New Washington state law bans medical records from open court during sexual harassment lawsuits

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With the #MeToo movement as a catalyst, the state Legislature passed a law that bans privileged medical and mental-health records and communications in most discrimination cases from reaching the courtroom during a court process known as discovery.

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After being sexually harassed at work, some women face the specter of having the most intimate, private details of their lives dissected in open court by attorneys for their employer.

That's because defense attorneys have often sought and obtained medical records of plaintiffs — even going back as far as birth — in defending their clients. Knowing this could happen, some victims of harassment have opted against taking their employer and their harasser to court.

"It was a way to silence their voices," said state Sen. Patty Kuderer, D-Bellevue, an employment-discrimination attorney. "It was a re-victimization, especially in sexual harassment cases."

Confronting sexual harassment and abuse

The #MeToo movement has sparked a national conversation about sexual harassment and assault. From actors in Hollywood to security guards at the Seattle Public Library, more people are coming forward with painful and intimate stories of abuse, casting new light on behavior that for too long has been dealt with in whispers, secret settlements or not at all. So where do we go from here? The Seattle Times' occasional series explores that and other questions as we move forward in this changed landscape.

But with the #MeToo movement as a catalyst, the state Legislature passed a law this year that bans privileged medical and mental-health records and communications in most discrimination cases from reaching the courtroom during a court process known as discovery.

The law, which goes into effect June 7, will create uniformity in the Washington Law Against Discrimination that makes it a civil right to be free from discrimination based on, among other things, race, sex, age and disability.

Beth Touschner, an employment-discrimination attorney, said that someone's private therapy sessions will no longer be read, analyzed and attacked by the defense.

Now when someone claims noneconomic damages for what attorneys call "garden variety" emotional distress like mental anguish, humiliation and suffering due to some form of discrimination such as harassment, the person's medical records won't be exposed.

Unlike economic damages such as loss of wages, noneconomic damages can include emotional distress.

Previously, defense attorneys could use the discovery process to obtain decades-old medical and mental-health records that many times had nothing to do with the alleged discrimination, Touschner said. Discovery is a pretrial exchange of information, such as records, between plaintiffs and the defense so everyone knows what may be presented at trial.

Kuderer, who co-sponsored the bill, said this "chilling effect" caused some of her clients to walk away from lawsuits or not even file them. She said defense attorneys use these records to find other reasons for a plaintiff's emotional distress, like "a death, a miscarriage or abortion or if they were treated for a STD (sexually transmitted disease) when they were a teenager that the victim may not want in the public realm."

The alleged harasser, she said, could see all those medical records.

But Jeff James, a Bellevue attorney who defends private-sector employers, said there have been legitimate reasons for medical records to be introduced in discrimination

lawsuits. He said records could help contradict or challenge the cause or magnitude of alleged damages.

“The claim of invasion of privacy is something overblown, and the courts are there to protect the individual,” James said.

When the defense asks for records, a judge can determine what types of records a plaintiff must submit and the time frame they cover. But Kuderer said there has been no uniformity between judges on how far back the medical records could be pulled.

Some judges require a couple of years, others a decade. Kuderer recalled one case when a judge ordered all of the plaintiff’s medical records since birth be handed over to the defense.

Kuderer and James agree the #MeToo movement was on the minds of legislators when they voted 42-5 in the Senate and 97-1 in the House to approve SB 6027.

In fact, during a public hearing about the bill, the chair of the House Judiciary Committee, Rep. Laurie Jinkins, D-Tacoma, said “I guess we would call this the Weinstein bill” in reference to movie mogul Harvey Weinstein who has been accused of sexually harassing and abusing multiple actresses and employees.

There are three instances in which medical records and communication up to two years before the alleged unlawful act can be seen as part of discovery:

• If the plaintiff relies on the records or is using a health-care provider or expert to testify;

• If the plaintiff suffers from a diagnosable physical or psychiatric injury such as depression or post-traumatic stress disorder that she or he is seeking compensation for;

• If the plaintiff claims an employer is failing to accommodate a disability or is discriminating on the basis of the disability.

James said the law takes things a step backward.

“Eliminating the ability to get medical records tips the balance against employers,” he said.

The law's passage stems from and essentially reverses a 2013 state Court of Appeals Division I decision in Lodis v. Corbis Holdings Inc. that ruled plaintiffs must produce mental-health records when seeking emotional harm or distress in a discrimination suit.

That case began when Steven Lodis was fired and then filed an age-discrimination and retaliation lawsuit against Corbis, a digital image and stock photography supply company. A King County Superior Court judge struck down Lodis' emotional-harm damage claim after he refused to show his medical records with two psychologists during discovery.

Lodis appealed, but the Court of Appeals agreed with the prior ruling that Lodis must turn over his records. When Lodis did show his health records, he lost his case.

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