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Washington Court Weighs in on Privilege Waiver & What Is Opposition Activity

By Thomas Holt

In *Lodis v. Corbis Holdings, Inc.*, No. 67215-1-I (Wash. Ct. App. Jan. 14, 2013), the Washington State Court of Appeals has helped clarify what has become a contentious issue in employment litigation, ruling that “when a plaintiff puts his mental health at issue by alleging emotional distress . . . [t]he defendant is entitled to discover any records relevant to the plaintiff’s emotional distress.” In the same opinion, the court also held that a human resources executive need not step “outside his or her role of representing the company” to be protected from adverse treatment based on counseling others against discriminatory conduct.

Background

In 2005, Corbis Corporation, a stock photo company, hired the plaintiff as its vice president of worldwide human resources. In 2007, a new chief executive officer (CEO) took over. Soon thereafter, the CEO promoted the plaintiff to be part of Corbis’s executive management team.

After taking over, the CEO allegedly made many comments indicating his preference for younger workers, referring to older workers as being “out of touch,” “an old-timer,” “grandmotherly,” or “the old guy on [the] team.” He also allegedly expressed a desire to hire “younger” workers for Corbis’s executive management team.

The plaintiff, who was both over 40 and in charge of Corbis’s company-wide HR operations, repeatedly spoke with the CEO about his age-related comments, Corbis’s nondiscrimination obligations, and the potential risk created by the CEO’s remarks. The plaintiff also expressed concern about the CEO’s comments to Corbis’s general counsel.

Just a few months after the plaintiff spoke to the general counsel about the CEO’s remarks, the CEO fired the plaintiff, citing negative working relationships. Three months later, the plaintiff sued, claiming that the stated basis for his discharge was pretext, and that the real reasons were to retaliate against him for his discussions about the CEO’s age-related comments and to discriminate against him based on his age.

The complaint specifically claimed an entitlement to money damages for emotional distress caused by the discharge. After the suit was commenced, Corbis sought discovery related to the plaintiff’s claimed distress — in particular, records from two psychologists who had treated him. The plaintiff refused to produce the records, claiming they were protected from disclosure by the psychotherapist-patient privilege.

Prior to trial, the court dismissed the plaintiff's retaliation claim on the basis that he did not "step outside" his role as vice president of HR when he warned the CEO about age discrimination, and so could not have engaged in protected "opposition activity" sufficient to support a claim under the anti-retaliation provision of the Washington Law Against Discrimination (WLAD).

The case then proceeded to trial on the plaintiff's age discrimination claim and various counterclaims brought against him by Corbis. Before trial, Corbis moved to exclude all testimony and evidence related to emotional distress based on the plaintiff's refusal to produce his therapy records. The trial court ruled that the plaintiff had waived any privilege as to the records by seeking emotional distress damages, and that he either had to produce them prior to the beginning of testimony or his distress claim would be stricken. The plaintiff continued to refuse to produce the records, and was precluded from introducing any evidence about his claimed emotional distress.

At trial, the jury found that Corbis had not discriminated against the plaintiff based on his age, and further found in Corbis's favor on its counterclaims against the plaintiff. Thus, ultimately, not only did the plaintiff not prevail against Corbis, he actually ended up having a judgment entered against him. The plaintiff then appealed, arguing that the trial court had misapplied the law when it precluded testimony about emotional distress, and by dismissing his retaliation claim.

The Washington Court's Decision Clarifies Murky Discovery Rules

On appeal, the plaintiff argued that the trial court had erroneously excluded his emotional distress evidence because his claimed emotional distress was just "garden variety." That is, he claimed that because he had not alleged any *specific* psychiatric condition resulting from Corbis's actions (or the aggravation of such a condition), and he had not intended to introduce testimony by his psychotherapists, he had not waived privilege with respect to his treatment records, as the trial court ruled he had.

In making this argument, the plaintiff particularly relied on *Fitzgerald v. Cassil*, 216 F.R.D. 632 (N.D. Cal. 2003), a case decided by a California federal court. That case discussed in significant detail what it characterized as "three approaches" to the waiver of psychotherapist-patient privilege developed in the wake of the United States Supreme Court's decision in *Jaffee v. Redmond*, 518 U.S. 1 (1996), which recognized such a privilege under Rule 501 of the Federal Rules of Evidence. Ultimately, adopting what it called the "narrow approach," the *Fitzgerald* court ruled that waiver of psychotherapist-patient privilege should be "narrowly construed, particularly in civil rights cases," and that all counseling records can be withheld unless plaintiffs willingly disclose them through an "affirmative reliance" upon them in court.

The *Fitzgerald* court further stated that, even if courts were to apply what it described as the "middle ground" approach, plaintiffs should be entitled to withhold counseling records and other evidence relevant to their mental states when they assert claims of only "garden variety" distress — *i.e.*, distress that falls short of a diagnosable mental injury or disorder. This should be so, according to the *Fitzgerald* court, because plaintiffs do not put their mental state "in controversy" by alleging claims based on it unless they also allege a specific medical condition.

Setting binding precedent on the subject throughout Washington State, the state appellate court panel examining the plaintiff's claims roundly rejected the reasoning in *Fitzgerald*, holding that "when a plaintiff puts his mental health at issue by alleging emotional distress, he waives his psychologist-patient privilege for relevant mental health records. The defendant is entitled to discover any records relevant to the plaintiff's emotional distress." This decision should end the strategy of some plaintiff-side employment lawyers in Washington of withholding relevant counseling records while at the same time selectively introducing testimony about plaintiffs' mental health in order to recover damages based on alleged harm to it.

