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

DEBORAH STURTZ,

Plaintiff,

vs.

Civil Action 2:13-cv-236
Judge Sargus
Magistrate Judge King

JPMORGAN CHASE & CO. dba
JP MORGAN CHASE BANK,
NATIONAL ASSOCIATION, *et al.*,

Defendants.

OPINION AND ORDER

This matter is before the Court on the motion of non-party Sara Finn Kriger, Ph.D., to quash defendants' subpoena to appear for a deposition on June 5, 2014, Doc. No. 21 ("*Motion to Quash*") and *Defendants' Motion for Leave to File a reply to Plaintiff's Response to Dr. Kriger's Motion to Quash Subpoena Instanter*, Doc. No. 28 ("*Motion for Leave to File Reply*"). For the reasons that follow, the *Motion to Quash* and *Motion for Leave to File Reply* are **DENIED**.

I. FACTUAL ALLEGATIONS AND PROCEDURAL BACKGROUND

Plaintiff Deborah Sturtz worked at Bank One (a predecessor of defendant JP Morgan Chase Bank, NA) ("Chase") from 1990 until her employment was terminated in or around November 2003. *Complaint*, Doc. No. 1, ¶ 8. Chase rehired plaintiff on or about January 2005 as a consultant and she was later hired as a Technology Project Manager on June 22, 2005. *Id.* Plaintiff alleges that her supervisor in 2009, Thomas Dowell, treated her differently in terms of employment

opportunities, supervision and evaluations because of her age.[1] *Id*. at ¶ 10. Plaintiff also alleges that, although she is qualified for her position, performed her work in a satisfactory manner and completed education and training, Chase did not promote her or other older employees. *Id*. at ¶¶ 9-13. Although plaintiff applied for several jobs at Chase for which she was qualified, Chase rejected her applications and did not consider her for these positions. *Id*. at ¶ 13. Plaintiff also alleges that Chase retaliated against her for taking FMLA leave in 2011 by placing her on a performance improvement plan and terminating her employment on July 8, 2011. *Id*. at ¶¶ 12, 22, 29. Plaintiff was 55 years old at the time of her termination and replaced by a younger man. *Id*. at ¶¶ 2, 22.

Plaintiff was treated by Dr. Kriger, a psychologist, at least four times in 2010 and on one occasion in 2011.[2] *Motion to Quash*, p. 1. According to Dr. Kriger,

> [t]he subject matter of the visits pertained to the stress that the Plaintiff was experiencing at work, as a result of being told that her company wanted her to retire, even though she had worked for the company for 19 years, and was not ready to retire. When I saw her, she manifested symptoms of depression and anxiety. These emotional reactions were evident in her test results (MMPI-2 and MCMI-III), and were consistent with the stress that she was feeling at that time.

Motion to Quash, p. 1.

On March 13, 2013, plaintiff filed the instant action, alleging that she was discriminated against and that her employment was terminated on account of her age in contravention of the Age

[1] Plaintiff was born on May 17, 1956 and is currently age 56. *Id*. at ¶ 2.
[2] Dr. Kriger represents that she had a clinical practice "till the end of 2013." *Motion to Quash*, p. 1.

Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 623, *et seq.* *Id*. at ¶¶ 23-24. Plaintiff also alleges that her employment was terminated in retaliation for having taken leave under the Family and Medical Leave Act ("FMLA"), 29 U.S.C. § 2601, *et seq.* *Id*. at ¶¶ 27-30. Plaintiff also asserts supplemental state law claims of age discrimination in violation of O.R.C. §§ 4112.02(A), 4112.99. *Id*. at ¶¶ 25-26.

On May 29, 2013, this Court conducted a preliminary pretrial conference pursuant to Fed. R. Civ. P. 16. *Preliminary Pretrial Order*, Doc. No. 11. Following that conference, the Court ordered, *inter alia*, that all discovery be completed by April 15, 2014. *Id*. at 3. Thereafter, in light of on-going settlement discussions, the Court modified the pretrial schedule by requiring, *inter alia*, that all discovery be completed by June 30, 2014 and that dispositive motions be filed no later than July 31, 2014. *Order*, Doc. No. 20, p. 1. In extending the case schedule by more than two months, the Court specifically warned the parties that these dates would not be further extended. *Id*. at 2.

