervisor," who "shall determine that… medical documentation submitted by the employee […] supports charging the absence to sick leave" and that it is appropriate for first-line supervisors to review and approve ADA accommodation requests in the first instance.[97] The Sixth Circuit declared that in order "to eliminate unnecessary levels of

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[90] 203 F.3d 843 (D.C. Cir. 2000).
[91] *Id.* at 847-48.
[92] *Lee II*, 636 F.3d 245, 257 (6th Cir. 2011).
[93] *Id.* at 257.
[94] *Id.* at 258.
[95] *Id.* at 257,
[96] *Id.* at 258.
[97] *Id.* at 258.

review, agencies should authorize first-line supervisors to approve requests for reasonable accommodation whenever possible."[98]

E. Commentators Split Over Permissive Content of Doctors' Notes

While scholarship addressing return-to-work policies and doctors' notes is exceptionally sparse,[99] law blogs advising employers are abuzz with the issue, in light of the Sixth Circuit's split-creating decision.[100] Many blogs see *Lee II*[101] as employer-friendly, claiming the court provided a favorable decision for employers with operations in states within the Sixth Circuit.[102] These reports warn readers, however, that "the permissible limits of an employer's right to require employees to disclose medical information upon returning from sick leave still are uncertain" in light of the split between the circuits.[103]

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[98] Policy Guidance on Executive Order 13164: Establishing Procedures To Facilitate The Provision of Reasonable Accommodation, No. 915.002, 2000 WL 33407185, at *6 (Oct. 20, 2000) (emphasis omitted).

[99] See generally Edward G. Phillips, *Disability-Related Inquiries in Uncertain Times*, TENN. B.J., June 2012, at 23.

[100] *See generally City may Require Doctor's Note From Workers Returning from Sick Leave, Federal Court Rules,* JACKSON LEWIS, (Sept. 5, 4:13 PM), http://www.jacksonlewis.com/resources.php?NewsID=3562; Colter Paulson, *Creating a Split with the Second Circuit, the Sixth Circuit Approves Sick Leave Policies That May Reveal a Disability to a Supervisor*, SQUIRE SANDERS (Sept. 18, 2011, 3:56 PM), http://www.sixthcircuitappellateblog.com/recent-cases/creating-a-split-with-the-second-circuit-the-sixth-circuit-approves-sick-leave-policies-that-may-rev/; Dan Kohrman, *Appeals Court Fails to Extend Protection Against Intrusive Disability-Related Inquiries,* AARP FOUNDATION (Sept. 18, 3:13 PM), http://www.aarp.org/work/employee-rights/info-03-2011/lee_v_city_of_columbus.html; Claudia D. Orr, *Court Rules Employer's Request for General Diagnosis Does Not Violate the Americans with Disabilities Act*, *PLUNKETT COONEY* (Sept. 18, 3:26 PM), http://www.plunkettcooney.com/publications-287.html; Ryan E. Bonina, *City of Columbus May Require Employees Returning from Sick Leave to Provide Doctor's Note,* EMPLOYER LAW REPORT (Sept. 5, 2011, 4:07PM), http://www.employerlawreport.com/2011/02/articles/leave-administration/city-of-columbus-may-require-employees-returning-from-sick-leave-to-provide-doctors-note/#axzz1afzYkZCe.

[101] *Lee II*, 636 F.3d 245 (6th Cir. 2011).

[102] *See e.g. City May Require Doctor's Note From Workers Returning from Sick Leave, Federal Court Rules,* JACKSON LEWIS, (Sept. 5, 4:13 PM), http://www.jacksonlewis.com/resources.php?NewsID=3562; Claudia D. Orr, *Court Rules Employer's Request for General Diagnosis Does Not Violate the Americans with Disabilities Act*, *PLUNKETT COONEY* (Sept. 18, 3:26 PM), http://www.plunkettcooney.com/publications-287.html; Ryan E. Bonina, *City of Columbus May Require Employees Returning from Sick Leave to Provide Doctor's Note,* EMPLOYER LAW REPORT (Sept. 5, 2011, 4:07PM), http://www.employerlawreport.com/2011/02/articles/leave-administration/city-of-columbus-may-require-employees-returning-from-sick-leave-to-provide-doctors-note/#axzz1afzYkZCe.

[103] *City May Require Doctor's Note From Workers Returning from Sick Leave, Federal Court Rules,* JACKSON LEWIS, (Sept. 5, 4:13 PM), http://www.jacksonlewis.com/resources.php?NewsID=3562.

Some blogs commend the Sixth Circuit's ruling in *Lee II*,[104] while others remain skeptical despite advising employers of what they may and may not include in a return-to-work policies in light of *Lee II*.[105] Dan Kohrman, Senior Attorney of the AARP Foundation, expressed concern~~ed~~ that the Sixth Circuit's take on doctors' notes will open the elderly to a higher possibility of disability discrimination.[106] Others question whether it is "good practice to permit the immediate supervisor to have access to such information is a practical issue based on the organizational structure and the location of the business."[107]

Other blogs have attempted to advise employers as to what they may and may not include in a return-to-work policy in light of *Lee II*.[108] One blog proposes a two-step analysis that employers should use to review their policies in the wake of *Lee II*,[109] encouraging in-house counsel to "ask two key questions in examining their policies: Why does the organization require a doctor's note from a returning employee, and is it a job-related or business necessity to know why an employee needed to use sick leave?"[110]

Whether in favor or in distrust of the Sixth Circuit's holding, the majority of employer blogs understand the decision as confirming "an employer's ability to make inquiries about the

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[104] Colter Paulson, *Creating a Split with the Second Circuit, the Sixth Circuit Approves Sick Leave Policies That May Reveal a Disability to a Supervisor*, SQUIRE SANDERS (Sept. 18, 2011, 3:56 PM), http://www.sixthcircuitappellateblog.com/recent-cases/creating-a-split-with-the-second-circuit-the-sixth-circuit-approves-sick-leave-policies-that-may-rev/.

[105] *See generally* Colter Paulson, *Creating a Split with the Second Circuit, the Sixth Circuit Approves Sick Leave Policies That May Reveal a Disability to a Supervisor*, SQUIRE SANDERS (Sept. 18, 2011, 3:56 PM), http://www.sixthcircuitappellateblog.com/recent-cases/creating-a-split-with-the-second-circuit-the-sixth-circuit-approves-sick-leave-policies-that-may-rev/; Dan Kohrman, *Appeals Court Fails to Extend Protection Against Intrusive Disability-Related Inquiries,* AARP FOUNDATION (Sept. 18, 3:13 PM), http://www.aarp.org/work/employee-rights/info-03-2011/lee_v_city_of_columbus.html.

[106] Dan Kohrman, *Appeals Court Fails to Extend Protection Against Intrusive Disability-Related Inquiries,* AARP FOUNDATION (Sept. 18, 3:13 PM), http://www.aarp.org/work/employee-rights/info-03-2011/lee_v_city_of_columbus.html.

[107] Claudia D. Orr, *Court Rules Employer's Request for General Diagnosis Does Not Violate the Americans with Disabilities Act*, *PLUNKETT COONEY* (Sept. 18, 3:26 PM), http://www.plunkettcooney.com/publications-287.html.

[108] *See supra* note 97.

[109] *Lee II*, 636 F.3d 245 (6th Cir. 2011).

[110] Joanne Sammer, *Court Says Doctor's Note Requirement Doesn't Violate Disability Law*, INSIDE COUNSEL, (Oct. 29, 4:55 PM), http://www.insidecounsel.com/2011/05/01/court-says-doctors-note-requirement-?page=2.

reason for an employee's sick leave" so long as employers ensure "that any such policies are applied consistently and uniformly,"[111] and advise employers to create return-to-work policies accordingly.