The Washington Court's Decision Also Expands the Range of Protected Opposition Activity

The *Corbis* court's decision is not all good news for Washington employers potentially confronting lawsuits by employees. The court also expanded the range of retaliation claims that employees may bring under Washington law by ruling that HR employees' ordinary job duties can be found to be protected "opposition activity" if they include counseling other employees against violating anti-discrimination laws.

The appellate court reversed the trial court's entry of summary judgment on the retaliation claim and remanded the case for trial on that claim, ruling that the plaintiff did not need to "step outside" his normal job duties in order for his actions to have been protected from retaliation.

under the WLAD. In so deciding, the court declined to apply federal case law interpreting the nearly identical statutory “opposition clause” in Title VII of the Civil Rights Act of 1964.

Specifically, the *Corbis* court found “not . . . persuasive” statements by the United States Court of Appeals for the Eighth Circuit in *EEOC v. HBE Corp.*, 135 F.3d 543 (8th Cir. 1998). In that case, the Eighth Circuit stated that “[a] requirement of ‘stepping outside’ a normal role” that can support a discrimination claim under Title VII must be “satisfied by a showing that the employee took some action against a discriminatory policy.” This statement was based on a holding to that effect in *McKenzie v. Renberg’s, Inc.*, 94 F.3d 1478 (10th Cir. 1996), a case brought under the anti-retaliation provision of the Fair Labor Standards Act (FLSA). In declining to apply the *HBE* court’s statement to the WLAD, the *Corbis* court observed that, unlike Title VII and the WLAD, the FLSA’s anti-retaliation provision does not actually have a clause prohibiting retaliation for merely “opposing a practice” forbidden by the statute—the type of clauses that provided the bases for both the plaintiff’s retaliation claim under the WLAD and the plaintiffs’ retaliation claims under Title VII in *HBE*. The *Corbis* court further observed that the *HBE* court’s treatment of the issue “was cursory and not necessary to the result.”

The Washington Court of Appeals acknowledged that its decision means that “nearly every activity in the normal course of a manager’s job would potentially be protected activity.” But, the court stated, better that possibility than to “strip human resources, management, and legal employees of WLAD protection” by reaching the contrary decision. The court also observed that the consequences of its decision would be tempered by the fact that plaintiffs would still be required to make out a *prima facie* case of retaliation in order for their claims to proceed.

Effect on Cases in Federal Courts Unclear

Neither the U.S. Supreme Court nor the U.S. Court of Appeals for the Ninth Circuit (the circuit in which Washington sits) has addressed the evidentiary question answered by the *Corbis* court — whether plaintiffs claiming an entitlement to damages for emotional distress should be able to conceal counseling records directly relevant to those claims by asserting that they are privileged. Other federal courts differ on the question. Thus, when a plaintiff alleges purely federal claims, employers facing claims in federal trial courts (even those situated in Washington) still will have to attempt to navigate the confused and contradictory federal case law on the question.

Similarly, in cases where the federal courts have jurisdiction based on claims brought under federal law, the federal law governing the discoverability of psychotherapy records (with its attendant lack of clarity) will probably apply even if pendant state claims significantly outnumber the federal claims.

On the other hand, cases decided in federal courts applying purely Washington law (*i.e.*, cases in which the federal courts have jurisdiction over Washington law claims based solely on the geographical diversity of the parties) will now have to allow reasonable discovery to be conducted into plaintiffs’ counseling records when those plaintiffs bring claims of emotional distress—as most plaintiffs alleging discrimination, harassment, and retaliation do.

A harder question exists in cases where federal courts have dual jurisdiction on the basis of both federal claims and the diversity of the parties. For example, in *Eagle Precision Technologies, Inc. v. Eaton Leonard Robolix, Inc.*, 2005 U.S. Dist. LEXIS 47173 (S.D. Cal. Aug. 11, 2005), a California federal trial court engaged in an extended discussion of the subject, ultimately applying state privilege law and concluding that, under Federal Rule of Evidence 501, the law to be applied is that which “provides the rule of decision.” What this means in practical terms is not easy to decipher in cases where numerous state and federal claims have overlapping, but different, elements of proof. A survey of the cases seems to indicate that, in such situations, federal courts tend to apply federal privilege law simply because they are comfortable with it, rather than because doing so is necessarily correct.

The bottom line is that, for cases in federal court decided solely under Washington law, full and fair discovery into plaintiffs’ emotional distress allegations will now be the rule. In other cases, including those involving both federal and Washington law claims, the issue will probably remain as muddy as ever. It is at least conceivable that the Washington state court decisions may prove persuasive to federal judges. But it is too soon to tell.

Considerations for Employers

The on-the-ground effect of the *Corbis* decision for employers that operate or have employees in Washington is two-fold. On one hand, employers need to be aware that even the routine job duties of HR employees and managers can be used as a foothold into a retaliation claim if those job duties include implementing nondiscrimination policies. As a result, employers should be particularly cautious when addressing disciplinary issues with HR and management employees in Washington, and seek legal counsel for negative employment actions related to them.

At the same time, Washington employers facing litigation involving claims of emotional harm should be aware that Washington state courts, unlike some federal courts, allow those claims to be fully explored. Under Washington law, at least, plaintiffs are not allowed to selectively present testimony on their mental state while at the same time concealing records related to it.

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