On April 29, 2014, defendants served a subpoena on Dr. Kriger, directing her to appear for a deposition on June 5, 2014, at 10:00 a.m. at defense counsel's law office in Columbus, Ohio. *See Subpoena*, Doc. No. 21-1, attached to *Motion to Quash* ("the subpoena" or "defendants' subpoena"). Dr. Kriger has moved to quash the subpoena, arguing that to require her to undergo a deposition would impose an undue burden on her. After the Court expedited briefing, *Order*, Doc. No. 22, *Defendants' Response to Dr. Sara Finn Kriger's Motion to Quash Subpoena*, Doc. No. 25 ("*Defendants' Response*"), was filed, indicating

that defendants had proposed certain accommodations to plaintiff related to the use of Dr. Kriger as a witness in this case. After the Court established a deadline of May 27, 2014 for plaintiff to respond to *Defendants' Response* or to the *Motion to Quash*, *Plaintiff's Response to Dr. Kriger's Motion to Quash Subpoena*, Doc. No. 27 ("*Plaintiff's Response*"), was filed. Defendants have now moved for leave to file a reply memorandum in order "to correct certain inaccuracies" in *Plaintiff's Response*. *Motion for Leave to File Reply*. Because the Court concludes that additional briefing is not necessary, defendants' *Motion for Leave to File a Reply* is **DENIED**.

II. STANDARD

Dr. Kriger has moved to quash defendants' subpoena directing her to appear for a deposition on June 5, 2014. Under Rule 45 of the Federal Rules of Civil Procedure, parties may command a non-party to, *inter alia*, attend a deposition and/or produce documents. Fed. R. Civ. P. 45(a)(1). Rule 45 further provides that "[o]n timely motion, the court for the district where compliance is required must quash or modify a subpoena that . . . subjects a person to undue burden." Fed. R. Civ. P. 45(d)(3)(A)(iv). Whether the burden on a proposed deponent is undue requires weighing "the likely relevance of the requested [information] . . . against the burden . . . of producing the [information.]" *EEOC v Ford Motor Credit Co*., 26 F.3d 44, 47 (6th Cir. 1994). Courts "have held that the scope of discovery under a subpoena is the same as the scope of discovery under Rule 26." *Hendricks v. Total Quality Logistics*, LLC, 275 F.R.D. 251, 253 (S.D. Ohio 2011) (internal quotation marks omitted). Rule 26 grants parties the right to "obtain discovery regarding any nonprivileged matter that

is relevant to any party's claim or defense. . . ." Fed. R. Civ. P. 26(b)(1). Relevance for discovery purposes is extremely broad. *Lewis v. ACB Business Services, Inc.*, 135 F.3d 389, 402 (6th Cir. 1998). However, "district courts have discretion to limit the scope of discovery where the information sought is overly broad or would prove unduly burdensome to produce." *Surles ex rel. Johnson v. Greyhound Lines, Inc.*, 474 F.3d 288, 305 (6th Cir. 2007) (citing Fed. R. Civ. P. 26(b)(2)). In determining the proper scope of discovery, a district court balances a party's "right to discovery with the need to prevent 'fishing expeditions.'" *Conti v. Am. Axle & Mfg.*, No. 08-1301, 326 Fed. Appx. 900, at *907 (6th Cir. May 22, 2009) (quoting *Bush v. Dictaphone Corp.*, 161 F.3d 363, 367 (6th Cir. 1998)). Finally, the movant bears the burden of persuading the court that a subpoena should be quashed. *See, e.g., Baumgardner v. La. Binding Serv., Inc.*, No. 1:11-cv-794, 2013 U.S. Dist. LEXIS 27494, at *4 (S.D. Ohio Feb. 28, 2013); *Williams v. Wellston City Sch. Dist.*, No. 2:09-cv-566, 2010 U.S. Dist. LEXIS 122796, at *21 (S.D. Ohio Nov. 2, 2010).