III. Discussion

A. Problematic and Less-than-Pragmatic Duality

Both the Second[112] and Sixth[113] Circuits' holdings, and the employer blogs' discussions of their possible meanings, agree that an employer who requires a returning employee to submit a doctor's note merely specifying that the employee is indeed capable of resuming the duties of his or her post generally does not present an issue within the context of the ADA or the Rehabilitation Act. Instead, it was the duality of the notes at bar that acted as the catalyst for litigation.[114] Requiring a doctors' note to also clarify the employee's general diagnosis (if in the Second Circuit) or "nature of the illness" (if in the Sixth Circuit) is the point of contention between the circuits.[115] A deeper analysis of these kinds of directives, particularly in the context of real-world application, suggests such requests are excessive.[116] If employers eliminate the secondary inquiry, they will

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[111] Ryan E. Bonina, *City of Columbus May Require Employees Returning from Sick Leave to Provide Doctor's Note,* EMPLOYER LAW REPORT (Sept. 5, 2011, 4:07 PM), http://www.employerlawreport.com/2011/02/articles/leave-administration/city-of-columbus-may-require-employees-returning-from-sick-leave-to-provide-doctors-note/#axzz1afzYkZCe.
[112] Conroy v. N.Y. Dep't of Corr. Servs., 333 F.3d 88 (2d Cir. 2003).
[113] *Lee II*, 636 F.3d 245 (6th Cir. 2011).
[114] *See supra* note 97; *Lee II*, 636 F.3d 245 (6th Cit. 2011); *Conroy*, 333 F.3d 88 (2d Cir. 2003).
[115] *See Conroy*, 333 F.3d 88 (2d Cir. 2003); Lee v. City of Columbus (*Lee II*), 636 F.3d 245 (6th Cir. 2011).
[116] A California district court recently held in favor of *Conroy*'s interpretation. *See E.E.O.C. v. Dillard's*, *Inc.,* 08CV1780-IEG PCL, 2012 WL 440887 (S.D. Cal. Feb. 9, 2012). While addressing a policy that contained language most similar to *Lee I/II*'s policy, the court ultimately ruled under the *Conroy* holding. Dillard's El Centro store's attendance policy required all employees returning from health-related absences to submit a doctor's note stating "the nature of the absence (such as migraine, high blood pressure, etc." and the "condition being treated" (i.e., dual-requirement notes) in order for the absence to be excused. *Id*. If the doctor's note merely stated that an employee was ready to return to work, the note was rejected. *Id*. The case noted three employees who turned in doctor's notes that originally failed to state the nature of the absence. *Id*. The first note stated "off work this week return 6/5/06." When the employee failed to produce a letter explaining the absence in greater detail, she was terminated. The second and third employee's notes did not initially state the natures of their absences, but at Dillard's request, they obtained revisions revealing such information, and Dillard's excused these absences. *Id*. Approximately a year after employee-1's termination, Dillard's El Centro Store amended its policy, merely requiring returning employees to "report off work prior to their scheduled start time." *Id.* The EEOC brought action on behalf

avoid trouble with the ADA or Rehabilitation Act while receiving all the information necessary for these directives to be effective.[117]

I. The Federal Circuit's Superficial Distinctions between Directives' "Variant" Requests

The circuits' use of variant terminology for this second requirement of the mandatory doctors' notes – "general diagnosis"[118] versus "nature of the illness"[119] – is likely more significant in theory than in practice.[120] Indeed, the Sixth Circuit's treatment of *Conroy*[121] does not entirely defy this assertion, for the court made little fuss over the distinction in word choice.[122] While agreeing that a "general diagnosis" would violate the ADA, the Sixth Circuit ultimately exerted most of its energy in drawing a distinction between claims brought under the ADA and claims brought under the Rehabilitation Act.[123] Importantly, it emphasized the Rehabilitation Act's use of the term "solely" instead of focusing on the linguistic details of the required return-to-work policies.[124] The Sixth Circuit's opinion does little to establish a notable gap between a "general diagnosis," which it regards as permissible under both laws, and the "nature of the illness," which it regards as impermissible under the ADA and consequently under the Rehabilitation Act.

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of employee-1 and other similarly situated employees. *Id*. Noting the existing split between the second and sixth circuits, the *Dillard*'s court held that the El Centro store's policy was improper because it required the nature of the absence and the condition being treated, which "permitted supervisors to conduct impermissible disability-related inquiries" under 42 U.S.C.A. § 12112(d)(4)(A). *Id*. Finding no distinction between requesting the "nature of one's illness" and a "general diagnosis, the court held Dillard's policy of requesting "the nature of the absence" "substantially similar to the 'brief general diagnosis'" held improper in *Conroy* because both types of inquiries may tend to reveal disability.

[117] *See* Part IV.

[118] *Conroy*, 333 F.3d at 93.

[119] *Lee II*, 636 F.3d at 248.

[120] *See* Dillard's Inc., 08CV1780-IEG PCL, 2012 WL 440887 at *5 (Finding that the "nature of an illness" and a "general diagnosis" are substantially the same, in holding that a dual-inquiry policy that "required an employee to disclose "the nature of the absence (such as migraine, high blood pressure, etc ....)" or "the condition being treated" in addition to whether the employee was ready to return to work…is is substantially similar to the "brief general diagnosis" … [and] such inquiry by [the employer] "may tend to reveal a disability.").

[121] 333 F.3d 88 (2d Cir. 2003).

[122] *Lee II*, 636 F.3d at 251.

[123] *Id.*

[124] *Id*. at 255.

Instead, the Sixth Circuit assumes a difference between requiring a note with a "general diagnosis" as opposed to one with a description of "the nature of the illness" without ever analytically establishing or defining the distinction.[125] The court does "not find the requirement that an employee provide a general diagnosis—or in this case, an even less specific statement regarding the "nature" of an employee's illness—" as equivalent to inquiring whether an employee has a disability under the Rehabilitation Act.[126] While claiming to "distinguish" *Conroy, Lee II* truly splits from it.[127] Perhaps this weak classification as "distinguished" is further evidence that the *Lee II* holding is not the fortress of employer-protection some employer blogs suggest it is.[128]

The Sixth Circuit attempts to clarify this point when it states: "Obviously, asking an employee whether he is taking prescription drugs or medication" would cross the threshold into inexcusable inquiry.[129] But, is the difference between asking about the "nature of an illness" and inquiring into an employee's medications really as "obvious" as the Sixth Circuit says it is?[130] The court's failure to elaborate on the difference may suggest it is not.[131] This shortcoming, rather, is more likely evidence of a near-impossible distinction to draw. The fact that the Sixth Circuit immediately changes gears and focuses on the significance of bringing suits under the ADA as opposed to the Rehabilitation Act also supports this theory. The court's refusal to explain the

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[125] *Id.* at 251-52.
[126] *Id.* at 254.
[127] *Id.* at 253-54.
[128] *See generally* Ryan E. Bonina, *City of Columbus May Require Employees Returning from Sick Leave to Provide Doctor's Note,* EMPLOYER LAW REPORT (Sept. 5, 2011, 4:07PM), http://www.employerlawreport.com/2011/02/articles/leave-administration/city-of-columbus-may-require-employees-returning-from-sick-leave-to-provide-doctors-note/#axzz1afzYkZCe; Claudia D. Orr, *Court Rules Employer's Request for General Diagnosis Does Not Violate the Americans with Disabilities Act*, PLUNKETT COONEY (Sept. 18, 3:26PM), http://www.plunkettcooney.com/publications-287.html.; Colter Paulson, *Creating a Split with the Second Circuit, the Sixth Circuit Approves Sick Leave Policies That May Reveal a Disability to a Supervisor*, SQUIRE SANDERS (Sept. 18, 2011, 3:56PM), http://www.sixthcircuitappellateblog.com/recent-cases/creating-a-split-with-the-second-circuit-the-sixth-circuit-approves-sick-leave-policies-that-may-rev/; *City may Require Doctor's Note From Workers Returning from Sick Leave, Federal Court Rules*, JACKSON LEWIS, (Sept. 5, 4:13PM), http://www.jacksonlewis.com/resources.php?NewsID=3562.
[128] *Lee II*, 636 F.3d at 251.
[130] *Id*. at 254-55 (citing *Scott*, 717 F.Supp.2d at 1084--85). *See also* Roe v. Cheyenne Mountain Conference Resort, 920 F.3d 1154--55 (D.Colo. 1996).
[131] *Lee II*, 636 F.3d 245, 251-52.

distinction at any length suggests a forced concession to the fact that the difference is subtle, if not nominal, and further clarifies that *Lee II* may not be the employer safe-haven some blogs say it is.[132]

Admittedly, there is an inferential step between knowing the "nature" of an employee's illness and having knowledge of his or her disability.[133] The Sixth Circuit's denial of any possibility that such an inference exists, however, is a substantial hole its holding.[134] While information about the "nature" of an employee's illness does not guarantee an immediate supervisor will make that cognitive leap toward knowing the employee's disability, it is by no means impossible, either.[135] The ability to infer an employee's disability from a list of medications he or she is taking seems equivalent, if not identical, to the ability to infer one's disability from an explanation of the "nature" of his or her illness.[136] The ADAAA also supports this notion because it prohibits the determination of disability through reliance on such facts as the employee's "medication, medical supplies,[. . .] hearing aids and cochlear implants or other implantable hearing devices, mobility devices[. . . .]"[137]

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[132] *See generally* Ryan E. Bonina, *City of Columbus May Require Employees Returning from Sick Leave to Provide Doctor's Note,* EMPLOYER LAW REPORT (Sept. 5, 2011, 4:07PM), http://www.employerlawreport.com/2011/02/articles/leave-administration/city-of-columbus-may-require-employees-returning-from-sick-leave-to-provide-doctors-note/#axzz1afzYkZCe; Claudia D. Orr, *Court Rules Employer's Request for General Diagnosis Does Not Violate the Americans with Disabilities Act*, PLUNKETT COONEY (Sept. 18, 3:26PM), http://www.plunkettcooney.com/publications-287.html.; Colter Paulson, *Creating a Split with the Second Circuit, the Sixth Circuit Approves Sick Leave Policies That May Reveal a Disability to a Supervisor*, SQUIRE SANDERS (Sept. 18, 2011, 3:56PM), http://www.sixthcircuitappellateblog.com/recent-cases/creating-a-split-with-the-second-circuit-the-sixth-circuit-approves-sick-leave-policies-that-may-rev/; *City may Require Doctor's Note From Workers Returning from Sick Leave, Federal Court Rules*, JACKSON LEWIS, (Sept. 5, 4:13PM), http://www.jacksonlewis.com/resources.php?NewsID=3562.

