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

Joel D. King,	:	
Plaintiff	:	Civil Action 2:10-cv-00527
v.	:	
Fleetwood Motor Homes of Indiana, Inc.,	:	Magistrate Judge Abel
Defendant	:	

Discovery Conference Order

On January 11, 2011, counsel for the parties participated in a telephone discovery dispute conference with the Court. During the conference, the following rulings were made.

Medical records.

Plaintiff is willing to produce his medical records from January 1, 2010 forward. Defendant wants all his medical records. Defendant observes that in 2004 an earlier employment terminated, apparently due to King's bipolar condition. Defendant argues that it needs to know the entire history of King's disabling condition. There were also performance issues before King went on medical leave. He was told to improve his performance or do something else.

Claims pleaded. The July 21, 2010 amended complaint pleads claims for violations of the FMLA, ADA, Ohio Revised Code § 4112.02, and ERISA. There are also

claims for violation of public policy and infliction of emotional distress. Count I, the FMLA claim, pleads that King "suffered from a serious health condition that required treatment from a health care provider," but defendant "failed to provide the [medical] leave and restore [him] to an equivalent position" when he returned to work. Doc. 4, ¶¶ 22 and 25. Count II, the ADA claim, pleads that King "was a qualified individual pursuant to 42 U.S.C. § 2111(8)," and that Fleetwood RV "discriminated against [him] because of his disability . . . ." *Id.*, ¶¶ 30 and 32. So the issue is whether on or about January 9, 2010 when King sought emergency treatment for a bipolar disorder and thereafter he suffered from a disability entitling him to FMLA leave and prohibiting his employer from retaliating against him for taking that leave or discriminating against him because of the disability.

Doctor-patient privilege. The first question the Court must face is whether plaintiff's claim of privilege is governed by federal or Ohio law. Here both federal and Ohio law claims are pleaded. Consequently, the federal common law of privilege controls.[1]

Although the United States Court of Appeals for the Sixth Circuit has consistently held that there is no federal physician-patient privilege,[2] it has held that confidentiality is so central to the psychotherapist-patient relationship that the court

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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).

"recognize[s] the compelling necessity for the [psychotherapist-patient] privilege . . . ." *In re Zuniga*, 714 F.2d 632, 639 (6th Cir. 1983); *United States v. Snelenberger*, 24 F.3d 799, 802 (6th Cir. 1994). However, the court made "no attempt . . . to define the appropriate perimeters of the privilege," concluding that its scope must be determined case-by-case. *Id*. Moreover, the court held that the grand jury subpoena at issue, which sought the names of patients, the dates of treatment, and the length of treatment, was enforceable because "the identity of a patient or the fact and time of his treatment does not fall within the scope of the psychotherapist-patient privilege." *In re Zuniga*, 714 F.2d at 640. The only other Circuit to recognize a federal psychotherapist-patient privilege has limited it:

> only to a requirement that a court give consideration to a witness's privacy interests as an important factor to be weighed in balancing the admissibility of psychiatric histories or diagnoses."

In re Doe, 964 F.2d 1325, 1329 (2d Cir. 1992).

When a claim arises under state law, Rule 501, Fed. R. Evid. provides that any claim of privilege is to be determined in accordance with that state's law. In Ohio, the psychotherapist-patient privilege is created solely by statute. R.C. §4732.19. *See In re Miller*, 63 Ohio St.3d 99, 107 at n.6 (1992). Section 4732.19 provided that communications between a licensed psychologist and a patient "are placed upon the same basis as those between physician and patient under division (B) of section 2317.02 of the Revised Code." That section provides:

> The following persons shall not testify in certain respects:

. . .

(B)(1) A physician . . . concerning a communication made to him by his patient in that relation or his advice to his patient, except as otherwise provided in this division and division (B)(2) of this section . . .

The testimonial privilege under this division is waived, and a physician . . . may testify or may be compelled to testify in a civil action, in accordance with the discovery provisions of the Rules of Civil Procedure in connection with a civil action . . ., under the following circumstances:

> (a) If the patient . . . gives express consent;
>
> (b) If the patient is deceased, the spouse of the patient or his executor or administrator of his estate gives express consent;
>
> (c) If a medical claim . . ., an action for wrongful death, any other type of civil action, or a claim under Chapter 4123 of the Revised Code is filed by the patient . . . .

