Iris Weinmann
GREENBERG & WEINMANN

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Preventing employers from running roughshod over privacy rights

RESPONDING TO OVERREACHING DISCOVERY

It is not unusual in employment litigation for the defendant employer to go on the offensive in response to being sued by a former employee, attempting to use the discovery process to investigate every aspect of the former employee's life. Such tactics may be used to try to embarrass the plaintiff, engage in a fishing expedition to try to discover evidence that might be used to attack the employee's credibility, or simply to harass the employee in retaliation for bringing a lawsuit.

This article examines frequent areas of overreaching by defendants in the context of employment litigation and provides legal authority that can be used to protect the client from unreasonable invasions of privacy.

Resisting overreach in discovery of plaintiff's medical records

When an employee alleges in his or her lawsuit that he or she suffered emotional distress or physical injuries as a result of the employer's conduct, the employer will often overreach, attempting to discover the name of every medical provider with whom the employee has treated and seek all of the employee's medical records, often without limitation as to time or medical condition.

It is well established that medical records are within a constitutionally protected zone of privacy. (See, e.g., *Davis v. Superior Court* (1992) 7 Cal.App.4th 1008, 1019; *Board of Medical Quality Assurance v. Gherardini* (1979) 93 Cal.App.3d 669, 679, overruled in part on other grounds by *Williams v. Superior Court* (2017) 3 Cal.5th 531, 557, fn. 8.) Such records are also subject to the statutory physician-patient privilege established in Evidence Code sections 990, et seq. and 1010, et seq.

Where a party seeks to discover documents subject to the constitutional right to privacy or protected by a statutory privilege, it is improper to "order discovery simply upon a showing that the Code of Civil Procedure section 2017.010 test for relevance has been met." (*Williams v.Superior Court, supra,* 3 Cal.5th at 556.) Rather, the court must balance the privacy interest against the countervailing interest served by disclosure. (*Id.* at p. 552 (citing *Hill v. National Collegiate Athletic Assn* (1994) 7 Cal.4th 1, 35, 37-40).) Any intrusion on the right to privacy "should be the minimum intrusion necessary to achieve its objective." (*Lantz v. Superior Court* (1994) 28 Cal.App.4th 1839, 1855, overruled in part on other grounds by *Williams v. Superior Court, supra,* 3 Cal.5th at p. 557, fn. 8.)

Contrary to what defendants often try to argue, the mere fact that a plaintiff files a lawsuit does not result in a wholesale waiver of his or her right to privacy. The California Court of Appeal has explained that plaintiffs are:

> not obligated to sacrifice all privacy to seek redress for a specific [physical,] mental or emotional injury; while they may not withhold information which relates to any physical or mental condition which they have put in issue by bringing this lawsuit, *they are entitled to retain the confidentiality of all unrelated medical or psychotherapeutic treatment they may have undergone in the past*.

(*Britt v. Superior Court* (1978) 20 Cal.3d 844, 864 (emphasis added); see also *San Diego Trolley, Inc. v. Superior Court* (2001) 87 Cal.App.4th 1083, 1093, overruled in part on other grounds by *Williams v. Superior Court, supra,* 3 Cal.5th at p. 557, fn. 8 [The patient/litigant exception is narrowly construed so that patients are not deterred from "instituting any general claim for mental suffering and damage out of fear of opening up all past communications to discovery."].)

Moreover, a claim for emotional-distress damages does not automatically permit a defendant to seek discovery on every other private alternate source of potential emotional distress. (*Tylo v. Superior Court* (1997) 55 Cal.App.4th 1379, 1386-87, overruled in part on other grounds by *Williams v. Superior, supra,* 3 Cal.5th at p. 557, fn. 8.) In *Tylo*, the court applied the *Britt* limited-waiver doctrine to an employment-discrimination case, holding that a claim of emotional distress caused by a wrongful termination does not allow the defendant employer to engage in a "fishing expedition" seeking all other potential stressors in the plaintiff's life. (*Tylo, supra,* 55 Cal.App.4th at p. 1388.)

There, the employer defendant argued "that because [the plaintiff] is seeking emotional distress damages in her suit, they have a right to discover 'other stressors that *might* have caused or contributed to [the plaintiff's] alleged emotional injuries.'" (*Id.* at p. 1386 (italics in original).)

