



Washington's New Law Restricts Access to Medical Records in Discrimination Suits

From the Desk of John Kreutzer: Once a lawsuit is filed, the parties engage in discovery, where they exchange records and documents that are relevant to their respective claims and defenses. Recently, Washington's legislature passed a law to prevent defendants from being able to obtain a plaintiff's medical records related to the plaintiff's noneconomic damages claim in suit brought under the Washington Law Against Discrimination ("WLAD"). Read on for a discussion on the new law that went into effect on June 7, 2018.

Washington Legislative Update SB 6027

SB 6027 was first introduced on December 5, 2017. After being passed by both the House and the Senate, the bill was delivered to Washington's Governor who signed the bill on March 15, 2018. The law provides that a plaintiff "does not place his or her health at issue or waive any health care privilege," by seeking noneconomic damages in a discrimination suit under the WLAD.

The bill does provide three exceptions to this new rule. The **first exception** is applicable if the plaintiff alleges to suffer from a "specific diagnosable physical or psychiatric injury," such as PTSD. The **second exception** applies if the plaintiff wishes to rely on the medical records or retains a health care provider or expert to testify. The **third exception** applies if the plaintiff is alleging discrimination on the basis of the disability or a failure to accommodate the disability.

Even when one of the three exceptions is found to apply, SB 6027 continues to restrict the defendant's access to those records with two limitations. The **first limitation** provides that access to the records is limited to records that were either created or occurred in the time period that begins "two years before the first alleged unlawful act and [ends] on the last date for which the plaintiff

seeks damages (absent exceptional circumstances)." The **second limitation** provides that records are limited to those that are specifically related to a diagnosable condition, a healthcare provider relied upon by the plaintiff, or a disability that is at issue in a disability-related suit.

Based on the timing of the bill as well as testimony offered at public hearings, it appears that SB 6027 was passed in response to and in support of the #MeToo movement. In fact, during a public hearing on SB 6027, a member of the House Judiciary Committee noted "I guess we would call this the Weinstein bill." The legislative history underlying the bill suggests that the bill was based on concerns that victims of abuse or harassment may be hesitant to bring suit based on fear of having their medical records open in court and accessed by the defendant and defendant's counsel. According to the staff summary of public testimony, those testifying in support of the bill stated that "[a]llowing discovery of all medical history can have a chilling effect on the victim, and some victims walk away from making any claim in order to avoid providing an employer with access to all medical records."

While there is no dispute that the law could help some victims feel more secure in bringing a WLAD action, SB 6027 will have a significant impact on employers and



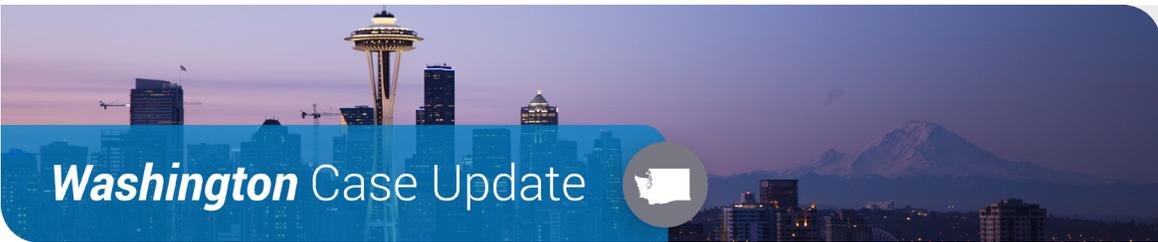
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Washington Case Update



defendants. Specifically, employers and other defendants named in a WLAD suit will be left without medical records to determine if the plaintiff's noneconomic damages claim can be challenged or contradicted. Accordingly, as long as the plaintiff alleges "garden variety" emotional distress and chooses not to retain an expert to testify in reliance of the records, defendants will be unable to discover and offer medical record evidence that could challenge plaintiff's allegation of anxiety, suffering, anguish, and distress. Defendants will no longer be able to retain a medical expert to review those records and testify in court. In other words, the new law will make it far more challenging to review, evaluate and challenge plaintiff's claim for noneconomic damages in a WLAD suit.

View the Session Law for SB 6027 here: <http://lawfilesexternal.wa.gov/biennium/2017-18/Pdf/Bills/Session%20Laws/Senate/6027.SL.pdf#page=1>



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