[133] Discussions of unconscious bias support the notion that these inferential steps *do*, and in the absence of the actor's awareness. *See generally* Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995) (discussing the existence and pervasiveness of unconscious bias as an "unintended consequence" of humans' need to categorize the world).

[134] *Lee II*, 636 F.3d 245, 253.

[135] *See supra* note 123.

[136] Roe, 920 F.3d at 1154--55.

[137] 42 U.S.C. § 12102(4)(E)(i) (Supp. 2009).

Since the *Lee II* court conceded that inquiry into the general diagnosis is improper under the ADA, the possibility that "the nature of an illness" will provide an awareness of a disability also treads dangerously close to violation of the law.[138] Furthermore, the inferential leaps necessary to jump from knowledge of an employee's general diagnosis to an awareness of his or her disability (deemed inappropriate by both Circuits) are the same inferential leaps necessary to the jump from knowledge of an employee's illness' "nature" to his or her disability. If a difference exists at all, it is so thin a veil between the two circumstances that employers should find no solace in it.

A closure of the cognitive gap between knowledge of the "nature of the illness" and an awareness of an employee's disability is not a certain one when a supervisor has knowledge of the "nature" of an employee's illness.[139] The Sixth Circuit's refusal to consider the possibility of such an occurrence, however, suggests that the Sixth Circuit does not believe the ADA or, by incorporation, the Rehabilitation Act, are concerned with such a situation.[140] Yet, the ADA and Rehabilitation Acts are not concerned with only *guaranteed* instances of discrimination.[141] These laws aim to prevent all discrimination based on disability in the employment context.[142]

II. A False Distinction Revealed Through Application

Perhaps the *Lee II* court refused to analyze the difference between a "general diagnosis" and a description of the "nature of an illness" because the distinction is particularly insignificant, if not nonexistent, in *practice*.[143] The City of Columbus acknowledged this very real possibility at the district court level, in response to which the district court clarified that the "argument that it is

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[138] *Lee II*, 636 F.3d 245, 251-52.
[139] *See supra* note 120.
[140] *Id.*
[141] *See generally*, S. REP. NO. 101-116 (1989); H.R. Rep NO. 101-485 (1990); 154 CONG. REC. S9626-01 (2008).
[141] Lee I, 644 F.Supp.2d 1000, 1009 (S.D. Ohio 2009).
[142] *Id.*
[143] *See supra* note 116.

not in control of the extent or accuracy of the diagnoses the treating physician chooses to impart on the return to work document" was irrelevant to its decision.[144] While an employer's control, or lack thereof, over the responses of medical professionals may have been irrelevant, the fact that these notes may reveal more than is asked for because of some miscommunication goes to the very heart of the ADA and, by incorporation, the Rehabilitation Act, because over-revelation increases the chance that a supervisor will discover an employee's disability and discriminate against the employee on the basis of that disability.[145] The City itself admitted that these doctors' notes may not provide precisely the information requested; if they were to reveal more, the argument that these notes tend to reveal a disability becomes all the stronger, and the potential for incurring liability becomes that much a higher for the employer.

Also, mindful of the fast-paced, hectic work environment of most medical professionals, it seems unlikely doctors will always heed the nuanced expectations established by variant legal terms of art like the "nature of the illness." Given the Sixth Circuit's own failure to distinguish between the permissible "nature of an illness" and the impermissible "general diagnosis," a medical professional could easily, even *would* easily, misconstrue the terms.[146] It is not reasonable to expect a professional of another field to successfully do so. Detailing the "nature of an illness" may seem to medical professionals as though it requires more words than simply stating a general diagnosis. This suggests that the two types of directives may, in practice, actually yield notes from doctors with identical content – an impermissibly general diagnosis.

When asked what responses she would provide to either directive, Nursing Professor and Nurse Practitioner Denise Coppa reported that both directives made her uncomfortable because

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[145] Note that a doctors' note is not the only way an employer may secure information of this kind. The possibility exists that an employee may provide a "general diagnosis" or a description of the "nature of the illness," to an employer, as the employee understands the illness from dealings with his or her physician. Such a possibility, however, is not at the crux of this Comment's analysis and could not be cured by its proposed solution.

[146] *Lee II*, 636 F.3d at 251-52.

they inquire into privileged information under HIPAA.[147] For this reason, Coppa claimed she would err on the side of caution and discuss only whether her patient was able to return to work and would *not* mention a "general diagnosis" or any similar information in her response to either directive.[148] She stressed that while this would be her response, the directives did seem to seek an improper level of detail regarding the employee's health, and she disagreed that some practitioners may provide the requested information, with patient permission.[149] When prompted to divulge what differences she observed between the two directives, Coppa said that she believed "nature of the illness" could be construed as seeking such qualifiers as "good," "serious," "critical," and [while that] may be enough for the employer," it would still be improper, in her opinion, to divulge any such information, even those one-word descriptions, without the written consent of the patient.[150]

In contrast, Optometrist Dr. Laura Perrin[151] would "state a general diagnosis *only*" in response to either directive, and would not make "an assessment about the patient's ability to resume his or her work duties."[152] Perrin clarified that her general responses to directives of this kind contain a "brief note with the patient's name, [date of birth], and date of eye service" in which she state that "the patient was treated in [her] office for an 'eye condition' that impeded vision and required medical treatment."[153] She also noted that she is comfortable writing these types of notes only after treatment is complete, because she would never provide an employer

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[147] Pub.L. 104-191. *See* Health Insurance Portability and Accountability Act, PUB. L. NO. 104-191, August 21, 1996, 10 Stat. 1936.
[148] Interview with Denise Coppa, Nurse Practitioner and Director of the Family Nurse Practitioner Program, College of Nursing, University of Rhode Island, (Oct. 20, 2011).
[149] *Id.*
[150] *Id.*
[151] Interview with Dr. Laura Perrin, Optometrist, Randolph Eye Care, (Jan. 18, 2012).
[152] *Id.*
[153] *Id.*

with an estimation.[154] When prompted to discuss any differences she identified between the two types of directives, Perrin noted that the difference was "a fine one."[155] According to Perrin, the directive requesting a "general diagnosis" is self-evident in what it seeks, and "is appropriate because an employer should know what general effect the medical problem may have on his or her employee's ability to function in the workplace. If a patient [cannot] see properly, then this would clearly impede his or her ability to perform his or her tasks, whereas a mobility problem may well be accommodated in the workplace."[156]

On the other hand, Perrin noted that a directive requesting a description of the "nature of the illness" "requests a more specific description of the medical problem."[157] She percieved that this "more specific description of a patient's eye condition exceeds the bounds of doctor/patient confidentiality…. and [it is] unnecessary, as the decision as to whether the patient is capable of performing his work is best determined directly by the patient and employer."[158] Finally, Perrin stressed that estimating a patient's ability to perform his or her duties at work is beyond the scope of her rights and obligations.[159] She clarified that she is "not qualified to make such an assessment, as work settings and work tasks vary tremendously and differ with each specific case."[160]

Of course, some physicians will interpret these directives consistently with the obscure distinction implicated by the Sixth Circuit's holding in *Lee II*;[161] however it is unlikely all doctors

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[154] *Id.*
[155] *Id.*
[156] *Id.*
[157] Interview with Dr. Laura Perrin, Optometrist, Randolph Eye Care, (Jan. 18, 2012).
[158] *Id.*
[159] *Id.*
[160] *Id.*
[161] *Lee II*, 636 F.3d 245 (6th Cir. 2011).

will, as highlighted by the variant interpretations mentioned above.[162] The reality is that even if a small percentage of doctors respond to these kinds of directives with too much information regarding an employee's ailment, those employees will be more likely to suffer disability-based discrimination. Just as the district court in *Lee II* was not persuaded by the city's argument that it could not control physicians' answers to its note requests, courts are equally unlikely to be persuaded by an employer claiming that some, or even most, doctors do interpret these directives in accordance with how the courts interpret them. Even one medical professional misconstruing the directive and providing an employee's supervisor with too-detailed a description of the illness could open an employer to liability. This reality suggests that elimination of the second inquiry of these directives is the safest choice for employers seeking to avoid these kinds of suits.

