-MRA Blessing v. Ohio University Doc. 16

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Benita Blessing,	:	
Plaintiff	:	Civil Action 2:09-cv-00762
v.	:	Judge Sargus
Ohio University,	:	Magistrate Judge Abel
Defendant	:	

Discovery Conference Order

A telephone discovery conference was held April 29, 2009. Counsel for all parties participated.

During the conference three rulings were made. First, plaintiff will supplement her answers to defendant's interrogatories no later than three (3) business days before she is deposed. For interrogatories that ask plaintiff when actionable conduct occurred, who was involved, and for a description of the conduct, plaintiff's counsel represented that Dr. Blessing had provided all the information known to her or upon which plaintiff will rely at trial. Dr. Blessing will review her interrogatory responses to make sure that all such information has been provided before she is deposed.

Second, Dr. Blessing's tax information is not presently relevant because she remains employed by Ohio University until this June. If she does not then obtain comparable employment, tax information would be relevant. But she may redact her husband's information before providing tax returns for the last year she was employed by the University and subsequent years in which she has not obtained comparable employment.

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Third, Dr. Blessing's medical records are not relevant because she does not allege any psychological injury. This does not preclude her from providing testimony about emotional distress from being deprived of her right not to be discriminated against, so long as she does not support that claim with testimony about medical treatment or psychological counseling.

Federal law of privilege applies. The amended complaint pleads federal claims; consequently, the federal common law of privilege controls.[1]

Psychotherapist-patient privilege. There is no federal physician-patient privilege.[2] In *Jaffe v. Redmond*, 518 U.S. 1, 15 (1996), the United States Supreme Court recognized a psychotherapist-patient privilege for the first time. Well before *Jaffe*, the United States Court of Appeals for the Sixth Circuit recognized the privilege.[3] However, it has made "no attempt . . . to define the appropriate perimeters of the privilege," concluding that its scope must be determined case-by-case.[4]

Waiver of the psychotherapist-patient privilege. In *Jaffe*, the Court acknowledged

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[1]The United States Court of Appeals for the Sixth Circuit held in *Hancock v. Dodson*, 958 F.2d 1367, 1373 (6th Cir. 1992) that when the evidence is relevant to a federal claim "the existence of pendent state law claims does not relieve us of our obligation to apply the federal law of privilege."

[2]*Dodson*, 958 F.2d at 1372-73; *Mann v. University of Cincinnati*, 114 F.3d 1188, 1997 WL 280188 at *4 (6th Cir. May 27, 1997); *G.M.C. v. Director of Nat. Inst. etc.*, 636 F.2d 163, 165 (6th Cir. 1980). *See, Whalen v. Roe*, 429 U.S. 589, 602 at n. 28 (1976)(Asserting that no attorney-client privilege was recognized at common law.)

[3]*In re Zuniga*, 714 F.2d 632, 639 (6th Cir. 1983); *United States v. Snelenberger*, 24 F.3d 799, 802 (6th Cir. 1994).

[4]*Id*.

that the privilege could be waived, "We do not doubt that there are situations in which the privilege must give way, for example, if a serious threat of harm to the patient or to others can be averted only by means of a disclosure by the therapist."[5]

The party asserting the privilege has the burden of proving that it has not been waived.[6]

The case law is often described as including two approaches to waiver. A *broad approach* finds waiver whenever a party puts his or her mental status at issue. A *narrow approach* finds waiver only when a party affirmatively offers expert evidence of his or her psychological condition. These approaches are summarized in *Fitzgerald v. Cassil*, 216 F.R.D. 632, 636-37 (N. D. CA 2003):

> On the one end of the spectrum there is the broad approach to waiver. Under the broad approach, courts have held that a simple allegation of emotional distress in a complaint constitutes waiver. *See* Sarko v. Penn-Del Directory Co., 170 F.R.D. 127 (E.D.Penn.1997); *Doe v. City of Chula Vista*, 196 F.R.D. 562 (S.D.Cal.1999). Under the narrow approach, at the other end of the spectrum, courts have held that there must be an affirmative reliance on the psychotherapist-patient communications before the privilege will be deemed waived. *See* *Vanderbilt v. Town of Chilmark*, 174 F.R.D. 225 (D.Mass.1997); *Hucko v. City of Oak Forest*, 185 F.R.D. 526 (N.D.Ill.1999).[1]
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> The rationale behind the *Sarko* line of cases is generally based on fairness considerations. *See, e.g.*, *Doe*, 196 F.R.D. at 566, 569. That is, if a plaintiff claims emotional distress, then a defendant needs to be able to challenge that claim thoroughly; psychological records can illuminate, for instance, whether there are sources of the emotional distress other than the defendant's conduct.
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> The theory behind the *Vanderbilt* line of cases is generally based upon the primacy of the privacy interests inherent in the privilege and *Jaffee's* rejection

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[5] *Id*. at 18, n.19.

[6] *Merrill v. Waffle House, Inc.*, 227 F.R.D. at 474; *Fitzgerald v. Cassil*, 216 F.R.D. at 636.

