Privacy in employment law

Bringing an employment action doesn't mean "opening the kimono" at defendant's whim

By Alexis S. McKenna

Plaintiffs' attorneys who are inexperienced at employment law often express surprise at how boldly defense attorneys attempt to delve into a full array of the plaintiff's private matters. I recently asked a defense attorney in one of my sexual harassment cases, an attorney who normally practices personal injury law, why he sought a number of matters in discovery that I know he does not seek in personal injury cases. He responded, quite sincerely, "Your client's primary damages are emotional distress; so, I'm entitled to all this." He had no further explanation, and he seemed to think he didn't need one.

As with any plaintiff, plaintiffs in employment litigation most certainly still maintain some of their privacy rights, even those claiming severe emotional distress. Plaintiffs' privacy rights have been well established through constitutional, statutory and case law, although many defendants seem to want to ignore this. This article will provide an overview of plaintiffs' rights, focus on those issues which arise most often in employment cases, and explain how plaintiffs can maintain their privacy despite having brought an employment claim.

Right to privacy

Californians, including plaintiffs in lawsuits, have an "inalienable right of privacy" provided by Article I, section 1 of the California Constitution. (*Britt v. Superior Court* (1978) 20 Cal.3d 844, 855-856.) In fact, this constitutional privilege has been held to operate even if a statutory privilege does not protect the matter in question. (*Davis v. Superior Court* (1992) 7 Cal.App.4th 1008, 1014 (citations omitted).) Plaintiffs do not completely cast aside this constitutional right to privacy simply because they have brought a lawsuit. "Although there may be an implicit *partial* waiver, the scope of such waiver must be narrowly, rather than expansively construed...." (*Davis, supra,* 7 Cal.App.4th at 1014 (citing to *Vinson v. Superior Court* (1987) 43 Cal.3d 833, 842) (emphasis added).) Moreover, the implicit partial waiver "encompasses *only* discovery *directly relevant* to the plaintiff's claim and essential to the fair resolution of the lawsuit." (*Davis, supra,* 7 Cal.App.4th at 1014 (emphasis added).)

In other words, the scope of relevancy normally applied in discovery – whether the matter either is itself admissible in evidence or appears reasonably calculated to lead to the discovery of evidence (Code Civ. Proc., § 2017.010) – is *not* the standard applied when dealing with private matters. Courts consistently hold the scope of relevancy in discovery to be very broad. Information is considered reasonably calculated to lead to the discovery of evidence if through reason, logic or common sense it could *lead* to admissible evidence. (*Lipton v. Superior Court (Lawyers' Mutual Ins. Co.)* (1996) 48 Cal.App.4th 1599, 1611 (citations omitted).) However, this sort of fishing expedition is not allowed when dealing with constitutionally protected, private matters. Rather, constitutionally protected information is treated like privileged information in the discovery process. "The party seeking the constitutionally protected information has the burden of establishing that the information sought is directly relevant to the claims." (*Tylo v. Superior Court* (1997) 55 Cal.App.4th 1379, 1387.) Further: "Even when discovery of private information is found directly relevant to the issues of ongoing litigation, it will not be automatically allowed ... The scope of any disclosure must be narrowly circumscribed, drawn with narrow specificity, and must proceed by the least intrusive manner." (*Davis, supra,* 7 Cal.App.4th at 1014.)

Various matters which the courts have found to be constitutionally protected include: personnel files (*Board of Trustees v. Superior Court* (1981) 119 Cal.App.3d 516, 528-530); educational records (*Porten v. University of San Francisco* (1976) 64 Cal.App.3d 825, 829); medical records (*Board of Medical Quality Assurance v. Gherardini* (1979) 93 Cal.App.3d 669, 678); mental health/psychological history (*Davis, supra,* 7 Cal.App.4th at p. 1013-1014); sex life (*Vinson v. Superior Court (*1987) 43 Cal.3d 833, 841); (*John B. v. Superior Court* (*Bridget B.*) (2006) 38 Cal.4th 1177, 1198;); marital relationship (*Tylo v. Superior Court (*1997) 55 Cal.App.4th 1379; 1387); and financial information (*Moskowitz v. Superior Court* (1982) 137 Cal.App.3d 313).)[1]

Medical records

Defendants in employment cases will often seek the entirety of plaintiff's medical records through subpoena, including his or her psychological history as well as physical medical condition, arguing that they are entitled to all of the records to see if some other factor may have caused the plaintiff's emotional distress. They are trying to apply the typical relevancy standard, not that which applies to privileged information. They cannot do this.