Furthermore, since the notes will still address whether the employee is healthy enough to return to work, their content seems to remain sufficient to meet the employers' purposes for utilizing the directives, even with removal of the secondary inquiry. The ADA makes clear that only baseline questions regarding an employee's health, stemming from a legitimate business purpose, are appropriate inquires.[163] Hence, the duality of a doctor's note like that considered by the Sixth Circuit in *Lee II* seems excessive.[164] Unless there is some business reason that requires inquiry into the employee's illness, a note with this excessive duality seems to dance dangerously close to the line between compliance and violation of the ADA. Thus, elimination of this dual-nature is the soundest recommendation to employers seeking to insulate themselves from the possibility of liability within the context of return-to-work policies.

III. The Employers' Purposes: Does Duality Stem from a Legitimate Business Purpose?

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[162] Interview with Dr. Laura Perrin, Optometrist, Randolph Eye Care, (Jan. 18 2012); Interview with Denise Coppa, Nurse Practitioner, and Director of Family Nurse Practitioner Program, College of Nursing, University of Rhode Island (Oct. 20, 2011).
[163] 42 U.S.C. § 12112(d)(4)(B) (1990).
[164] *Lee II*, 636 F.3d at 248.

This framework then invites, or even more accurately, demands answer to the question: Do basic business reasons justify this secondary inquiry? While one can, with effort, imagine a unique profession in which the demands of a given employee's position are so detailed, specific, and connected to certain aspects to the employee's good health, that an employer's inquiry into the "nature" of an illness could perhaps be justified by a legitimate business reason. These circumstances, however, likely arise in few cases, and certainly do not constitute the norm. Thus, whether basic business reasons, universal to many types of employers, make this duality of doctors' notes necessary for the note's efficiency is the proper inquiry.

John Harper, Senior Compliance and Employment Counsel to BASF, the largest chemical company in the world that currently employs more than 100,000 employees in 80 countries, provided insight into the possible reasons why an employer may inquire about the "nature" of an employee's illness.[165] When asked generally if an employer could have a legitimate business reason for proposing this kind of directive, Harper answered in the affirmative.[166] Further expansion on his response, however, revealed that this legitimate business reason is usually only present – and present with good reason – when the employee works in a "safety-sensitive position," or in a job in which the employee's good bill of health is essential to successful completion of the position's demands.[167] Jobs of this sort typically include those within the roles of "production, maintenance and utilities."[168] For example, Harper noted that a chemist suffering from an ailment that could cause him to unexpectedly faint is particularly detrimental in his job's physical environment, to his safety, and to the safety of others in his work environment.[169] A fainting chemist in a laboratory is significantly more dangerous than a fainting accountant in an

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[165] Telephone Interview with John Harper, Senior Compliance and Employment Counsel, BASF, (Oct. 25, 2011).
[166] *Id.*
[167] *Id.*
[168] *Id.*
[169] *Id.*

office. Thus, in the cases of employees in safety-sensitive positions, these secondary inquiries are aimed at not only employee-safety but also liability avoidance.

Yet, why does the employer concern itself with an employee's illness when that employee is now returning to work, presumably after the ailment has receded? Sometimes, doctor's notes approve an employee to return to work "with restrictions," according to Harper.[170] If a note merely clears an employee to return to work without restrictions, such is generally sufficient for the employer in Harper's experience.[171] Harper noted that if a note *does* contain restrictions, however, a secondary set of inquiries is then set into motion.[172] At BASF, in these cases, the employee's doctor may be asked for further clarification on these restrictions, the employee may be asked to undergo a "return to work exam" from the company's own Corporate Medical Department's doctors, or the employee may be asked to obtain an independent "fitness for duty" exam from an outside physician .[173] Note that the company's own doctors directly receive employee's medical notes; immediate supervisors and Human Resources do not receive letters of this nature.[174] Thus, in Harper's experience, inquiring further into the "nature" of an employee's illness is triggered only by an initial doctor's note listing restrictions on the employee's performance.[175] In less complicated circumstances, a note clearing the employee to fully return to his or her duties at the

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[170] *Id.*
[171] Telephone Interview with John Harper, Senior Compliance and Employment Counsel, BASF (Oct. 25, 2011). *See also* Telephone Interview with Robert Novo, Chief Administrative and Compliance Officer, General Chemical and GT Technologies, (Jan. 27, 2012) (Novo stated that the company only requires doctors' notes "in conjunction with short term disability coverage," and the requests ask "that the employee's doctor fill out a form indicating that the employee is temporarily 'disabled' (not able to perform the essential functions of their job), date treatment began, and expected return to work date. Upon their return," Novo noted, "the employee needs to get a release from their doctor indicating they are able to return to work and under what restrictions.").
[172] *Id.*
[173] *Id.*
[174] *Id.*
[175] *Id.*

company is "generally okay."[176] Whether the company takes its inquiries a step further is a fact-specific determination.[177]

When asked whether there are any universal business reasons, applicable to most employers, that may justify inquiry into the "nature" of an employee's illness, Harper said, "cynicism on part of employers."[178] Harper noted instances when employers receive similar notes from the same doctor regarding different employees over time, suggesting that perhaps the doctor is simply providing the employee with a reason to be excused from work without truly making a diagnosis at all.[179] Harper clarified that such instances are by no means the norm, but they "do happen."[180] In these circumstances, the employer's secondary-tier of inquiry regarding the illness' "nature" functions as a safeguard against fraud on part of the employee.[181]

Finally, Harper expressed that, in application, the difference between a directive requesting a general diagnosis and one requesting the "nature" of an illness will lie "in the eye of the beholder."[182] His inclination is that "if [the employer] goes for more than a "with/without restrictions" [distinction in their directive], it will get a diagnosis" in response.[183] In closing, he stressed that these policies are all about employers balancing variant concerns that are in tension

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[176] *Id.*
[177] Telephone Interview with John Harper, Senior Compliance and Employment Counsel, BASF (Oct. 25, 2011).
[178] *Id*; *but see* U.S. EEOC v. Dillard's Inc., 08CV1780-IEG PCL, 2012 WL 440887 (S.D. Cal. Feb. 9, 2012) (finding the employer provided no evidence of a reason "to know the nature of the employee's medical condition because of excessive absences or in order to protect the health and safety of its other employees," and that the employer made "no attempt to explain why it is necessary for the doctor's note to state the medical condition for which an employee is being treated. Where a medical provider verifies in writing that the employee has a medical condition, which required her to be out of work, and also specifies when the employee may return to work, [the employer] has not explained why it is necessary to identify the underlying medical condition.").
[179] Telephone Interview with John Harper, Senior Compliance and Employment Counsel, BASF (Oct. 25, 2011).
[180] *Id.*
[181] *Id.*
[182] *Id.*
[183] *Id.*

with one another: Balancing concerns regarding safety, liability, cynicism and fraud against a desire to comply with the provisions of the ADA.[184]

When addressing an employee who does not hold a safety-sensitive position and is capable to return to work without restrictions, employers inquiring into the general diagnosis or "nature" of an employee's illness are merely doubling-up on the directive's first inquiry, and asking an inexcusably probing question that adds nothing of value to the answer already ascertained. Since erring on the side of excess is more likely to incur ADA liability, employers are best advised to avoid dual return-to-work directives in these circumstances. The City of Columbus' directive itself also supports the assertion that dual-natured notes are excessive. It demanded a statement of the "nature" of a family member's illness, if the employee took time to care for a family member.[185] One struggles to imagine a situation where the knowledge of a family member's illness is necessary to the determination of whether the employee is ready to return to work.

While equal application of the directive is one of the details the Sixth Circuit hung its proverbial hat on in *Lee II,* it is difficult to conceive of why an employer would cast the net of equal application *so* wide and would ask the "nature" of a loved one's illness.[186] One struggles even harder to think of how that "nature" could impact the employee's performance once he or she returned to his or her post at work. In these cases, the directives are not excessive for doubling-up on the same inquiry in an inexcusably probing manner. Instead, they are excessive because the second inquiry can serve no business purpose, and thus open the employer to liability under the ADA.

Yet, as Harper's insight revealed, further inquiries into an employee's health may be justified when dealing with a safety-sensitive position or an employee cleared to return to work

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[184] *Id.*
[185] *Lee II*, 636 F.3d 245, 248 (6th Cir. 2011).
[186] *Id.*

"with restrictions."[187] Even in these circumstances, however, asking about the "nature" of the illness is not advisable. Harper suggested seeking mere clarification instead. Thus, even in such cases, requesting a description of the "nature" of the illness will still be excessive and unnecessary for the employer's purposes. Furthermore, as clarified by Harper above, asking for such will likely yield a general diagnosis and will ultimately open the company up to liability under the ADA.[188] The ADA allows an employer to "make inquiries into the ability of an employee to perform job-related functions."[189] Since a follow-up policy could be limited to clarifying questions about an employee's ability to perform, and because ability to perform job-related functions is not necessarily defined by the illness itself, inquiry into the "nature" crosses the line.