The *Tylo* court disagreed and refused to allow the employer to inquire into the nature of the plaintiff's marital relationship and her husband's medical history, which were alleged alternative sources of distress. (*Id.* at p. 1388.) It reasoned that because the plaintiff had "tendered her psychological condition in this litigation only as it relates to termination of the employment contract," "discovery is limited to those injuries resulting from termination of the contract." (*Ibid.*)

Similarly, in a personal-injury case involving an emotional-distress claim, the appellate court reversed the trial court's order permitting disclosure of 10 years of medical records relating to injuries that were not directly related to those claimed in the lawsuit, reasoning as follows:

> Real party has not countered with any showing of direct relevance; rather, real party only speculates that in the records requested there could be material which might be relevant to various issues in this action, such as the nature and extent of emotional distress suffered, causation of the accident and petitioner's condition at the time of the accident. Mere speculation as to the possibility that some portion of the records might be relevant to some substantive issues does not suffice.... [R]eal party has made no attempt to limit the request to specific matters directly relevant to petitioner's pain and suffering from the physical injuries.... The request is thus overbroad because it necessarily

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> encompasses privileged material which is not relevant to the lawsuit.

(*Davis v. Superior Court, supra*, 7 Cal.App.4th at pp. 1017-1018 (internal citations omitted).)

Plaintiff's counsel should ensure that only the medical documentation directly relevant to the employee's case is produced and take steps to maintain the employee's privacy with respect to all other medical diagnosis and treatment. This may require limiting the scope of a subpoena to only medical records regarding specific conditions and limiting the time period for which records are being produced.

Upon receipt of an overly broad subpoena for med records

It is good practice upon receiving an overly broad subpoena for medical records to contact the medical providers to let them know that the plaintiff disputes the scope of the subpoena and to request that the medical providers not respond to the subpoena before the specified production date, to allow the plaintiff time to enter into an agreement with the defendant to limit the scope of the subpoena or to file a motion to quash the subpoena.

Particularly in cases where a client may have sought evaluation or treatment from a medical provider for multiple conditions, some of which are directly relevant to the case and some of which are not, in conferring with opposing counsel, the plaintiff's attorney may want to suggest a first-look procedure by which medical records are first produced to plaintiff's counsel, who can then review the records and redact unrelated matters, to ensure that only information regarding the relevant conditions are produced. The medical provider is unlikely to have the time or inclination to conduct a detailed review of the medical records in order to redact unrelated entries. Thereafter, any remaining dispute can be resolved with the court's assistance through in camera review of the disputed records.

A person's medical history may reveal extremely personal matters that an employee would not want others – especially a former employer with whom the employee now has a dispute and likely a lack of trust – to have access to. It is crucial for plaintiff's counsel to take effective steps to prevent the unnecessary disclosure of such sensitive information.

Resisting attempts to obtain records from prior and subsequent employers

Another common discovery tactic used by defendants in employment cases is to issue subpoenas seeking the plaintiff's entire personnel file from employers who employed the plaintiff after he or she was terminated from the defendant, and sometimes even seeking personnel records from the employers who employed the plaintiff before the defendant.

Like medical records, employment records fall within a constitutional zone of privacy. (*Board of Trustees v. Superior Court* (1981) 119 Cal.App.3d 516, 526, overruled in part on other grounds by *Williams v. Superior Court, supra,* 3 Cal.5th at p. 557, fn. 8.) Thus, in order to compel production, the defendant must meet the same standard discussed above with respect to medical records.

Records from prior employers

A frequent argument made by defendants to justify their subpoenas to employers who employed the plaintiff before the defendant is that the former employment may be relevant to loss of income and mitigation. California law disagrees. An employee's duty to mitigate requires that the employee seek employment which is comparable or substantially similar *to that which was deprived.* (*Parker v. 20th Century Fox* (1970) 3 Cal.3d 176, 181-182.) As the California Supreme Court has explained:

> The general rule is that the measure of recovery by a wrongfully discharged employee is the amount of salary agreed upon for the period of service, less the amount which the employer affirmatively proves the employee has earned or with reasonable effort might have earned from other employment.

(*Id.* at p. 181.)

Accordingly, the plaintiff's economic loss consists of the wages he or she would have continued to earn while working for the defendant had he or she not been wrongfully terminated, after deducting any replacement income that he or she is able to earn. The plaintiff's earnings at earlier employment are not even marginally relevant to his or her loss of income damages or mitigation, let alone directly relevant.

Moreover, even if the plaintiff's earnings from prior employment were somehow relevant to his or her efforts at mitigation, at most, the defendant would be entitled to discover his or her earnings for a limited period, not every single document relating to attendance, performance, disciplinary action, commendations, and random communications between the plaintiff and his or her former employers as is often sought by the defendants' overly broad and all-encompassing subpoenas.

