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LITIGATION

The battle for third-party information in discrimination claims

By Amy Semmel

Prosecuting a claim for employment discrimination often means battling for information and records about employees *other* than the plaintiff. In *Life Technologies v. Superior Court*, 2011 DJ-DAR 10709 (1st Dist. July 14, 2011), the 1st District Court of Appeal ruled that the notice procedures applicable to subpoenas for employment records set forth in California Code of Civil Procedure Section 1985.6 apply to demands for production of documents and interrogatories under the Discovery Act. But the opinion itself raises yet more procedural questions.

To prevail on a claim for employment discrimination, the plaintiff must prove that he has been treated differently *compared* to similarly situated employees outside the plaintiff's protected class because of a protected characteristic (such as race, gender or disability). Documents regard-

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ing employees other than the plaintiff may be necessary to prove this. For example, a plaintiff alleging that she was not offered the same training and advancement opportunities as similarly situated men might need to obtain training and promotion records to substantiate her observation. A plaintiff suing for alleged retaliation for taking protected leave for cancer treatment might need to obtain records pertaining to retention of persons taking other types of leave.

Evidence that others within the plaintiff's protected class have also been subjected to disparate treatment can be powerful evidence of discrimination as well. Such evidence is admissible and not to be excluded simply because the harassing or discriminatory conduct occurred outside the plaintiff's presence and at times other than

when the plaintiff was employed. *Pantoja v. Anton*, 2011 DJ-DAR 11962 (5th Dist. Aug. 9, 2011); *Johnson v. United Cerebral Palsy/Spastic Children's Foundation of Los Angeles and Ventura Counties*, 173 Cal.App.4th 740, 759-768 (2009).

In *Life Technologies*, a patent attorney who managed a sizable patent group in an in-house legal department, alleged that he was the victim of age discrimination after a corporate acquisition. As the merger approached, he noted that he was being excluded from opportunities that could have an impact upon his retention, while younger employees were allowed such opportunities. Another employee warned the plaintiff that he was on a "hit list" for termination where performance issues would be fabricated to drive older workers out or terminate them for cause in order to avoid paying severance. The plaintiff also noticed that nearly all of the attorneys in the acquiring corporation's legal department were "newly minted attorneys," much younger than he. As the merger approached, the plaintiff was systematically stripped of his duties, then put on a "performance plan." Finally, the employer fulfilled the plaintiff's worst fears by terminating him for poor performance and denying him a severance package.

After filing an individual action for age discrimination alleging both disparate treatment and disparate impact (where a facially neutral policy disproportionately affects a protected class), the plaintiff served interrogatories seeking (among other things) the names of all employees terminated in a two year period, the department, age at termination, reason for termination, whether severance was offered and if not, why not. The trial court granted a motion to compel answers to the interrogatories after notice to the affected employees of the information was released, unless the non-party employees filed a motion for protective order.

The 5th District ruled that the informa-

tion was likely discoverable, but found fault in the trial court's order in that it failed to separately analyze each category of information sought, "placed no restraint on the time and manner by which the current and former employees may be contacted" and failed to contain "safeguards to maintain the confidentiality of the information ultimately disclosed."

Before turning to procedural issues, the court noted that the "statistical" information sought was relevant not only to the plaintiff's disparate impact case, but also to his individual disparate treatment case.

The court then proceeded to balance the privacy rights of the third-party employees against the public interest in eradicating discrimination and retaliation. It first used the analytical framework set forth in recent cases such as *Pioneer Electronics (USA) Inc. v. Superior Court*, 40 Cal 4th 360 (2007) and *Alch v. Superior Court*, 165 Cal. App. 4th 1412 (2008). That is, a determination of the following: whether the party whose information sought possesses a legally protected privacy interest under the particular circumstances; whether the invasion of privacy is "serious" in nature, scope and/or actual or potential impact to constitute an "egregious" breach of social norms; whether the conduct alleged to be an invasion of privacy furthers legitimate and important competing interests; and whether protective measures, such as limiting disclosure to those who have a legitimate need to know, may minimize the privacy intrusion.

Relying on cases involving wholly distinguishable circumstances, the court went further, holding that "the balance will favor privacy for confidential information in third party personnel files unless the litigant can



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show a compelling need for the particular documents and that the information cannot reasonably be obtained through depositions or non-confidential sources.”

The court then directed the trial court to evaluate each category of information requested to determine whether a compelling need for the information existed, taking into consideration whether less intrusive means for disclosure exist. In addition, the court held that non-party employees should have the same rights to notice when their personal information is sought under the Discovery Act, as when sought pursuant to California Code of Civil Procedure Section 1985.6.

While establishing a procedural framework, *Life Technologies* raises new issues for the party seeking personnel information regarding third party employees. Here are some practical suggestions to address these head on. First, if discovery regarding personal information of other employees is anticipated, propose a reasonable protective order early in the case, providing that the information and documents obtained will

be used solely for the purposes of the pending action and disclosed only to the parties, their counsel and experts.

Second, the employee’s attorney may well be unaware of the names and addresses of the third party employees as to whose information is sought — making it impossible to provide Section 1985.6-type notice. To avoid long delays from service of the discovery to receipt of meaningful responses, meet and confer with opposing counsel regarding a procedure for giving notice in conjunction with service of the discovery. Also, consider whether a protective order is necessary (stipulated or otherwise) to preclude the employer from encouraging employees to object.

Third, try to work out a streamlined mechanism for resolving any objections received after notice is given to the third party employees. Of course, an objection is not dispositive: Upon a motion to compel, the court must then balance the privacy interests against the interests, public and private, advanced by the litigant. *Alch v. Superior Court*, 165 Cal. App. 4th at 1431-1439.

Fourth, the court suggested that less intrusive means, such as depositions, should be considered when balancing privacy interests against the interests of the plaintiff. In many cases, however, there will be no substitute for production of the records themselves, since no human would be able to recall the volume of data necessary. The information sought in *Life Technologies* is likely that sort of information: Even a person most knowledgeable will be unable to recite at a deposition detailed statistical and narrative information about a large corporate take-over involving scores of terminations. And while in certain circumstances it might be sufficient to disclose information without identifying the particular employees, there will inevitably be situations in which anonymous information will not suffice.

In sum, to obtain information protected by a strong right of privacy, the party seeking such documents will have to make a particularized showing of the direct relevance of each category and take steps to protect the privacy of affected non-parties.