B. The Sixth Circuit Haphazardly Hangs Hats on Claims under Variant Statutes

The Sixth Circuit[190] drew a distinction between claims under the ADA, as seen in *Conroy*,[191] and claims under the Rehabilitation Act, as was the case in *Lee II*.[192] The Sixth Circuit suggested that the Rehabilitation Act establishes a higher standard for plaintiffs to meet, requiring "that plaintiffs demonstrate that they have been discriminated against solely by reason of a disability."[193] Thus, it found that "the mere fact that an employer, pursuant to a sick leave policy, requests a general diagnosis that *may tend to lead* to information about disabilities falls short of the requisite proof that the employer is discriminating *solely* on the basis of disability."[194]

Therefore, it suggests that a proper analysis focuses on "whether a medical inquiry is *intended* to reveal, or *necessitates revealing* disability, rather than whether the inquiry may

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[187] Telephone Interview with John Harper, Senior Compliance and Employment Counsel, BASF (Oct. 25, 2011).
[188] *Id.*
[189] 42 U.S.C. § 12112(d)(4)(B) (1990).
[190] *Lee II*, 636 F.3d 245 (6th Cir. 2011).
[191] Conroy v. N.Y. Dep't of Corr. Servs., 333 F.3d 88 (2d Cir. 2003).
[192] *Lee II*, 636 F.3d at 245.
[193] *Id.* at 255.
[194] *Id.*

merely *tend to* reveal a disability."[195] Thus, according to the Sixth Circuit, a plaintiff must show that a directive "intends to" reveal or "necessitates revealing" a disability.[196] "Tending to" reveal a disability is insufficient under the Rehabilitation Act, according to the Sixth Circuit.[197] The Sixth Circuit's attempt to draw a dividing line between directives that "necessitate," "intend," and "tend to" reveal a disability invites the question: Are there actual differences between directives that achieve one of these three aims in practice, and if so, are these distinctions so significant that employers may confidently distinguish them?

1. Definition: "Intends"/"Necessitates"

A directive which "intends to" or "necessitates" revelation of a disability would pass the Sixth Circuit's standard.[198] Black's Law Dictionary defines "intend" as "1. To have in mind a fixed purpose to reach a desired object; to have as one's purpose […] 2. To contemplate that the usual consequences of one's act will probably or necessarily follow from the act, whether or not those consequences are desired for their own sake […] 3. To signify or mean."[199] The Oxford English Dictionary defines "intend" as "to stretch out, extend, expand, increase, intensify, […] to start on a journey; to set out, [. . .] to give auditory attention [. . .], [. . .] to give ear to […] to have in the mind as a fixed purpose; to purpose, design."[200]

The definitions suggest that "intention" may depend on inference. "Signification" and "meaning" are worthless without inference and interpretation. The acts of "stretching out, extending" and "expanding" are inherent to the process of drawing an inference. These realities suggest that a directive which "intends" to reveal disability (deemed inappropriate by the *Lee*

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[195] *Id.*
[196] *Id.*
[197] *Lee II*, 636 F.3d 245 (6th Cir. 2011).
[198] *Id.*
[199] BLACK'S LAW DICTIONARY 880 (9th ed. 2009).
[200] *Intend Definition,* OED.COM, http://www.oed.com.ezproxy.shu.edu/view/Entry/97442?rskey=rRDJGq&result=2&isAdvanced=false#eid (last visited Sept. 28, 2011).

court) and one which merely "tends" to reveal disability through the assistance of an inferential step (approved of by the *Lee II* court) are not so different in practice. Both processes utilize the same procedures.

Black's Law Dictionary does not define "necessitates." Instead, it defines the Latin "Necessarius" as "1. Necessary; essential. 2. Unavoidable, obligatory, compelling."[201] The Oxford English Dictionary defines the verb form "necessitate" as "to make necessary, to demand, require, or involve a necessary condition, accompaniment or result, [. . .] to reduce a person to want or need."[202] These definitions suggest that drawing a line between "necessitating" and "intending" or "tending to" is the closest the Sixth Circuit comes to a sound distinction.[203] However, this is not the difference the *Lee II* court attempted to define, for they declared "necessitates" and "intends" equal in its standard under the Rehabilitation Act.[204]

While a supervisor who knows the "nature" of an employee's illness will not necessarily discriminate against the employee on the basis of disability, in the case where such discrimination does occur, the note will be the *necessary* condition of the events. If not for the note, there would be no way to discover the disability and thus no discrimination. The question then becomes: What does the ADA and the Rehabilitation Act seek to protect, the possible or only the probable? As noted in Part II above, the ADA and the Rehabilitation Act do not seek to protect employees from the guaranteed, the necessarily-going-to-occur discrimination in the

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[201] BLACK'S LAW DICTIONARY 1130 (9th ed. 2009).
[202] *Necessitates Definition,* OED.COM, http://www.oed.com.ezproxy.shu.edu/view/Entry/125635?rskey=Y31v3n&result=2&isAdvanced=false#eid (last visited Sept. 28, 2011).
[203] *Lee*, 636 F.3d 245, 254-55.
[204] *Id.*

workplace.[205] These provisions seek to protect employees from all disability-based discrimination.

Even if the *Lee* standard was that directives which "necessitate" revelation of a disability are the only type that violate the Rehabilitation Act, such a holding would be so fuzzy and rest upon such a weak analytical foundation that employers should not find solace in it. This, however, was not the standard spelled out by the Sixth Circuit. *Lee II* held that a directive which "intends" to reveal a disability is also over the line, and the distinction between "intends" and "tends to" is flimsy at best.[206]

2. Definition: "Tend"

According to the Sixth Circuit, a directive that merely "tends to" reveal a disability does not pass the standard spelled out in *Lee II.*[207] Black's Law Dictionary defines the verb form of "tend" as "1. To be disposed toward (something); 2. To serve, contribute, or conduct in some degree or way; to have a more or less direct bearing or effect; 3. To be directed or have a tendency to (an end, object, or purpose.)"[208] The Oxford English Dictionary defines "tend" as "to have it in the mind as a purpose to do something,[. . .] to understand or apprehend, […] to wait for, await; to look out for expectantly, […] to have the care and oversight of; to take charge of, to look after, [or] to turn one's ear, give auditory attention, listen, hearken."[209]

Note that both "tend" and "intend" include in their definitions the concept of turning one's ear to information. Being "directed or hav[ing] a tendency" (the essence of *tend*) truly differs in practice from "having it in mind" (the essence of *intend*). These similarities suggest

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[205] *See* S. REP. NO. 101-116, at 20 (1989) (describing the central purpose of the ADA as aiming to enable disabled individuals to enjoy "the economic and social mainstream of American life.")
[206] *Id.*
[207] *Id.*
[208] BLACK'S LAW DICTIONARY 1606 (9th ed. 2009).
[209] *Tend Definition,* OED.COM, http://www.oed.com.ezproxy.shu.edu/view/Entry/199029?rskey=WcxfjW&result=3&isAdvanced=false#eid (last visited September 28, 2011).

that which "tends" and that which "intends" are not very dissimilar in practice. The definitions of "tend" also align themselves with the notion that a directive inquiring into the "nature" of an illness is possibly just one *inferential step* away from revelation of disability, just as knowledge of a general diagnosis is merely one step away from the same conclusion.[210]

Even if a directive merely "tends" to reveal a disability, the directive still "serves, contributes or conducts in some degree or way" the inference necessary to reveal an employee's disability.[211] Such a directive enables one, even perhaps subconsciously to "look out for expectantly" the inference necessary to make this discovery. Directives inquiring into the "nature of an illness" "dispose" the receiver of that information (in the *Lee II* case the immediate supervisor) "toward" the inference necessary to reveal an employee's disability, and possibly open the employee to discrimination on the basis of that disability.

The above definitions support the Sixth Circuit in that "tend" does not mean the directive *will certainly* reveal the disability.[212] The definitions, however, also reveal that a directive which "tends" to reveal disability increases the possibility of discrimination based on that disability. The information submitted to supervisors in dual-natured doctor's notes increases the likelihood that supervisors will take the short inferential step from merely reading the note to suspecting, or discovering, the employee's disability. It logically follows that with knowledge of these notes, supervisors are then situated in a position to better ascertain an employee's disability. When awareness of the disability abounds, the likelihood for discrimination on the basis of that disability increases. This increased likelihood, of course, increases the employer's likelihood of becoming liable under the ADA or, through incorporation and this analytical framework, the

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[210] *See supra* note 120.
[211] *See generally* BLACK'S LAW DICTIONARY 1606 (9th ed. 2009); *Tend Definition,* OED.COM, http://www.oed.com.ezproxy.shu.edu/view/Entry/199029?rskey=WcxfjW&result=3&isAdvanced=false#eid (last visited September 28, 2011).
[212] *Lee II*, 636 F.3d 245 (6th Cir. 2011).