III. DISCUSSION

Dr. Kriger moves to quash the subpoena, arguing that requiring her to undergo a deposition would impose an undue burden on her in light of her current professional and personal circumstances. *Motion to Quash*, p. 1. At the end of 2013, she closed her clinical practice after 40 years and is in the process of selling the building that housed her practice and dismantling her professional corporation. *Id.* at 1-2. She also suffered the unexpected "recent passing" of her husband, who also functioned as the controller and manager of her professional corporation. *Id.* at 2. Dr. Kriger explains that these

difficult events have turned her grief into depression which, in turn, negatively impacts, *inter alia*, her concentration, short-term memory and emotional control. *Id*. Dr. Kriger, who is 71 years old, also suffers from certain medical difficulties related to her vocal cords and knee pain. *Id*. Dr. Kriger further represents that she previously provided to counsel "all the pertinent information" she possessed regarding plaintiff:

> At the request of the Plaintiff's attorney, in July 2013, I submitted a summary of my contact with the Plaintiff, and this included information on the dates of service, her reported problem/emotional status, and her treatment. In January 2014, I was asked to copy and submit the contents of the Plaintiff's file. My submission included all the progress notes, the background form and a symptoms list. I did not enclose the test data of the MMPI-2 and MCMI-III, explaining in a note to the Plaintiff's attorney that these tests are protected by the Trade Secrets Act, which forbid me from releasing them to anyone, including to another psychologist. Please note, however, that the treatment summary I had submitted to the attorney in July, included a summary of the test findings, so that, in effect, all the pertinent information I possess regarding the Plaintiff, has already been disclosed to the attorneys in this case.

Id. at 1. Under all these circumstances, Dr. Kriger asks the Court to quash the subpoena. *Id*. at 2.

Defendants, who were unaware of Dr. Kriger's personal circumstances at the time the subpoena was issued, do not object to releasing Dr. Kriger from the subpoena should the Court limit plaintiff's ability to use Dr. Kriger as a witness. *Defendants' Response*, p. 1. Specifically, defendants seek the following conditions before releasing Dr. Kriger: (1) plaintiff must limit any affidavit or other testimony by Dr. Kriger to plaintiff's claim for compensatory emotional distress damages stemming from alleged age discrimination; and (2) defendants must be given the opportunity to

depose Dr. Kriger before plaintiff offers her testimony (whether by affidavit or live testimony). *Id*.

Plaintiff, too, does not object to releasing Dr. Kriger from the subpoena, but opposes defendants' proposed limitation on plaintiff's use of Dr. Kriger as a witness. *Plaintiff's Response*, pp. 1-2. Plaintiff argues that she "should not be prejudiced by Dr. Kriger's current unavailability or limited in the testimony that Dr. Kriger may be able to present in this litigation." *Id*. at 1. Plaintiff proposed that, should she proffer Dr. Kriger's affidavit at the summary judgment stage or testimony at trial, the Court could determine at that time whether defendants may appropriately depose Dr. Kriger. *Id*. at 2-3.

Dr. Kriger's deposition testimony falls within the ambit of discoverable information. *See* Fed. R. Civ. P. 26(b)(1). Plaintiff and Dr. Kriger concede that Dr. Kriger's treatment of plaintiff related to the stress that plaintiff allegedly experienced while in defendants' employ and plaintiff is presently unwilling to limit her claims to exclude reliance on Dr. Kriger's testimony. The production of Dr. Kriger's records is simply not an adequate substitute for her deposition testimony, to which defendants are unquestionably entitled. Although plaintiff urges the Court and defendants to defer Dr. Kriger's deposition until plaintiff unilaterally determines – after the discovery completion date – whether and to what extent she will rely on Dr. Kriger's testimony, neither plaintiff nor Dr. Kriger can assure either the Court or defendants that Dr. Kriger will be reasonably available for deposition at that time. Indeed, the record presents no reason to believe that the burden on Dr. Kriger would be

any less should she be required to undergo a deposition at a later date.

Although the Court is sympathetic to Dr. Kriger's professional and personal circumstances, the Court cannot conclude that the burden to her of appearing for a deposition outweighs the defendants' need for her deposition. *See*, *e.g.*, *Ford Motor Credit Co*., 26 F.3d at 47.

WHEREUPON, *Defendants' Motion for Leave to File a Reply to Plaintiff's Response to Dr. Kriger's Motion to Quash Subpoena Instanter*, Doc. No. 28, and non-party Dr. Sara Finn Kriger's motion to quash defendants' subpoena to appear for a deposition on June 5, 2014, Doc. No. 21, are **DENIED**.[3]

May 22, 2014

s/Norah McCann King
Norah McCann King
United States Magistrate Judge

[3] Defendants are urged to attempt to accommodate Dr. Kriger's schedule. However, the Court will not extend the current discovery deadline.