(2) If the testimonial privilege described in division (B)(1) of this section is waived as provided in division (B)(1)(c) of this section, a physician . . . may be compelled to testify or to submit to discovery under the Rules of Civil Procedure only as to a communication made to him by the patient in question in that relation, or in his advice to the patient in question, that related causally or historically to physical or mental injuries that are relevant to issues in the medical claim . . . or other action . . . .

(3) As used in divisions (B)(1) and (2) of this section, "communication" means acquiring, recording, or transmitting any information, in any manner, concerning any facts, opinions, or statements necessary to enable a physician . . . to diagnose, treat, describe, or act for a patient. A "communication" may include, but is not limited to, any medical . . ., office, or hospital communication such as a record, chart, letter, memorandum, laboratory tests and

> results, x-ray, photograph, financial statement, diagnosis, or prognosis.

The meaning of this statute would appear to be plain on its face. It creates a physician-patient privilege for "communication made to him by his patient in that relation or his advice to his patient . . . ." R.C. §2317.02(B)(1). However, the statute further provides that the physician-patient relationship is waived if "any . . . civil action . . . is filed by the patient . . . ." R.C. §2317.02(B)(1)(c). The scope of a waiver under R.C. §2317.02(B)(1)(c) is limited to "a communication made to him by the patient in question in that relation, or his advice to the patient in question, that related causally or historically to physical or mental injuries that are relevant to issues in . . . [the] civil action . . . ." R.C. §2317.02(B)(2).

Evidence that this is the plain and natural reading of the statute is found in the Supreme Court of Ohio's decision, *In re Miller*, 63 Ohio St.3d 99, 109 (1992):

> [W]e find that appellant has not expressly waived the privilege; R.C. 2317.02(B)(1)(a) does not apply. Since appellant is not deceased, R.C. 2317.02(B)(1)(b) cannot apply *and since appellant has not **filed** any type of civil action to place his own physical condition at issue, no R.C. 2317.02(B)(1)(c) waiver has occurred*.

(Emphasis added.)

Although a medical release, subject to an attorneys' eyes only protective order, is often the easiest way to proceed with the discovery of medical records, the waiver of the physician-patient and psychotherapist-patient privilege effected by filing a lawsuit is limited to communications made by the patient to her treating source or the treating source's advice to the patient "that related causally or historically to physical or mental

injuries that are relevant to issues in . . . [the] civil action . . . ." R.C. §2317.02(B)(2). For that reason, plaintiff's counsel has the right to procure the medical records herself, review them, and produce those relevant to the issues in this litigation. Subject to an attorneys' eyes only protective order, plaintiff's counsel should indicate the nature of any medical records not produced or for any redactions in medical records produced and state the reason for not producing them. Plaintiff's counsel must retain the unredacted medical records so that the Court could review them *in camera* if there is a dispute about whether all relevant records were produced.

Ruling. At this time, I conclude that medical records of treatment for a bipolar condition in 2004 are not relevant to the issue of whether King had a disability in January 2010. Defendant further argues that prior medical treatment may be relevant to his claim that its unlawful conduct caused King mental anguish, psychiatric disability, humiliation and emotional distress. *Id.*, ¶ 33. Plaintiff's counsel responded that King is seeking only the typical emotional distress damages arising from deprivation of a legal right and not damages arising from medical treatment.

At this time I will limit defendant's right to access medical records to his treatment in January 2010 and thereafter. However, plaintiff must produce all the medical records from the treators who provided treatment in or after January 2010. So that if a treator provided medical treatment earlier, those records should be produced. Plaintiff must also produce any medical records obtained by those treators as well as any references to treatment history in their office notes. All the information available to treators in January 2010 is relevant to whether they concluded that he suffered by a

disabling medical condition then.

Should further discovery give defendant good reason to believe that medical records from other sources before January 2010 are relevant to a claim or defense in this lawsuit, defend-ant's counsel is free to bring the matter back before the Court.

Personnel files from previous employers.

Defendant seeks King's personnel files from three previous employers: R.R. Donnelly (2001-02); Stanley Steemer (2002); and Keystone RV (2003-04). Plaintiff's request to quash the subpoenas for these files is DENIED. The personnel files are arguably relevant to the information King provided Fleetwood RV about his job qualifications and experience.

Scheduling Order.

The primary experts must make their Rule 26(a)(2) disclosures on or before **March 1, 2011.** Any responsive experts must make their disclosures on or before **April 13, 2011.**

s/ Mark R. Abel
United States Magistrate Judge