Rehabilitation Act. For this reason, employers should be skeptical of the presumed protection the *Lee II* holding provides them.

C. Equal Application Provides Little Shelter

Instead of concerning itself with the very real possibility that this inferential step can take place from a doctor's note containing the "nature" of an employee's illness, the Sixth Circuit attempted to further support its approval of the City of Columbus' directive by pointing out that the return-to-work policy applied equally to all employees.[213] The directive was therefore "not prohibited by the ADA because it is a workplace policy applicable to all employees, disabled or not."[214] Even so, it is the actions that occur after a doctor has provided a note to an immediate supervisor which implicate the ADA and Rehabilitation Act: specifically, the increased likelihood that an immediate supervisor may, by knowing of an employee's "general diagnosis" or the "nature" of his or her illness, infer the employee's disability,[215] thereby exposing the employee to a higher possibility of disability-based discrimination.[216] For those who do not have a disability to be revealed, no possibility of discrimination follows. However, for those who do have a disability that may be revealed by this information, discrimination becomes more likely. Therefore, the Sixth Circuit's reliance on equal application of the city's directive provides little safe haven to employers with similar policies in practice.[217]

D. The Sixth Circuit's Reliance on the EEOC

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[213] *Lee II*, 636 F.3d 245, 255 (6th Cir. 2011); *contra* U.S. EEOC v. Dillard's Inc., 08CV1780-IEG PCL, 2012 WL 440887 at *5.
[214] *Id.*
[215] *See supra* note 120.
[216] 42 U.S.C. § 12112 (1990); 29 U.S.C. § 791 (1973).
[217] *Lee II*, 636 F.3d at 255.

The *Lee II* court also found unsound support for its "equal means appropriate" finding in *Questions and Answers.*[218] Citing Question 15, the Sixth Circuit noted the EEOC states that "an employer is entitled to know why an employee is requesting sick leave."[219] An employer, therefore, may ask an employee to provide a doctor's note or other explanation as long as it has a policy or practice of requiring all employees to do so."[220] This guidance does not mention doctors' notes that inquire into the "nature" of one's illness.[221] The phrase "or other explanation" may indicate favorable treatment of the "nature" requirement.[222] More likely, it suggests that another method of communication is allowable, but not another form of inquiry. This latter interpretation of the phrase is supported by the structure of the entire sentence: "provide a doctor's note or *other explanation*."[223] This syntactical structure suggests that the "other" is an alternative to the note – the means of communicating information – not the information contained therein.[224] Thus, the EEOC clarifies that perhaps a telephone call or email would suffice instead of a note.[225] It does not state that inquiring into the "nature" of an employee's illness is acceptable.[226]

Concededly, the EEOC does assert that an employer is "entitled to know why an employee is requesting sick leave."[227] This is the strongest evidence is in favor of the Sixth Circuit's interpretation of the law and circumstances. However, the EEOC does not explicitly define this "why." This "why" could be satisfied by a note merely stating that the employee is

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[218] *Questions and Answers: Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees under the Americans with Disabilities Act (ADA),* 2000 WL 33407183, at *4 (EEOC Guidance July 26, 2000).
[219] *Lee II*, 636 F.3d at 255.
[220] 2000 WL 33407183 at *4.
[221] *Lee II*, 636 F.3d at 252.
[222] *Id.*
[223] *Id.* at 255.
[224] *Id.*
[225] *Id.*
[226] *Id.*
[227] *Lee II*, 636 F.3d at 255 (citing 2000 WL 33407183, at *4).

ill. This "why" could be in reference to those special circumstances in which further inquiry is appropriate, such as those noted by Harper.[228] This "why" could be evidence of the cynicism surrounding doctors' notes in response to return-to-work directives.[229] By failing to further expand on what precisely the employer is entitled to know, the EEOC's guidance provides some, but little, strength to the Sixth Circuit's holding and little confidence for employers.[230]

Furthermore, the protection provided by Question 15, if any, is diminished by the fact that the EEOC's guidance does not have the force of law.[231] The court itself conceded that the guidance was "non-binding."[232] Thus, Question 15 is merely persuasive authority, and supports only the general proposition that policies applying to all employees are usually acceptable under the ADA.[233] Since the strength of that evidence was debunked above, Question 15 does little to support the holding in *Lee II*.

The *Lee II* court also cited two EEOC rulings and one District of Columbia Circuit case to little avail.[234] *White v. Potter*[235] also put stock in the notion that "an employer may ask an employee to justify his/her use of sick leave by providing a doctor's note or other explanation as long as it has a policy or practice requiring all employees" to follow it, it was an acceptable practice.[236] At best, this holding bolsters the already-debunked notion that if a policy applies equally to all, it is appropriate. As noted above, the inquiries are what are at issue in these cases, not the application of the policies.

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[228] Telephone Interview with John Harper, Senior Compliance and Employment Counsel, BASF (Oct. 25, 2011).
[229] *Id.*
[230] *Lee II,* 636 F.3d 245 (6th Cir. 2011).
[231] *See* Skidmore v. Swift & Co., 323 U.S. 134 (1944).
[232] *Lee II*, 636 F.3d 245, 256 (6th Cir. 2011).
[233] *Lee II*, 636 F.3d 245 (6th Cir. 2011).
[234] *Id.* at 255-56.
[235] EEOC Doc. 01A14266, 2002 WL 31440931 (Oct. 23, 2002).
[236] 2002 WL 31440931, at *4 n.2.

Donoghue v. Nicholson,[237] another EEOC ruling, does even less in the way of support for the *Lee II* holding. *Donoghue* was chiefly concerned with the appropriate means of communication through which an employer may receive notification of an employee's request of sick leave.[238] This case seems to align itself with the EEOC's interpretation which suggests that the phrase "or other explanation" refers to the appropriate means through which directive requests may be communicated, not proper types of inquiries.

Finally, the *Lee II* court cited *McGill v. Munoz*.[239] Like *White*,[240] this case addressed equal application of a policy, and how a policy which is applied equally is legitimate.[241] Any discussion of the "nature" of an illness, or the content of a note, is wholly absent. Thus, *McGill*[242] does equally as little as *White*[243] and *Donoghue*[244] to bolster the *Lee II* holding, for the above authorities do not directly address what is an "acceptable inquiry" is under the ADA or the Rehabilitation Act. Instead, they are concerned with the fact that requiring doctor's notes, as a form of documentation, is permissible and with the equal application of sick leave policies. Neither of these findings provides the *Lee II* holding with enough breadth to shield employers with dual-natured directives from liability.

F. *Staub's* Complicating Contribution to Placing Doctors' Notes in Immediate Supervisors' Hands

The City of Columbus' directive required employees to deliver physician's notes to an immediate manager.[245] While the Sixth Circuit held that plaintiffs could not challenge the directive on the mere speculation that immediate supervisors might violate the statute's

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[237] EEOC Doc. 0120063441, 2007 WL 2907575 (Sept. 26, 2007).
[238] *Id.*
[239] 203 F.3d 843, 847-48 (D.C. Cir. 2000).
[240] EEOC Doc. 01A14266, 2002 WL 31440931 (Oct. 23, 2002).
[241] *Id.*
[242] 203 F.3d 843, 847-48 (D.C. Cir. 2000).
[243] EEOC Doc. 01A14266, 2002 WL 31440931 (Oct. 23, 2002).
[244] EEOC Doc. 0120063441, 2007 WL 2907575 (Sept. 26, 2007).
[245] *Lee II*, 636 F.3d at 248.

confidentiality provisions,[246] courts may disagree with this holding in light of the Supreme Court's recent decision in *Staub v. Proctor Hospital.*[247] In that case, an employee's supervisor fabricated a disciplinary incident because of the supervisor's personal animosity towards the employee's military obligations.[248] These events subsequently led the company's Human Resources department to terminate the military.[249] The Supreme Court held the employer liable under the cat's paw liability theory[250] because the supervisor discriminated against the employee with intent to see the employee ultimately fired, and the employee was, in fact, fired.[251] The fact that the "innocent" Human Resources department was the ultimate decision maker regarding the choice to terminate did not shield the company from liability.[252]

In light of the Supreme Court's adoption of the theory of cat's paw liability for employers, some suggest that the *Staub* holding[253] may prompt employers to remove tangible employment action[254] choices from the hands of lower-level supervisors and instead leave such choices solely in the hands of Human Resources departments, and those departments should exercise caution in relying on information from the supervisors.[255] The degree of separation between the doctors' note

