Workplace Privacy Data Management & Security Report

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# Workplace Privacy, Data Management & Security Report

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## California Appellate Court Expands Common Law Right of Privacy

The Fourth District Court of Appeal for the State of California expanded the tort of "public disclosure of private facts" under that state's common law right to privacy in a case involving a claim by an employee against her supervisor and employer. *Ignat v. Yum! Brands, Inc.* et al, No. G046434, (Cal. Ct. App. March 18, 2013). The plaintiff in that case suffered from bi-polar disorder and occasionally missed work due to the side effects of medication adjustments. After returning from such an absence, the plaintiff alleged that her supervisor had informed everyone in her department about her medical condition and that, as a result, she was "shunned" and a co-worker asked if she was going to "go postal." The plaintiff filed suit alleging a single cause of action for invasion of privacy by public disclosure of private facts. The trial court dismissed her claim on summary judgment because the disclosure of her condition was not in writing, relying on California case law from the early 1930's.

On appeal, the court reversed the dismissal, concluding that "limiting liability for public disclosure of private facts to those recorded in writing is contrary to the tort's purpose, which has been since its inception to allow a person to control the kind of information about himself made available to the public - in essence to define his public persona." The court went on to note that, "[w]hile this restriction may have made sense in the 1890's - when no one dreamed of talk radio or confessional television - it certainly makes no sense now."

The court also clarified that the common law tort of invasion of privacy was not based on the guarantee of privacy which was added to the California Constitution in 1972 and noted that the two legal theories (common law and the State Constitution) provide "separate, albeit related ways to ensure privacy."

Different states have interpreted the common law right of privacy in the workplace in different ways. In Minnesota, for example, a district court rejected a lawsuit by an employee who claimed that her employer violated her right to privacy when it informed approximately 12 to 15 individuals that she suffered from multiple sclerosis. That court determined that because the disclosure was not "accessible to the public at large," it did not qualify as public in nature for purposes of maintaining an invasion of privacy claim. *Johnson v. Cambell Mithun*, 401 F. Supp.2d 964 (Minn. 2005).

If an employee is out on medical leave or requires an accommodation, employers may be asked what information, if any, can be disclosed to co-workers and supervisors about that employee's medical

condition, and the reason for her leave or accommodation. HIPAA is probably not implicated in such situations because most employers are not covered entities in this context. Both the Americans with Disabilities Act (ADA) and the Family Medical Leave Act (FMLA), however, require employers to maintain confidentiality of medical information. See 29 C.F.R. Section 1630.14(c) (relating to ADA) and 29 C.F.R. Section 825.500 (relating to FMLA).

Employees asserting a common law claim for invasion of privacy against their employer based on the disclosure of medical information have not often been successful, but *Ignat* suggests the tide may be changing. The best practice is to reveal as little as possible to those with a need to know.

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