A plaintiff's medical and psychiatric records are protected not only by his or her privacy rights, but also by the physician-patient privilege and the psychotherapist-patient privilege. (See Evid. Code,

§§ 990, et. seq.; 1012 et.seq.) Although Evidence Code section 996 provides an exception to the physician-patient privilege where the patient has put his or her medical condition in issue, and section 1016 provides an exception to the psychotherapist-patient privilege where the patient has put his or her emotional or mental state in issue, the privilege is *broadly* construed by the courts while any exceptions are *narrowly* construed. (*Britt, supra,* 20 Cal.3d, at p. 863); *People v. Castro* (1994) 30 Cal.App.4th 390.)

The courts recognize that a person's medical history is an especially private area, "infinitely more intimate, more personal in quality and nature" than other areas protected by the constitutional right to privacy. (*Gherardini, supra,* 93 Cal.App.3d at 678.) The purposes for zone of privacy surrounding medical records are (1) 'to preclude humiliation of the patient that might follow disclosure of his ailments' [Citations] and (2) to encourage the patient's full disclosure to the physician of all information necessary for the effective diagnosis and treatment of the patient. (Citations.) (*Ibid.*) Both these purposes would be severely undermined if courts allowed litigants to overstep privacy rights by granting them unrestricted access to medical and psychiatric records.

The party seeking access to these privileged records may *only* have those *directly relevant* to those ***specific*** *conditions* the plaintiff has raised in the case. (*Britt, supra*, 20 Cal.3d, at p. 863-864.) A plaintiff's right of privacy remains protected as to physical and mental conditions *unrelated* to the claim or injury sued upon. (See *id.* at p. 864.) Further, the burden is on the party seeking the discovery to demonstrate that the information sought is directly relevant. (*Id.* at 859-862.) Disclosure may only be ordered if it would serve a "compelling public interest." (*Britt, supra,* 20 Cal.3d at 855-856; *John B., supra,* 38 Cal.4th at 1199.)

Accordingly, while your clients will have to understand that they are waiving their privacy rights with respect to those specific conditions they put at issue, they should not have to worry that their entire medical or psychiatric history will be disclosed. In fact, even if they believed they suffered a particular condition as a result of the conduct of the defendants, they are not required to claim every condition if they do not wish to have their prior history of that condition at issue. Plaintiffs certainly may narrow their claims in order to protect their privacy. In addition, they can claim "garden variety" emotional distress instead of severe emotional distress in order to further protect and narrow the scope of the discovery of any private matters. A "garden variety" emotional distress claim seeking damages for "pain and suffering" does *not* place plaintiff's mental condition in issue. (*Davis, supra,* 7 Cal.App.4th at 1016 (in garden variety case, plaintiff's right to privacy in his or her post-injury psychotherapeutic records outweighs any need for discovery of that information); see also *Vinson v. Superior Court* (1987) 43 Cal.3d 833, 840 (simple claims for having to endure an oppressive work environment or for lost wages normally will not place plaintiff's mental state in controversy).[2]

Sexual history

In sexual-harassment cases, some defense attorneys also claim that they are entitled to delve into the plaintiff's sexual history – it seems they wish to present a defense that implies that the plaintiff is sexually promiscuous and therefore was not offended by the harasser's conduct, or he or she in fact invited the conduct. In truth, plaintiffs most often do maintain their privacy regarding sexual history, even in sexual-harassment cases. Defendants must pass procedural safeguards in order to obtain any sort of discovery regarding a plaintiff's sexual history in such cases. Code of Civil Procedure section 2017.220 provides:

> …in any civil action alleging conduct that constitutes sexual harassment, sexual assault, or sexual battery, any party seeking discovery concerning the plaintiff's sexual conduct with individuals other than the alleged perpetrator shall establish specific facts showing that there is good cause for that discovery, and that the matter sought to be discovered is relevant to the subject matter of the action and reasonably calculated to lead to the discovery of admissible evidence. This showing shall be made by a noticed motion….

Further, evidence of "specific instances of plaintiff's sexual conduct, or any of such evidence, is not admissible by a defendant in order to prove consent by the plaintiff or absence of injury to the plaintiff in a sexual harassment case." (Evid. Code, § 1106(a).) "Sexual conduct" in Evidence Code 1106(a) is interpreted broadly to include "testimony about the plaintiff's racy banter, sexual horseplay, and statements concerning prior, proposed, or planned sexual exploits." (*Rieger v. Arnold* (2002) 104 Cal.App4th 451, 462.)