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[246] *Id.* at 258.
[247] 131 S.Ct. 1186 (2011).
[248] *Id.*
[249] *Id.*
[250] *See generally* 19 No. 4 FAM. & MED. LEAVE HANDBOOK NEWSL. 5.
[251] 131 S.Ct 1186 (2011).
[252] *Id. See generally,* Andy Gruber, *Breaking Up is Hard to Do: Issues Surrounding Employee Termination,* BINGHAM MCHALE, (Jan. 9, 2011 3:14 PM), http://blog.binghammchale.com/wp-content/uploads/2011/05/LL__Termination.pdf.
[253] Staub v. Proctor Hosp., 131 S.Ct. 1186, 1194 (2011).
[254] *See* Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998) ("A tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.").
[255] John J. Balitis, Jr. & Carrie Pixler Ryerson, *The Moral of Staub v. Proctor Hospital: Don't Get Burned By Discriminatory Employment Decisions*, FENNEMORE CRAIG, P.C., (Feb. 17, 12:23 PM), http://www.fclaw.com/newsletter/newsletter.cfm?id=1071; Alan Lescht, *Supreme Court Holds That Company May Be Liable For The Discriminatory Motives of Non-Decision Makers*, FISHER & PHILLIPS, LLP, (Feb. 13, 2011, 12:14 PM), http://www.laborlawyers.com/shownews.aspx?Show=13759&Type=1122; *Staub v. Proctor Hospital: A Key Victory For Employees' Rights*, ALAN LESCHT & ASSOCIATES, P.C., (Feb. 17, 2011, 12:35 PM), http://www.dcemploymentattorney.com/blog/2011/04/staub-v-proctor-a-key-victory-for-employees-rights.shtml.

and one in a position to discriminate against the employee is key to success; keeping such information out of the hands of immediate supervisors is a significantly safer route. Although this choice will not completely protect employers from liability, it will decrease the chances of a successful cat's paw liability claim against the company.

Indeed, a plethora of employer blogs are encouraging employers to provide supervisors with special training as a means of avoiding cat's paw liability, or removing powers relating to hiring and firing from supervisors altogether.[256] If advising employers to move hiring and firing powers out of the hands of supervisors is advisable, it is equally wise for employers to keep medical information that may tend to, intend to or necessitate revelation of an employee's disability out of the hands of direct supervisors too. If a manager's discrimination based on bias against military involvement could be imputed onto the employer, discrimination based on disability could just as easily fit that mold.

While some employer blogs deem *Lee II* an employer-friendly decision, *Staub* is undisputedly far from it. Since suing one's employer just became that much easier under cat's paw liability theory, it makes the most sense for employers to, now more than ever before, avoid liability for disability discrimination. Removing information that, with the assistance of a mere

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[256] *How to Avoid the Dreaded 'Cat's Paw' in Light of Staub,* CONSTANGY, BROOKS & SMITH, LLP (Oct. 2, 2011, 9:04 PM), http://www.constangy.com/communications-324.html; *Breaking Up is Hard to do: Issues Surrounding Employee Termination,* BINGHAM MCHALE, (Oct 2, 2011, 7:43PM), http://blog.binghammchale.com/wp-content/uploads/2011/05/LL__Termination.pdf; Hutton & Williams, LLP, *How Can Employer's Defect the Cat's Paw?*, HUNTON EMPLOYMENT AND LABOR PERSPECTIVES (Oct. 2, 2011, 9:13PM), http://www.huntonlaborblog.com/2011/03/articles/employment-policies/how-can-employers-deflect-the-cats-paw/; Richard Renner, *Staub Wins at Supreme Court: Employers are Liable for Supervisors Animus*, WHISTLEBLOWERS PROTECTION BLOG (Oct. 2, 2011, 9:29PM), http://www.whistleblowersblog.org/2011/03/articles/corporate-1/staub-wins-at-supreme-court-employers-are-liable-for-supervisors-animus/; *U.S. Supreme Court Adopts 'Cat's Paw' Doctrine in Discrimination Cases*, BRACEWELL & GUILIANI, LLP (Oct. 2, 2011, 9:02PM), http://www.bracewellgiuliani.com/index.cfm/fa/news.advisory/item/96d52c0b-b733-4058-80f2-00fa2514600d/US_Supreme_Court_Adopts_Cats_Paw_Doctrine_in_Discrimination_Cases.cfm; *U.S. Supreme Court Broadens Employer Liability by Upholding 'Cat's Paw' Theory in Employment Discrimination Cases*, DUANE MORRIS, LLP (Oct. 2, 2011, 9:10PM), http://www.duanemorris.com/alerts/Supreme_Court_Staub_Proctor_Hospital_cat_paw_employment_discrimination_3972.html.

inferential step could reveal an employee's disability, from the hands of immediate supervisors is the best advice for employers.

IV. Trim Down to Avoid Liability: Single-Inquiry Return-to-Work Policies

Instead of navigating the unequal waters between the Second and Sixth Circuits, and contemplating how to strategically remain within the boundaries of the more favorable jurisdiction, employers have an easily-implemented, effective solution at their disposal which will enable them to obtain all information necessary to the effective execution of work while still avoiding liability under the ADA and the Rehabilitation Act. The solution is divided: into types of employees returning to work (those in safety-sensitive position and those not), and into those cleared to return to work with restrictions, and those without.

1. Single-Inquiry Protection from Liability: A Proposed Return-to-Work Policy

For all employees returning to work, the initial step in the proposed, safest return-to-work policy is to merely inquire, in the first phase of your directive, whether the employee is healthy and ready to return to work. In response to this single inquiry, a physician will either clear an employee for return to duty, or will do so with some restrictions on ability in place. In the first instance, the directive has achieved its purpose; the employer may be confident the employee can return to duty with full ability, and the employee is in no increased danger of discrimination based on disability. Thus, for employees, particularly those in non-safety-sensitive positions who are capable of returning to work without restrictions, a single-inquiry directive applies.[257] The directive probes no further because no legitimate business reason would justify further inquiry, and all necessary information has already been relayed to the employer.[258]

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[257] Telephone Interview with John Harper, Senior Compliance and Employment Counsel, BASF (Oct. 25, 2011).
[258] *See supra* Part III.

For employees cleared to come back to work with restrictions, a follow-up inquiry may kick in as part of the return-to-work policy.[259] This secondary inquiry will be particularly justifiable for employees in safety-sensitive positions.[260] In addition to the first inquiry, the employer may follow up and ask the physician for clarification about the particular restrictions on the employee's abilities to perform job-related duties or responsibilities. Note, however, that asking about the general diagnosis or "nature" of the employee's illness would be unnecessary, unjustifiable, and is too risky under the provisions of the ADA. Instead, the employer may inquire into the specifications regarding the limitations on the employee's capabilities. The follow-up questions must be formulated in a way that seeks to uncover facts about the employee's ability to complete duties and meet demands at work, not about the employee's general health or illness. There is a distinction between revealing how the employee can or cannot perform the job and the "nature" of his or her sickness. This distinction is to be identified and heeded by employers seeking to avoid liability with most success in light of dispute between the Second[261] and Sixth[262] Circuits. An example of an appropriate follow-up letter follows.

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[259] *See supra* Part III.
[260] *See supra* Part III.
[261] Conroy, 333 F.3d 88 (2d Cir. 2003).
[262] *Lee II*, 636 F.2d 245 (6th Cir. 2011).

S A M P L E

[Return-to-Work Directive Follow-Up Request]

Dear Dr. **[name]:**

[Employee name], a patient of yours, is employed as a **[position title]** with the **[company name]**. I received your initial letter dated **[date]**, wherein you indicated that **[employee name]** was able to return to work, but with **[insert relevant restrictions as delineated in first communication from doctor]**. In light of **[this restriction/these restrictions/employee's safety-sensitive position],** I find it necessary to request further clarification of these restrictions upon **[his/her]** current ability to perform **[his/her**] duties as a **[position title]** at **[company name]**.

[Employee's name]'s position requires **[him/her]** to **[detailed specifications of employee's job possible impacted by health impairments]**. In a signed and sealed letter, please provide any and all relevant insight into how the restrictions you've deemed currently applicable to **[employee's name]** will impact **[his/her]** performance of these duties. I will use your elaboration in evaluating **[his or her]** ability to perform these functions at work, and in deciding whether accommodations in **[his or her]** work environment or assignments are most appropriate.

Please mail your elaboration of **[Employee's name]** work capability restrictions to the address below. To preserve confidentiality, please ensure that your response is mailed in a sealed envelope directly to our Human Resources department, to the attention of **[Human Resources director's name].** If you have any questions, concerns, or if the information requested of you is unclear in any way, please contact me at **[telephone number]** or via email at **[email address]** before responding to this request.

