



Laboring Results

A Monthly Dispute Resolution E-zine
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SHHH, SWEAR THAT YOU WILL KEEP THE SECRET AND NOT TELL ANYONE!!!!

An employee's secret that she was pregnant, which was kept from her boss, does not give her protection under the Fair Employment and Housing Act for pregnancy discrimination.

In Trop v. Sony Picture Entertainment Inc. (June 1, 2005), employee Trop told fellow employees that she was trying to get pregnant and when she did become pregnant, swore the fellow employees to secrecy. The fellow employees kept the secret. The only hint that she was pregnant was dropped in the presence of the boss at a Christmas party when she was playing with an infant. Trop stated to the boss that it looks like 'I get to have one of my own.' Trop's physical appearance did not indicate that she was pregnant. Prior to the Christmas party, her boss was dissatisfied with Trop's performance and was making plans to fire her. Trop went on a one month vacation and after she came back in January, the boss fired her.

The court held that under FEHA that Trop could show discrimination only if the boss knew that she was pregnant. Trop was not visibly pregnant and she, nor her fellow employees, told the boss that she was pregnant. Since the boss did not know she was pregnant and the record established that Trop made several mistakes and failed to meet the boss's demanding standards, Trop failed to establish a prima facie case of discrimination.

Some employees expect bosses to be mind readers. They assume because they tell one employee, that the secret will become part of the rumor mill and the boss will definitely find out. If you want to be protected under FEHA, do not leave it to the rumor mill to obtain job protection.

SECRETIVE DISABILITIES.

Secretiveness is also common in employees who have hidden disabilities. An employee who is disabled has a difficult time dealing with a disability, let alone adjust to the fact that they may need help in order to work. They fear that once anyone discovers they are disabled that they will be alienated by family, friends and employers. As a result of this perception, they become very determined to keep their disability a secret. If they suffer adverse employment consequences because of their disability, the Courts have held that an employer cannot be held liable for disability discrimination if the employer shows that he was unaware that the employee had a disability, e.g., a hidden disease that shows no outward signs that a person may need an accommodation to perform the job.

Accommodating a disability is problematic for employers when they are unaware of the disability and terminate the employee for job-related reasons. How does an employer accommodate an employee's disability if they are unaware of the disability? To further complicate matters, privacy laws in California make it extremely difficult for employers to inquire about medical conditions. One approach is to make sure all employees understand their rights to an accommodation under state and federal anti-discrimination laws, that they are given the opportunity to fully disclose any issues affecting their work, including physical and mental disabilities, and that if they disclose, that they will not be terminated because of the disclosure.

As a mediator, in the 'secret' disability discrimination cases this becomes the time when you put on your hat as a therapist and deal with the employee's emotions surrounding the disability. Mediation becomes the time when the employee will finally come to grips with their disability, which results in the mediator spending time listening to how the disability affected their life, how it has alienated family and friends, and how they plan to handle their disability in the future. Dealing with this emotional catharsis leads to the employee's acceptance and resolution of the termination and that the FEHA does not protect a secret kept from the employer. Interestingly, in many of these mediated cases, the employer is so sympathetic that they will offer money to settle it, even though liability is tenuous.

The recent trend among many companies is that they have begun to actively recruit disabled employees. Recently, Diversity Inc. ranked the top 10 corporations for the best recruiting programs for the disabled: Merrill Lynch & Co., Procter & Gamble, Hewlett-Packard, JP Morgan Chase, Verizon Communications, SSM Health Care, General Motors, Sodexo U.S.A, Merck & Co., and Prudential Financial. Interestingly,

each of these companies has a strong commitment to women in management. Can it be concluded that women more acceptable of the disabled?

So, let the secret out. Keeping it to yourself will only hurt you in the long run.

To ask a question, to request more information on dispute resolution services send an e-mail to emoreno@eampc.com or log on to www.eampc.com. To unsubscribe please send an e-mail to emoreno@eampc.com and type remove in the subject line. If you know anyone who is interested in Laboring Results, do not hesitate to pass it along.

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