The Court of Appeal has pointed out with respect to Evidence Code section 1106 that:

> The purpose of this legislation, though probably self-evident, was eloquently stated by the Legislature: The discovery of sexual aspects of complainant's lives ... has the clear potential to discourage complaints and to annoy and harass litigants. That annoyance and discomfort, as a result of defendant[s'] ... inquiries, is unnecessary and deplorable. Without protection against it, individuals whose intimate lives are unjustifiably and offensively intruded upon might face ... invoking their remedy only at the risk of enduring further intrusions into details of their personal lives in discovery, and in open ... judicial proceedings. The Legislature is mindful that a similar state of affairs once confronted victims in criminal prosecutions for rape.... The Legislature concludes that the use of evidence of a complainant's sexual behavior is more often harassing and intimidating than genuinely probative, and the potential for prejudice outweighs whatever probative value that

evidence may have. *Absent extraordinary circumstances, inquiry into those areas should not be permitted, either in discovery or at trial.*

(*Knoettgen v. Superior Court* (1990) 224 Cal.App.3d 11, 13 (emphasis added.))

Simply put, defendants cannot inquire into a plaintiff's sexual history, or attempt to introduce such evidence, merely by stating that they think she is promiscuous. The requirement of showing "extraordinary circumstances" will not easily be met, thereby providing plaintiff protection of his or her sexual privacy.

Defense attorneys in sexual harassment cases may further argue that they are entitled to, at the very least, information regarding the plaintiff's sexual conduct in the workplace generally in order to show that he or she would not have been offended by the harasser's conduct. However, plaintiffs do not waive their privacy rights regarding sexual conduct in the workplace or with co-workers other than those they accuse of the sexually harassing conduct. The scope of admissible evidence in employment cases is *limited* to "evidence about the plaintiff's prior sexual conduct with the individual defendants, or others whose conduct plaintiff ascribed to the employer, regardless of whether it occurred in or outside the workplace." (*Rieger, supra,* 104 Cal.App.4th at 465.)

Keep in mind, should your client wish to keep his or her sexual history and practices private, he or she must not, of course, open the door by claiming damage to his or her sex life as a result of the defendants' wrongful conduct. Even if that is a damage, your client should consider not claiming it as a damage in order to prevent discovery on the topic, including any inquiry through a mental status exam, as explained further below.

Mental status exams

Defendants in employment cases sometimes attempt to circumvent the above privacy safeguards by insisting the plaintiff be subjected to a mental status exam, and thereafter have their examiner inquire into these private areas. However, a mental exam is also a discovery tool, and defendants may not use this tool to circumvent the privacy rights which otherwise apply.

Unlike a physical exam, the defense cannot just demand a mental exam, even though your client may be claiming emotional distress; defendants must bring a motion to the court and show good cause for such an exam. (Code Civ. Proc., §§ 2032.310; 2032.320(a).)[3] If it fits within your case strategy, you should be able to avoid a mental status exam entirely. A defendant cannot compel a mental exam if the plaintiff claims no continuing injury; e.g., where plaintiff only alleges past but no present or future emotional distress. (*Doyle v. Superior Court* (1996) 50 Cal.App.4th 1878, 1886.) The *Doyle* Court explained: "Where a plaintiff alleges that she is not suffering any current mental injury but only that she has suffered emotional distress in the past arising from the defendant's misconduct, a mental examination is unnecessary because such an allegation alone does not place the nature and cause of the plaintiff's current mental condition "in controversy." (*Id.* at 1887.) Further, barring "exceptional circumstances" a defendant cannot compel a mental exam if the plaintiff stipulates that (1) "no claim is being made for mental and emotional distress over and above that usually associated with the physical injuries claimed" and (2) "no expert testimony regarding this usual mental and emotional distress will be presented at trial in support for the claim for damages." (Code Civ. Proc., § 2032.320(b)(c).)

The first part of that stipulation seems unclear in the context of most employment cases where, unlike other personal injury matters, "physical" injuries have not occurred. However, in the the leading case on this issue, the California Supreme Court clarified the issue: "A simple sexual harassment claim asking compensation for having to endure an oppressive work environment or for wages lost following an unjust dismissal would not normally create a controversy regarding the plaintiff's mental state" (*Vinson v. Superior Court* (1987) 43 Cal.3d 833, 840.) The *Vinson* Court held that the plaintiff in that case *did* put her mental state in controversy, and good cause was shown for an exam, because she claimed the conduct of the defendants caused her various *ongoing* mental and emotional "ailments", i.e. severe emotional distress, and defendants pointed to specific justifying facts for the exam. (*Id.,* at 840-841.)