The defendant may also contend that records of the plaintiff's performance at earlier employers would be relevant to determine if he or she had performance problems that were similar to problems that the defendant alleges led to the termination underlying the plaintiff's lawsuit. This argument, too, fails. Records of a plaintiff's performance at past employers are inadmissible as a matter of law on the issue of the plaintiff's future performance, since it would constitute inadmissible character evidence. (Evid. Code, § 1101, subd. (a) ["[E]vidence of a person's character or trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion."].)

Thus, in *Hinson v. Clairemont Community Hospital* (1990) 218 Cal.App.3d 1110, 1120, overruled on other grounds

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in *Alexander v. Superior Court* (1993) 5 Cal.4th 1218, the court relied on section 1101, subdivision (a) in excluding evidence concerning the defendant doctor's performance at past employers, finding such evidence inadmissible under Evidence Code section 1101, subdivision (a). Similarly, a defendant will not be permitted to introduce evidence of the plaintiff's conduct at prior employers to prove that his or her performance while working for the defendant must have therefore been deficient. Because such evidence is inadmissible, the defendant cannot satisfy its burden of establishing that the records are discoverable.

Another justification frequently articulated by defendants to support broad subpoenas to a plaintiff's former employers is that past-employment records *may* be useful to attack the plaintiff's credibility. More often than not, the precise type of impeachment evidence the defendant expects to find is not articulated. This is a clear fishing expedition that is not permitted when the constitutional right to privacy is at issue. Mere speculation as to the possibility that some portion of the records *might* be relevant to some substantive issues does not suffice. (*Davis v. Superior Court*, *supra*, 7 Cal.App.4th at p. 1017; *Mendez v. Superior Court* (1988) 206 Cal.App.3d 557, 570-571, overruled on other grounds by *Williams v. Superior Court*, *supra*, 3 Cal.5th at p. 557, fn. 8 [mere conjecture about what might be found is an insufficient basis for discovery of matters protected by the constitutional right to privacy]; *Huelter v. Superior Court* (1978) 87 Cal.App.3d 544, 548-549 ["mere speculation…does not justify the discovery of privileged matter."].)

Records from subsequent employers

While some records from employers with whom the plaintiff obtained employment after his or her employment with the defendant was terminated may be relevant, defendants invariably tend to issue overly broad subpoenas seeking every conceivable record relating to the plaintiff. Such subpoenas may be disruptive to the employee's new job, especially where the new employer was previously unaware of the employee's pending lawsuit. At times, the defendant appears more motivated to try to disrupt the plaintiff's relationship with his or her new employer than to obtain information necessary to prepare its defense.

The types of information from subsequent employers that may be relevant include records of the employee's earnings, dates of employment and perhaps the reasons communicated by the employee for leaving the defendant's employment. Rarely, however, do defendants in employment cases limit their subpoenas to such categories of documents. Rather, defendants tend to request everything under the sun, including the plaintiff employee's entire personnel file, performance evaluations, pre-employment exam records, worker's compensation records, documents regarding grievance procedures, and every other conceivable record relating to the plaintiff. These documents bear no relevance to the plaintiff's claims and should not be subject to discovery.

Attempts to subpoena employee's educational records

On occasion, defendants may attempt to subpoena the employee's college or other school records. In such cases, the defendant's request often appears more targeted at harassing the plaintiff than discovering relevant documents.

Individuals also have an expectation of privacy in their educational records. (*Porten v. University of San Francisco* (1976) 64 Cal.App.4th 1839, 1853.) Unless something related to the educational records is directly at issue in the lawsuit, such records should not be subject to discovery. The plaintiff's grades, class schedule, school application and academic records are generally not even remotely related to whether the defendant employer subjected the aggrieved employee to a hostile work environment, or wrongfully terminated the plaintiff employee's employment or whatever other wrongful conduct is alleged as the basis for the lawsuit and such discovery should be resisted.

Defendants often try to argue that college or other records might be relevant if it turns out that the plaintiff misstated something on his or her resume or application about his or her level of education, citing the after-acquired evidence defense. The after-acquired evidence defense applies when an employer being sued for wrongful termination learns of misconduct by the employee such that the employer would have terminated the employee anyway for such misconduct:

> Where an employer seeks to rely upon after acquired evidence of wrongdoing, it must first establish the wrongdoing was of such severity that the employee in fact would have been terminated on those grounds alone if the employer had known of it at the time of the discharge.

(*McKennon v. Nashville Banner Publishing Co.* (1995) 513 U.S. 352, 362-363.)

