

United States District Court
For the Northern District of California

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**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION**

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| EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, |) | Case No. 5:13-cv-04507-BLF-PSG |
| |) | |
| Plaintiff, |) | ORDER GRANTING-IN-PART |
| |) | EEOC'S MOTION TO QUASH |
| v. |) | |
| |) | (Re: Docket No. 24) |
| PETERS' BAKERY, |) | |
| |) | |
| Defendant. |) | |

Before the court is Plaintiff Equal Employment Opportunity Commission's motion to quash.¹ Defendant Peters' Bakery opposes. Yesterday, the parties appeared for a hearing.² After considering the arguments, the court GRANTS EEOC's motion, but only IN-PART, as laid out below.

¹ See Docket No. 24. EEOC specifically moves to quash five to quash five document subpoenae issued by Peters' Bakery demanding: (1) the charge investigation files of Kim Alvernaz and (2) Marcela Ramirez as well as (3) Ramirez's psychotherapy, (4) medical and (5) medical billing records. See Docket No. 25-1, Exs. A-E.

² See Docket No. 36.

1 **A. The Charge Investigation Files of Kim Alvernaz and Marcela Ramirez**

2 Peters' Bakery does "not contest the motion to quash" the subpoenae of the Alvernaz and
3 Ramirez charge investigation files.³ The charge investigation files therefore need not be produced.

4 **B. Ramirez's Psychotherapy Records**

5 Under the federal psychotherapist-patient privilege, "confidential communications between
6 a licensed psychotherapist and her patients in the course of diagnosis or treatment are protected
7 from compelled disclosure under Rule 501 of the Federal Rules of Evidence."⁴ "Like other
8 testimonial privileges, the patient of course may waive the protection."⁵ The question before the
9 court is whether Ramirez's psychotherapist-patient privilege has been waived by the EEOC's civil
10 case seeking recovery for emotional damages. The answer to that question, it turns out, is the
11 subject of considerable disagreement among the district courts.

12 Judge Spero explains the split:

13 In the wake of *Jaffee*, courts have struggled to determine the circumstances under which
14 waiver of the psychotherapist-patient privilege occurs. *See Fitzgerald v. Cassill*,
15 216 F.R.D. 632, 640 (N.D. Cal. 2003) (reviewing case law addressing waiver). Some
16 courts have taken a broad approach to waiver, finding, for example, that mere assertion of a
17 claim for emotional distress damages is enough to justify a finding of waiver. *See id.*
18 (citing *Sarko v. Penn-Del Directory Co.*, 170 F.R.D. 127 (E.D. Penn. 1997); *Doe v. City of*
19 *Chula Vista*, 196 F.R.D. 562 (S.D. Cal. 1999)). These cases focus on fairness
20 considerations. *Id.* Other courts have taken a narrow approach, holding that there must be
21 an affirmative reliance on the psychotherapist-patient communication before the privilege is
22 waived. *See id.* (citing *Vanderbilt v. Town of Chilmark*, 174 F.R.D. 225 (D. Mass. 1997)).
23 These latter cases are based on the primacy of the privacy interest that is inherent in the
24 privilege. *Id.* Finally, some courts have taken a "limited broad view" in which they have
25 found waiver where a plaintiff has alleged more than "garden variety" emotional distress
26 and has instead alleged emotional distress that is "complex" or has resulted in specific
27 disorders. *Id.* at 637 (citing Weinstein's Federal Evidence § 504 .07[8] & n.22.4).⁶

28 ³ *See* Docket No. 34 at 11 ("Defendant Peters' Bakery will not contest the EEOC files of Marcela Ramirez in this forum. The files produced during discovery are incomplete and Defendant will pursue its Rule 34 remedy. With respect to the file of Kim Alvernaz, Defendant Peters' Bakery will not contest the motion to quash that subpoena.").

⁴ *Jaffee v. Redmond*, 518 U.S. 1, 15 (1996) (footnote omitted).

⁵ *Id.* at 15 n.14.

⁶ *Boyd v. City & Cnty. of San Francisco*, Case No. 3:04-cv-05459-MMC-JCS, 2006 WL 1390423, at *5 (N.D. Cal. May 18, 2006).

1 EEOC urges that Ramirez’s patient-psychotherapy privilege has not been waived. Some
2 courts evaluate the waiver of the psychotherapist-patient privilege under standards articulated
3 within Fed. R. Civ. P. 35(a). Rule 35 requires a showing that an issue is “in controversy” and there
4 is “good cause” for the discovery.⁷ Any psychological or counseling records should only be
5 produced if Ramirez has placed her mental condition “in controversy.”⁸ Bare allegations of mental
6 anguish, embarrassment and humiliation are insufficient.⁹ Because (1) EEOC has not asserted a
7 separate claim for intentional or negligent infliction of emotional distress, (2) there is no claim for
8 a specific psychiatric injury or disorder, (3) there is no claim of unusually severe distress and (4) no
9 mental health expert is expected to testify at trial,¹⁰ EEOC concludes Ramirez’s mental condition is
10 not “in controversy” despite her prayer for damages related to emotional pain and suffering.¹¹

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14 ⁷ Fed. R. Civ. P. 35(a).