Yet, even if your case is one where you wish to make claims of ongoing, severe emotional distress, and/or call an expert to testify about the plaintiff's emotional distress, such that the plaintiff will be subject to a mental exam by the defense, that still does not mean that defendants' examiner is allowed an unlimited scope for the examination. The *Vinson* Court made clear that even though it found the plaintiff in that sexual-harassment case could be subject to a mental status exam, she had not waived her right to sexual privacy. Thus, the examiner was prohibited from asking her about her sexual history, habits or practices. (*Id.* at 843-844.) In any case where your client will be subject to a mental status exam, any stipulation or court order should prevent the examiner from delving into your client's sex life.

On-line privacy

An evolving issue in employment cases is the right to privacy regarding online communications and social media. The case law on these issues is still unclear, and thus far no California cases have dealt directly with the issue of whether defendants can subpoena plaintiffs' social media accounts. The Court of Appeal has held, however, that the author of an article posted on MySpace had no expectation of privacy even though she removed the article after six days, and she did not use her last name. (See *Moreno v. Hanford Sentinel Inc.* (2009) 172 Cal.App.4th 1125.) Notably, though, the Court of Appeal quoted *M.G. v. Time*

Warner, Inc. (2001) 89 Cal.App.4th 623, 632, stating, "The claim of a right to privacy is not so much one of total secrecy as it is of the right to *define* one's circle of intimacy – to choose who shall see beneath the quotidian mask. Information disclosed to a few people may remain private." (*Moreno, supra,* 172 Cal.App.4th at 1130.) But continuing, the *Moreno* Court stated, "Nevertheless, the fact that Cynthia [the author] expected a limited audience does not change the above analysis. By posting the article on myspace.com, Cynthia opened the article to the public at large. Her potential audience was vast." (*Ibid.*)

Disturbingly, a trial court in New York, relying on *Moreno*, compelled a plaintiff to sign a consent form authorizing access to her Facebook and MySpace accounts, stating, "When Plaintiff created her Facebook and MySpace accounts, she consented to the fact that her personal information would be shared with others, *notwithstanding her privacy settings*. Indeed, that is the very nature and purpose of these social networking sites else they would cease to exist." (*Romano v. Steelcase Inc.* (N.Y. Sup.2010) 30 Misc.3d 426,434.) The court granted the requested order permitting the defendants "access to Plaintiff's current and historical Facebook and MySpace pages and accounts, including all deleted pages and related information." (*Ibid)*

The most favorable case for plaintiffs on this issue thus far seems to be an unreported decision from the U.S. District Court for the District of Nevada, *Mackelprang v. Fidelity Nat'l Title Agency* of Nevada, Inc. (2007 WL 119149 (d. Nev.)), ruling on a motion to compel e-mail communications on two MySpace accounts in a sexual-harassment case.

The plaintiff denied they were her accounts, but the court found the evidence suggested they did belong to the plaintiff. But the court also found the defendants were on a fishing expedition and denied the motion because the requests were overly broad. The court stated that the defendants could serve discovery requests "on Plaintiff to produce her Myspace.com private messages that contain information regarding her sexual-harassment allegations in this lawsuit or which discuss her alleged emotional distress and the cause(s) thereof." However, the court said other private e-mails, such as those between the plaintiff and third parties that were sexually explicit or promiscuous, could not be obtained. (*Id.* at *8.)

This is an issue on which plaintiffs' attorneys must keep a close eye, as cases may appear at any time. It does not help that Facebook seems to change its rules regarding privacy settings on a regular basis. Regardless, it is best to advise clients to set their social network settings to private, and of course refrain from discussing their case and their injuries on-line in any fashion.

Conclusion

The California right to privacy is not absolute, and plaintiffs do, to some extent, waive their privacy rights when they bring lawsuit. However, this waiver is not as broad as defense attorneys would like it to be. Plaintiffs in employment cases can, and should, be able to maintain the privacy of much of their constitutionally protected information.


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Endnotes

[1] Defendants often seek any and all of this information through discovery in employment cases. This article, however, focuses on those private matters which most often are sought and the tools defendants most often use to try to get this information.

[2] A full discussion regarding the pros and cons of claiming "garden-variety" versus severe emotional distress, as well as all of the surrounding case law, is beyond the scope of this article. In summary, while this can narrow the scope of discovery and further insulate your clients' privacy rights, it also limits their damages, and ability to call experts.

[3] When the defendants meet and confer on stipulating to an exam, if you feel good cause will be shown, it makes the most sense to spare the court an unnecessary motion, as long as you can negotiate to get appropriate parameters for the exam set forth in the stipulation.