Unless the defendant can set forth evidence that the plaintiff made misrepresentations in his or her employment application so material that he or she would have been terminated had the defendant discovered them during the course of the plaintiff's employment, this argument should fail. If all the defendant can assert is the possibility that *perhaps* if it looked at all of the plaintiff's school records, it *might* find something inaccurate in what he or she told the defendants, this is speculation insufficient to allow the defendant to overcome the plaintiff's privacy rights. (*Huelter v. Superior Court*, *supra*, 87 Cal.App.3d at pp. 548-549.)

Attempts to conduct discovery into plaintiff's sexual history

Any attempt by the employer in a sexual harassment, sexual assault or sexual battery case to conduct discovery about the plaintiff's sexual conduct with individuals other than the alleged harasser must be resisted. California statutory law expressly protects such evidence from discovery:

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> 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….

(Code Civ. Proc., § 2017.220.)

The burden is on the defendant in such cases to establish "specific facts" establishing "good cause" for such discovery. (*Ibid.*) Likewise, admission of such evidence is not admissible at trial. (See Evid. Code, § 1106, subd. (a) ["In any civil action alleging conduct which constitutes sexual harassment, sexual assault, or sexual battery, opinion evidence, reputation evidence, and evidence of specific instances of the plaintiff's sexual conduct, or any of that evidence, is not admissible by the defendant in order to prove consent by the plaintiff or the absence of injury to the plaintiff, unless the injury alleged by the plaintiff is in the nature of loss of consortium."].)

In addition to the protections afforded by statute, case law likewise affirms these protections for victims of sexual harassment, sexual assault and sexual battery. (See, e.g., *Mendez v. Superior Court* (1988) 206 Cal.App.3d 557, 570, overruled on other grounds by *Williams v. Superior Court, supra,* 3 Cal.5th at p. 557, fn. 8; *Knoettgen v. Superior Court* (1990) 224 Cal.App.3d 11, 14.)

The term "sexual conduct" as used in section 1106, subdivision (a) applies to all active or passive conduct that reflects a willingness to engage in sexual activity, not just sexual activity itself. Thus, testimony that the employee engaged in "racy banter, sexual horseplay, and statements concerning prior, proposed, or planned sexual exploits" are considered "sexual conduct," evidence of which is inadmissible. (*Rieger v. Arnold* (2002) 104 Cal.App.4th 451, 462.)

Thus, any attempt by the defendant employer to conduct discovery into the plaintiff's sexual conduct with individuals other than the harasser must be vigorously opposed.

Attempts to discover benefits received from collateral sources

Unemployment insurance benefits are not deductible from a backpay award because such benefits are "intended to alleviate the distress of unemployment and not to diminish the amount which an employer must pay as damages for the wrongful discharge of an employee." (*Monroe v. Oakland Unified School Dist.* (1981) 114 Cal.App.3d 804, 810.) The same holds true with respect to disability benefits, since "the purpose of disability compensation is similar in part to that underlying general unemployment compensation." (*Mayer v. Multistate Legal Studies, Inc.* (1997) 52 Cal.App.4th 1428, 1436, fn. 3.)

Disability benefits and unemployment insurance benefits received by a plaintiff are collateral sources. The collateral-source rule provides that, if an injured plaintiff receives some compensation for injuries from a source wholly independent of the wrongdoer, those amounts are not deducted from the plaintiff's award of damages:

> The collateral source rule operates to prevent a defendant from reducing a plaintiff's damages with evidence that the plaintiff received compensation from a source independent of the defendant. [Citation.] Examples of collateral sources that may not be used to decrease a plaintiff's recovery include medical insurance, pension and disability benefits, and continued wages paid by an employer. [Citation.]

(*McKinney v. California Portland Cement Co.* (2002) 96 Cal.App.4th 1214, 1222.)

Because evidence of collateral-source benefits received by an employee would be inadmissible at trial, the employer's request seeking documents evidencing disability or unemployment insurance benefits is not reasonably calculated to lead to the discovery of admissible evidence and is therefore not discoverable. (Code Civ. Proc., § 2017.010.) At the same time, it seeks private financial information, and is invasive of the employee's right to privacy. Thus, the plaintiff should object to discovery requests seeking such information.

Conclusion

Once rung, a bell cannot be unrung. It is important to keep information to which defendants are not entitled out of their hands from the outset; protecting clients' medical, financial and other privacy rights and preventing clients from feeling harassed and beaten up by their former employers.

Iris Weinmann is a partner in Greenberg & Weinmann *in Santa Monica. She has concentrated her practice on the representation of employees in civil rights and other employment-related litigation since 1994.*