15 (a) Order for an Examination.

16 (1) In General. The court where the action is pending may order a party whose mental
17 or physical condition--including blood group--is *in controversy* to submit to a
18 physical or mental examination by a suitably licensed or certified examiner. The
19 court has the same authority to order a party to produce for examination a person
20 who is in its custody or under its legal control.

21 (2) Motion and Notice; Contents of the Order. The order:

22 (A) may be made only on motion for *good cause* and on notice to all parties and the
23 person to be examined; and

24 (B) must specify the time, place, manner, conditions, and scope of the examination,
25 as well as the person or persons who will perform it. (emphasis added).

26 ⁸ See *O’Sullivan v. State of Minnesota*, 176 F.R.D. 325, 327 (D. Minn. 1997) (denying Rule 35
27 examination because plaintiff, who alleged emotional distress incident to employment
28 discrimination, had not put her mental condition “in controversy”).

⁹ See *Schlagenhauf v. Holder*, 379 U.S. 104, 118-19 (1964) (concluding that the “in controversy”
and the “good cause” requirements of Rule 35, were not satisfied “by mere conclusory allegations
of the pleadings – nor by mere relevance to the case – but require an affirmative showing by the
movant that each condition as to which the examination is sought is really and genuinely in
controversy and that good cause exists for ordering each examination.).

¹⁰ The EEOC also relies on *Fitzgerald v. Cassill* to support the narrow view. 216 F.R.D. 632. The
Fitzgerald court adopted a narrow approach to waiver and concluded that because the plaintiffs
(1) did not allege “unusually severe emotional distress” or (2) intend to affirmatively rely on
communications between themselves and their health care providers, the psychotherapist/patient
privilege had not been waived and plaintiffs’ mental health records were not discoverable. *Id.* at
639. The court went on to note that while “the privilege may bar access to medical records, the

1 Peters' Bakery disagrees. It cites *Doe v. City of Chula Vista*¹² and urges a more permissive
2 perspective of psychotherapist-patient waiver is warranted. The *Chula Vista* court also noted the
3 split in authority and the lack of appellate court guidance. The court concluded, however, that if
4 the Supreme Court were to take up the issue it would likely adopt the permissive take because,
5 although Congress declined to adopt the rule, the Supreme Court submitted a Proposed Supreme
6 Court Standard 504(b) on the parameters of the psychotherapist-patient privilege to Congress with
7 "exceptions to the privilege for conditions included in an element of a claim or defense."¹³ The
8 *Chula Vista* court explained that for the plaintiff to recover emotional damages against her
9 employer, "Doe must prove that her employer's conduct proximately caused her specific injury"
10 and thus "her emotional health, near the time of the Defendant's conduct is an issue in the
11 litigation."¹⁴ At bottom, the "discovery process" must "be fair to both parties, so that each side is
12 able to present an effective and complete case to the jury."¹⁵

15 Defendant may cross-examine the Plaintiff about other stressors or contributing factors that may
16 explain or have contributed to the alleged emotional distress." *Id.* at 638.

17 ¹¹ See Docket No. 1 at E ("Order Defendant to make whole Charging Party by providing
18 compensation for past and future nonpecuniary losses resulting from the unlawful practices
19 complained of above including, but not limited to emotional pain and suffering, inconvenience,
20 loss of enjoyment of life and humiliation, in amounts to be determined at trial.").

21 ¹² 196 F.R.D. 562 (S.D. Cal. 1999).

22 ¹³ *Id.* at 565.

23 The Supreme Court had submitted a proposed Rule of Evidence on the
24 psychotherapist-patient privilege to Congress. Although Congress declined to adopt the
25 rule, the language of the proposed rule illuminates the Supreme Court's vision of the
26 parameters of the privilege and the instances in which the privilege would be waived. The
27 general rule of privilege was the same announced in *Jaffee*, that is, the patient has the
28 privilege to refuse to disclose "confidential communications, made for the purpose of
diagnosis or treatment of his mental or emotional condition." Proposed Supreme Court
Standard 504(b). The Court proposed exceptions to the privilege for conditions included in
an element of a claim or defense. Specifically, "[t]here is no privilege under this rule as to
communications relevant to an issue of the mental or emotional condition of the patient in
any proceeding in which he relies upon the condition as an element of his claim or
defense." *Id.* 504(d)(3).

¹⁴ *Id.* at 568.

¹⁵ *Id.* at 569 (emphasis omitted).

