To What Extent Can an Employer Seek to Be Furnished With Medical Data of an Employee?

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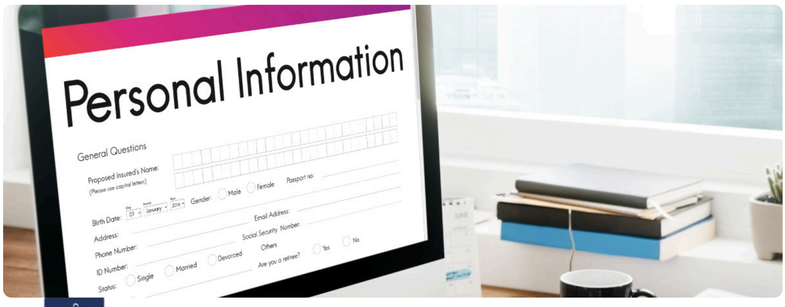

DETERMINATION OF CASE LAWS

The right to privacy is not one that can be forsaken in the quest of employment. In the case of ***Stephens v. Ohio State Tel. Co., 240 F 759, 773 (N.D. Ohio 1917)*** the U.S. District Court stated that "*every man . . . has the right of privacy ... at his home, at his lodging, [and] **at his place of work.***"

In ***St. Patrick's Home of Ottawa Inc. v. Canadian Union of Public Employees, Local 2437 (2016)*** where the employer disclosed an employee's medical note to another employer without the employee's consent, the arbitrator held that : -

> *"The release of medical information **about one's personal health, regardless of the contents of the note, is objectively offensive and embarrassing. It can also cause humiliation. It is not sufficient for this Employer to say that the contents of the note in question do not disclose any medical conditions that would stigmatize or cause embarrassment to a reasonable person. Any medical information is personal, private and must remain confidential.** The nature and extent of information that may be revealed in a medical note may have a bearing on the remedy available when there has been improper disclosure, but the disclosure of personal medical information of any kind is very disrespectful and offensive and therefore amounts to harassment as defined by these parties in this Collective Agreement."*

In the case of ***CNM –vs- The Karen Hospital Ltd, HAT No. 08 of 2015 (unreported)***, the Tribunal opined that 'informed consent' for HIV testing **means that the person being tested agrees to undergo the test on the basis of understanding the testing procedures, the reasons for the testing, and is able to assess the personal implications of having or not having the test performed.** The requirement for informed consent is intended to uphold the dignity of the patient.

Hon. Justice Majanja in ***Samura Engineering Limited & 10 Others v. Kenya Revenue Authority (2012) eKL12*** held that ***the purpose of the right to privacy is to protect human dignity which is itself a right under Article 28"***

However, not all medical assessments done on employees are illegal, especially where Essential Drug tests are found not to be harmful or intrusive. In the US Supreme Court case ***Samuel K. Skinner v. Railway Labor Executives Association (489 U.S. 602),*** the Court held that **both blood and urine tests were minimally intrusive**. While the Court acknowledged that the act of passing urine was in itself intensely personal, obtaining a urine sample in a medical environment and without the use of direct observation amounted to no more than a minimal intrusion. The Court justified not only testing of urine but also testing of blood by focusing on the procedure of testing (i.e., "experience . . . teaches that the quantity of blood extracted is minimal," and pointing out that since such tests are "common place and routine in everyday life," the tests posed "virtually no risk, trauma, or pain".. While such testing does amount to an imposition upon an employee (i.e., by requiring her to report to a physician and provide a urine sample) in a way that may not be commonplace for many employees, the Court ruled that since this takes place within an employment context (where limitations of movement are assumed), this interference is justifiable and does not unnecessarily infringe on privacy interests.

Locally, in ***VMK v CUEA [2013] eKLR***, the respondent had given the claimant a contract of service on a casual basis as a telephone operator in 2000. In 2003, her supervisor recommended her for a higher position, which she applied for and under that application included a medical test that did not indicate the testing for HIV. After undergoing the test, she was informed she was HIV positive and thereafter her promotion bid failed, causing her to continue employment on a casual basis even while her co-workers were promoted. In 2006, she wrote to the Personnel Officer having been aggrieved by her employment status and meagre salary which was responded to seven months after, giving her a one-year contract without benefits enjoyed by her colleagues. She continued on these terms till 2010 when her contract was terminated. The court found that the actions of the respondent indicated that the real reason behind the non-renewal was her HIV status as indicated by their lack of intention to employ her on permanent terms and thus resulted in unfair termination.

In the case of ***AMM v Spin Knit Limited [2013] KEELRC 573 (KLR)***, the claimant suffered an injury when he was attacked by thugs. Upon being discharged, he returned to work having been prescribed light duty but was still assigned heavy duty, resulting in him suffering further infection to his injuries. The employee attempted to seek compensation but the respondent refused to offer any assistance. Instead, the Respondent directed the claimant attend a mandatory HIV/AIDS test which he refused and was denied entry to the work place. He was thereafter terminated for non-attendance. The court found that the termination of the employee was improper as the respondent infringed on the claimant's right to privacy.

A healthy workforce is crucial for any organization. Section 34(1) of the Employment Act enjoins employers to ensure the provision of sufficient and proper medicine for their employees during illness and if possible, medical attendance during serious illness. This was echoed by, the Supreme Court in the case of ***Samuel Gitau Gachuru v Package Insurance Brokers (2021) eKLR*** wherein it was held that an employer must provide reasonable accommodation to a sick or incapacitated employee or demonstrate that they would incur undue hardship in providing such accommodation.

Employers have a legitimate interest in ascertaining their employee's health status to see if they are fit for their roles. However, this interest does not trump the employee's right to privacy. The court in the case of ***AMM v Spin Knit Limited [2013] KEELRC 573 (KLR)*** held that **where health status of the employee or the prospective employee has a bearing on the required qualifications or job specifications, it is sufficient for the employer to receive the doctor's certificate of fitness without disclosing the full medical report that infringes the employee's or prospective employee's health status**. An employer should highly restrict the disclosure of employees' medical reports and hold them in high confidence that protects the employee's privacy and therefore human dignity. An employer must not force an employee to undergo a medical examination or force the employee to present medical reports that expose the employee's health status that the employee is entitled to hold in his or her privacy.

CONCLUSION

An employer should ensure that any medical data collected is applied fairly, objectively, and without discrimination in making decisions about employee performance, promotions or other work-related issues.

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