Sincerely,

[Authorized Signature]

Thus, carefully-crafted, general return-to-work directives should discard the dual-pronged inquiry structure exemplified by the City of Columbus' policy in *Lee II*.[263] Return-to-work directives applicable to all employees should ask only: Is the employee healthy and ready to return to the duties of his or her job? Only in special circumstances – either when an employee's doctor clears him or her for work with restrictions, or perhaps when the employee fills a safety-sensitive position – shall the employer justifiably request further clarification of these restrictions.[264] In nearly all circumstances, an employer should refrain from inquiring into the "nature" of an employee's illness, since a legitimate business reason will be lacking to justify such an action, and it likely violates the ADA and, through incorporation, the Rehabilitation Act.[265]

Furthermore, to avoid any form of liability as a result of these policies, employers should require employees to send doctors' notes responding to these single-inquiry directives directly to Human Resources or another higher-level managerial staff member, and not to the employee's direct supervisor. In light of S*taub*, keeping such notes out of the hands of immediate supervisors is a cautionary, but still highly advisable, step.[266] It is cautionary because the proposed return-to-work directive does not reveal the "nature" of an employee's illness. While an unguaranteed inferential step must necessarily occur between a supervisor knowing of one's medical absence and then determining an employee's disability, employers of the belt-and-suspenders school of thought are best advised to keep such information out of the hands of direct

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[263] *Lee II*, 636 F.3d 245 (6th Cir. 2011).
[264] Telephone Interview with John Harper, Senior Compliance and Employment Counsel, BASF (Oct. 25, 2011).
[265] *Id.*
[266] *See supra* Part III.

supervisors to avoid the development of bias.[267] Phrased simply, employers seeking to err on the side of caution in their return-to-work policies are best advised to abide by the theory: "The fewer people with knowledge of these notes' content, the better." Supply immediate supervisors with only the information necessary to supervise the employee's job.

ii. Drawbacks of Single-Inquiry Requests are Minor and Fail to Outweigh the Advantages

Some may criticize this proposed directive for not addressing with enough force a concern of some employers: the cynicism some employers hold for notes from certain doctors.[268] A legitimate concern exists that employees can game the system by having a physician pen a note clearing the employee to return to work and he or she has not truly been ill.[269] This criticism does not, however, debunk the validity of the proposed directive or make it any less advisable.

To begin, no directive should be developed with this cynical concern chiefly in mind. Just as the practice of clients placing their trust in counsel is inherent to the legal system's functioning, an employer having a reasonable level of belief in the medical profession is inherent and essential to any successful return-to-work policy. Furthermore, while the proposed directive may not tackle this cynical concern head-on, it does not completely ignore this possibility either. The directive allows for employers to follow-up on the specific limitations on employee ability in light of any restrictions or when an employer is particularly concerned because the employee fills a safety-sensitive position. Follow-up inquiry is allowable in these instances because there is a legitimate business reason that justifies further probing and because even the follow-up questions need not and should not dive into the "nature" of a general diagnosis. An employer could argue with equal success that successive notes from the same doctor raise red flags in the

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[267] *See supra* note 120.
[268] Telephone Interview with John Harper, Senior Compliance and Employment Counsel, BASF (Oct. 25, 2011).
[269] *Id.*

company's Human Resources department and that it was therefore justified in following up in same manner specified above. Thus, when confronted with cynicism, employers may follow the secondary series of inquiries, so long as the questions do not violate the formula above.

Another criticism of the proposed directive logically follows this response to the first criticism: A single-prong directive with an optional follow-up provision will consume more time and resources than a dual-pronged return-to-work policy. Concededly, whichever department in charge of following up with appropriate directive responses will have to contact the employee's doctor once more. This contact, however, is likely as simple as sending another letter through the mail. Presumably the price of postage pales in comparison to the costs of litigation. Furthermore, any extra work imposed by the proposed policy truly falls onto the medical professionals involved, not the company – and they seem willing to shoulder the burden.[270] As noted above, medical professionals are uncomfortable with broad-reaching directives asking questions that may reveal a patient's sickness.[271] It seems likely medical professionals will happily provide follow-up answers regarding a patient's ability to perform his or her duties at work as a means of complying with their own oaths and ethics.[272]

In addition, serious calculations of risk and costs would have to be shouldered by a company insisting on a dual-pronged directive in the wake of *Conroy* and *Lee II*. While a dual-pronged policy may be cheaper up front, this Comment reveals why such a policy will likely expose an employer to liability under the ADA or Rehabilitation Act. Thus, a wise employer must calculate the possible costs of litigation incurred through a dual-prong policy, and weigh those against the minimally increased costs of a single-inquiry directive with follow-up option.

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[270] Interview with Denise Coppa, Nurse Practitioner and Director of the Family Nurse Practitioner Program, College of Nursing, University of Rhode Island (Oct. 20, 2011); Interview with Dr. Laura Perrin, Optometrist, Randolph Eye Care. (Jan. 18, 2012).
[271] *Id.*
[272] *Id.*

One struggles to fathom a situation where the former is not significantly more expensive than the latter.

Finally, one cannot ignore the ethical dilemma present behind a policy that a company knows will likely violate the ADA or Rehabilitation Act. If and when such a violation comes before a court, the bench is far less likely to show an employer any compassion when an easily-implemented, equally effective policy was available to it. Also, not only would courts view ethically questionable choice harshly, but employees may take notice, and ultimately the company could struggle to retain its talent. With a simple, effective and ethically superior option available, employers are best advised against dual-pronged return-to-work policies in favor of single-inquiry directives with an option of follow-up.

V. Conclusion

Whenever the federal circuits are split on a given issue pertaining to employment, employers' concern about incurring liability is heightened by the unequal footing the competing decisions yield. For this reason, employer blogs were abuzz with news following the Sixth Circuit's decision in *Lee II*.[273] Some saw it as employer-friendly, while others were more reserved in their judgment of how the decision would define treatment of employers' return-to-work directives over time.

An analysis of the Sixth Circuit's reasoning reveals the *Lee II* holding is too perforated with unsound support for employers to find any valid comfort in the decision.[274] The Sixth Circuit relies on two faulty distinctions.[275] The first, an attempted distinction between the meaning of "nature" of an illness and of "general diagnosis," is literally unfounded.[276] The court

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[273] *Id*.
[274] *See supra* Part III.
[275] *See supra* Part III.
[276] *See supra* Part III.

never establishes why or how the difference between these two terms exists.[277] Instead, it assumes a distinction that is either nonexistent, or that is so transparent employers are ill-advised to rely upon it.[278] Secondly, the Sixth Circuit attempts to define a higher standard for plaintiffs to meet under the Rehabilitation Act with little success.[279] The similarities between the definitions of "necessitate" and "intend" on one side of the standard, and "tend to" on the other are too numerous to ignore, and too revealing not to be categorized as persuasive.[280]

More importantly, consideration of the Sixth Circuit's holding in real-world application reveals the major failings of its ruling.[281] Even if the validity of these faulty distinctions drawn with legal terms of art could be argued in theory, they fail in practice.[282] When applied, directives like that in *Conroy*,[283] deemed a violation of the law, will likely produce the same doctors' notes as directives like the one considered in *Lee II,*[284] inappropriately deemed acceptable under the Rehabilitation Act.[285] Finally, this conversation is all the more complicated by the Supreme Court's recent *Staub* decision,[286] which leaves one to wonder if the Sixth Circuit would have decided differently regarding the issue of handing doctor's notes to immediate supervisors had the *Staub* holding come down earlier.[287] In light of *Staub,* the *Lee II* court's approval of submitting doctor's notes to immediate supervisors is cast into detrimental doubt.[288]

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[277] *See supra* Part III.
[278] *See supra* Part III.
[279] *See supra* Part III.
[280] *See* Part III.
[281] *See supra* Part III.
[282] *See supra* Part III.
[283] Conroy v. N.Y. State Dep't of Corr. Servs., 333 F.3d 88 (2d Cir. 2003).
[284] *Lee* II, 636 F.3d 245 (6th Cir. 2011).
[285] *See supra* Part III.
[286] Staub v. Proctor Hosp., 131 S.Ct. 1186 (2011).
[287] *Id.*
[288] *Id.*

Employers are encouraged to do away with generalized, dual-pronged return-to-work directives applicable to all employees.[289] Instead, employers are best advised to adopt a single-inquiry directive for all employees, with an option to follow-up for cases involving safety-sensitive position-holding employees or employees returning to duty with restrictions.[290] This follow-up option pacifies employers' cynicism regarding the validity of doctors' notes.[291] Finally, a comparison of the costs of a single-inquiry directive to the costs of disability discrimination-based litigation debunks the argument that the proposed directives will cost more than a dual-pronged policy.[292]

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[289] *See supra* Part IV.
[290] *See supra* Part IV.
[291] *See supra* Part III, IV.
[292] *See supra* Part IV.