1 Another recent district court opinion also bolsters Peters' Bakery's position: *EEOC v.*
2 *California Psychiatric Transitions*.¹⁶ In that case, even though "no specific emotional injury was
3 alleged, or no claim of intentional infliction of emotional distress was made, the only remedy the
4 EEOC" sought on behalf of the plaintiff was for "emotional distress damages."¹⁷ Emotional
5 distress damages therefore constituted the "crux" of the plaintiff's claim.¹⁸ The court did not
6 permit the EEOC to seek recovery for emotional distress and "shield information related" to her
7 claim or otherwise "hide the details" of her injury.¹⁹

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9 Based on the record before the court, Peters' Bakery has the better of the argument. The
10 facts of this case track *California Psychiatric Transitions*: the only damages sought by the EEOC
11 are for emotional distress. Ramirez already has been financially compensated through a union

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14 ¹⁶ 258 F.R.D. 391, 400 (E.D. Cal. 2009).

15 ¹⁷ *Id.*

16 Given the facts of this case, the Court finds that the broad approach to the psychotherapist
17 privilege should apply. Although no specific emotional injury was alleged, or no claim of
18 intentional infliction of emotional distress was made, the only remedy the EEOC is seeking
19 on behalf of Plaintiff Kennedy is emotional distress damages resulting from the alleged
20 sexual harassment. Thus, the emotional distress damages is the crux of Plaintiff's claim.
21 The fact that Ms. Kennedy is being treated for depression suggests that multiple causation
22 for her emotional distress may exist. The emotional distress she allegedly suffered as a
23 result of the sexual harassment could have been effected by her depression and vice versa.
24 Defendant should be able to determine whether Plaintiff's emotional state may have been
25 effected by something other than Defendant's alleged actions. "For each item of damages
26 . . . the plaintiff must show that the damage was proximately caused by the defendant's
27 unlawful conduct. In turn, the [defendant] is entitled to show that other factors contributed
28 to the plaintiff's damages." *Doe v. City of Chula Vista*, 196 F.R.D. at 568 (S.D. Cal. 1999)
(citations omitted).

23 ¹⁸ *Id.*

24 ¹⁹ *Sanchez v. U.S. Airways, Inc.*, 202 F.R.D. at 136.

25 To allow Plaintiffs to make a claim for emotional distress, but shield information related to
26 their claim, is similar to shielding other types of medical records. For instance, if the injury
27 at issue were to the knee, and Plaintiff had sustained a subsequent knee injury requiring
28 treatment, Plaintiffs would not be able to hide the details of the subsequent knee injury
because of privilege or privacy considerations. In order to allege and recover for a harm,
Plaintiffs need to show the existence and extent of the harm. The particular value of the
harm is best left to the fact-finder, after a careful view of the facts. The only way to
adequately review the facts is to bring to light relevant information.

1 arbitration for the loss of her job. Ramirez also has returned to her job.²⁰ EEOC now seeks
2 damages for stress and anxiety on behalf of Ramirez that were treated immediately after her
3 termination. To substantively evaluate the merits of the EEOC's claims, Peters' Bakery needs
4 access to Ramirez's psychotherapy records. Because these records are at the heart of EEOC's
5 theory of recovery, and the EEOC bears the burden to establish that the Ramirez's privilege has not
6 been waived,²¹ it would be inequitable to bar discovery on this issue.

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8 As Judge Austin explained in *California Psychiatric Transitions*: "To protect the records
9 would allow Plaintiff to proceed with a claim on unequal terms. If the EEOC wants a jury to
10 compensate Plaintiff for emotional distress, Defendant should be able to explore in discovery, other
11 circumstances that may have caused the injury. The [presiding judge] can be the gatekeeper of the
12 ultimate admissibility of the evidence through a Rule 403 balancing analysis at trial.²² A protective
13 order,²³ and a direction that any of the disclosed material filed with the court must be done under
14 seal, will protect [Ms. Ramirez's] privacy rights."²⁴

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16 Ramirez's psychotherapy records shall be produced.

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20 ²⁰ See Docket No. 32 at ¶ 7 ("At all times relevant, Charging Party Marcela Ramirez was a
21 unionized employee of Peters' Bakery and through collective bargaining arbitration proceedings,
she was returned to work with full back pay and benefits[.]").

22 ²¹ See *Stallworth v. Brollini*, 288 F.R.D. 439, 443 (N.D. Cal. 2012) (explaining that the burden falls
23 on the party asserting the psychotherapist-patient privilege) (citing *Fitzgerald v. Cassil*,
24 216 F.R.D. 632, 636 (N.D. Cal. 2003)); cf. *United States v. Martin*, 278 F.3d 988, 999-1000
(9th Cir. 2002) (noting that burden is on party asserting attorney-client privilege to establish all
elements of privilege, which includes no waiver).

25 ²² The undersigned's decision that certain information is or is not discoverable stands separate and
26 apart from the presiding judge's subsequent evaluation of admissibility of evidence at trial. That
decision remains for another day.

27 ²³ As previewed at the hearing, counsel shall meet and confer to work out a suitable protective
28 order in this case without delay.

²⁴ *California Psychiatric Transitions*, 258 F.R.D. at 400 (internal footnote omitted).