> of the balancing approach. . . . . The broader measure of fairness underpinning *Sarko* and the broad waiver approach would render the psychotherapist-patient privilege pointless: "[T]he very nature of a privilege is that it prevents disclosure of information that may be relevant in the case, in order to serve interests that are of over-arching importance." *Hucko*, 185 F.R.D. at 530.
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> In addition, the *Vanderbilt* line of cases relies upon an analogy to the attorney-client privilege which is waived when the client affirmatively relies on attorney-client communications to further her own claim. *See Vanderbilt*, 174 F.R.D. at 229. . . . Thus, as with the case of waiver of the attorney-client privilege, there may be a waiver of the psychotherapist -patient privilege if the communication between the two is put at issue by the patient, for example, where the cause of action relies on advice or findings of the psychotherapist. *See Vanderbilt*, 174 F.R.D. at 229. Under this measure of fairness, waiver prevents the privilege from being used as both a shield and a sword. *See id.* at 229-30.

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[1]For a discussion of the broad and the narrow approaches to waiver, see *Certainty Thwarted[: Broad Waiver Versus Narrow Waiver of the Psychotherapist-Patient Privilege After Jaffee v. Redmond,* 52 Hastings L.J. 1369, 1375-76 (2001).]

Broad waiver does not give sufficient weight to the privacy interests identified in *Jaffe* that underpin the psychotherapist-patient privilege. And it creates the potential for great abuse.[17] During mental health counseling, patients may disclose the most intimate details of their social lives as well as expose their innermost emotional and mental life. Many would not seek treatment if they believed that these disclosures would be published to others:

> [T]the psychotherapist-patient privilege is "rooted in the imperative need for confidence and trust." Treatment by a physician for physical ailments can often proceed successfully on the basis of a physical examination,

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[17]*Fitgerald*, 216 F.R.D. at 638; *Burrell v. Crown Central Petroleum, Inc.*, 177 F.R.D. 376, 383 (E.D. Tex. 1997).

> objective information supplied by the patient, and the results of diagnostic tests. Effective psychotherapy, by contrast, depends upon an atmosphere of confidence and trust in which the patient is willing to make a frank and complete disclosure of facts, emotions, memories, and fears. Because of the sensitive nature of the problems for which individuals consult psychotherapists, disclosure of confidential communications made during counseling sessions may cause embarrassment or disgrace. For this reason, the mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment.

Jaffe, 518 U.S. at 10 (Citations omitted).

Litigation is a competitive, adversary process. When a claim of emotional distress is made, there is a tendency to gather all information related to a party's mental health. Even when just "garden variety" emotional distress damages are claimed, defendants will often seek the plaintiff's mental health treatment records–of any and every description–going back 5, 10, or even 20 or more years. If these records are obtained, then the plaintiff is questioned at length during her deposition about the most intimate details of her relationships and her interior life.

This combative, pull out all the stops approach to discovery is inconsistent with the goal of litigation: To fairly–and with finality–resolve disputes. It also fails to recognize a central reality of litigation. Most litigants are in court reluctantly and against their will. In a very real sense, both the employee and the employer are involuntarily caught up in a lawsuit. Most employees who bring employment discrimination law-suits believe that they have been treated badly by their employer and that they have suffered adverse employment actions in violation of the law. They file suit to enforce a right they believe should have been accorded them without dispute in the work place. On the other hand, the employer believes that they made lawful employment decisions and should not have

been hauled into court by a disgruntled employee.

Given that courts are forums for resolving disputes between parties who are reluctantly litigating because they see no alternative other than abandoning their legal rights, judges must make every effort "to secure the just, speedy, and inexpensive determination of every action."[18] The normal demands on litigants are disruptive, intrusive, and time consuming. Without good reason, courts should be reluctant indeed to add to those burdens by permitting broad ranging discovery into a litigants most personal and private life.

By filing suit to vindicate a legal right and seeking damages for the emotional distress naturally resulting from the deprivation of that right, an employee who does not rely on expert evidence to support that claim should not be forced to expose the records of her mental health treatment to the adversary process and–potentially–to the world. The employer is not unfairly disadvantaged by the employee's reliance on non-expert evidence to prove her emotional distress damages:

> While the privilege may bar access to medical records, the defendant may cross-examine the plaintiff, as was done in the instant case, about other stressors or contributing factors that may explain or have contributed to the alleged emotional distress. The occurrence and dates of any psycho-therapy including that which occurred before the incident is not privileged and subject to discovery. *See* *Vanderbilt,* 174 F.R.D. at 230. The defend-ant can examine percipient witnesses or find other evidence to show, for example, that plaintiff's description of his or her distress is exaggerated. It may elicit from the plaintiff the fact that the plaintiff did not seek and obtain treatment or therapy for the alleged distress. These examples illustrate that the defendant has numerous avenues through which it can make its case without delving into the plaintiff's confidential communication with his or

[18]Rule 1, Fed. R. Civ. P.

her therapist. *Cf.* *Doubleday v. Ruh*, 149 F.R.D. 601, 607 (E.D. Cal.1993) (noting that, to overcome qualified work product privilege, party must demonstrate "a 'substantial need' for the qualified work product, as well as an inability to obtain the information from other sources without undue hardship"); Fed.R.Civ.P. 26(b)(3) (providing for qualified work product privilege). Finally, the defendant benefits by the guarantee that the plaintiff will not present expert evidence at trial.

Fitzgerald, 216 F.R.D. at 638.

s/Mark R. Abel
United States Magistrate Judge