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United States District Court,
E.D. New York.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff,
v.
BOSTON MARKET CORP., Defendants.

No. CV 03–4227 LDW WDW. | Dec. 16, 2004.

Attorneys and Law Firms

Judy A. Keenan, Katherine E. Bissell, New York, NY, for Plaintiff.

Joel L. Finger, Brown Raysman Millstein Felder & Steiner LLP, New York, NY, for Defendants.

Opinion

ORDER

WALL, Magistrate J.

***1** Before the court is a motion by the defendant Boston Market Corporation for an order permitting the defendant's attorneys to engage in ex parte communications with two of plaintiff Christine Gagliardi's psychologists and with representatives of the Eastern Suffolk Board of Cooperative Educational Services ("BOCES"), Suffolk County Adult Protective Services ("ADP"), and the Suffolk County District Attorney's Office ("DA"). *See* 11/4/04 Finger Letter. Gagliardi takes the position that the defendant is authorized to obtain all of her medical records and to depose her doctors and other non-parties, but that the Health Insurance Portability and Accountability Act of 1996 ("HIPAA") 42 U.S.C. §§ 1320d—1329d–8, along with various New York privileges and privacy rights, preclude ex parte discussions by Boston Market with those entities. *See* 11/10/04 Keenan Letter & 11/12/04 Curran Letter. For the reasons cited herein, the motion is denied.

BACKGROUND

The parties all agree that Gagliardi has placed her medical condition at issue in this lawsuit, which involves, *inter alia,* disability discrimination claims pursuant to Title VII and the Americans With Disabilities Act. Patricia Howlett, Esq., acts in this litigation as Gagliardi's Personal Needs and Property Management Guardian. Gagliardi has authorized, through Howlett, the release of her medical, health, educational, rehabilitation and employment records to the defendant and has authorized the defendant's deposition of her doctors. She has also allegedly authorized her own attorneys to speak ex parte with her doctors, with BOCES and with the DA, and has authorized counsel for the other plaintiff, the EEOC, to "speak privately" with BOCES. See 11/4/04 Finger Letter at 1–2 & Ex. A. Howlett specified, in the authorization to BOCES, that she would not "permit *ex-parte* communications between [BOCES] and defendant Boston Market Corporation and the attorneys for Boston Market Corporation about Christine Gagliardi, unless expressly agreed to" by her in a separate release. *Id.* Counsel for EEOC reports that it has already furnished the defendant with relevant records in its possession, including the complete BOCES records. 11/10/04 Keenan Letter at 2 n. 3.

Boston Market now seeks a court order allowing it to have ex parte discussions with several non-party fact witnesses. The defendant seeks access to (1) current and former members of the Suffolk County DA's office who handled the prosecution of Gagliardi's criminal complaint against Mr. Padilla, a former employee of Boston Market and Gagliardi's alleged harasser; (2) Elaine Laverty and Brian McIlvain, BOCES employees who worked with Gagliardi on employment issues; (3) representatives of Suffolk County's Adult Protective Services who conducted an investigation in April 2001 regarding allegations of abuse against Gagliardi;[1] and (4) Sandy Guarnotta[2] and Stuart Rothman, psychologists who evaluated Gagliardi but who, according to the defendant, did not treat her. 11/30/04 Schmidt Letter at 1–2.

1 The court notes that the defendant did not list these individuals in its 11/04/04 letter motion, but included them in its 11/30/04 reply letter.

2 The EEOC reports that counsel for Boston Market has cancelled a deposition of Dr. Guarnotta based on information that she does not have records and lacks any independent memory of Christine Gagliardi. Keenan Letter at 2 n. 2. The defendant does not mention this, and the court has proceeded on the assumption that Boston Market wishes to meet ex parte with both psychologists. Moreover, although the defendant states in its November 4th letter that it seeks to meet ex parte with Gagliardi's doctors and psychologists, the reply letter of November 30th lists only the two psychologists.

***2** There does not seem to be a dispute as to whether the defendant is entitled to discovery from these non-parties. The dispute is, instead, about the mode of communication that the defendant can use to obtain discovery. Because all of the people the defendant seeks to interview are non-parties, the court cannot order them to speak informally with the defendant, and the court is not sure whether the defendant is seeking an order that the plaintiff must authorize ex parte discussions, or a declaratory judgment that ex parte communication is acceptable. In any event, the EEOC, in opposition to the motion, argues that ex parte access must be denied, because it would "permit defendant to have unrestricted access to information that is privileged, highly personal or private, without providing the safeguards of having counsel for EEOC and Christine Gagliardi present to interpose legitimate objections to inquiries or statements by defense counsel which have nothing to do with obtaining relevant information." 11/10/04 Keenan Letter at 1. Counsel for Gagliardi, Michael Curran, argues that various state law privileges require denial of the motion. *See* 11/12/04 Curran Letter.

DISCUSSION

This motion presents a number of overlapping issues, including the Health Insurance Portability and Accountability Act of 1996 ("HIPAA") 42 U.S.C. §§ 1320d–1329d–8, New York privilege and privacy issues, the discovery provisions of the Federal Rules of Civil Procedure, and Federal Rule of Evidence 501. The court will look first to these issues as they relate to the propriety of ex parte communications with the two psychologists.

1.) Ex parte communications with Ms. Gagliardi's psychologists:

The plaintiffs argue that state law privileges for medical and mental health providers bar ex parte communications with Gagliardi's psychologists, specifically referencing New York's statutory psychologist-patient privilege, set forth at C.P.L.R. § 4507. *See* Curran Letter. The threshold question, however, is whether state law privileges apply at all in this lawsuit, which is in federal court on federal question jurisdiction, the plaintiff having asserted claims pursuant to Title VII and the Americans with Disabilities Act. Assertions of privilege in federal question cases are governed by federal common law, not by state law. Fed.R.Evid. 501; *see also National Abortion Fed'n,* 2004 U.S. Dist. LEXIS 4530, *18 (S.D.N.Y. Mar. 18, 2004) (citing *von Bulow v. von Bulow,* 811 F.2d 136, 141 (2d Cir.1987) & *Ehrich v. Binghamton City Sch. Dist.,* 210 F.R.D. 17, 21 (N.D.N.Y.2002)). Where, as here, an action involves both federal and state law claims, courts "have ordinarily held that privileges are determined under federal law." *Tesser v. Board of Educ.,* 154 F.Supp.2d 388, 391 (E.D.N.Y.2001).

Rule 501 provides, however, that evidentiary privileges should be governed by federal common law, only if a relevant rule of law has not been "otherwise ... provided by Act of Congress." In other words, Rule 501 reflects the general principle that courts develop federal common law only "when Congress has not spoken to a particular issue." *City of Milwaukee v. Illinois,* 451 U.S. 304, 313, 101 S.Ct. 1784, 68 L.Ed.2d 114 (1981). In HIPAA, Congress has "spoken" about the protection that must be extended to patients regarding their health related information. For this reason, HIPAA and the regulations promulgated thereunder, and not Rule 501 and federal common law, control the release of medical information by the plaintiff's psychologists. *See National Abortion Fed'n,* 2004 U.S. Dist. LEXIS 4530 at *19–20 (citing *National Abortion Fed'n v. Ashcroft,* 2004 U.S. Dist. LEXIS 1701, *15 (N.D.Ill. Feb. 5, 2004), *aff'd,* 362 F.3d 923 (7th Cir.2004)).

***3** HIPAA is "a complex piece of legislation that addresses the exchange of health-related information" (*National Abortion Fed'n,* 2004 U.S. Dist. LEXIS 4530 at *5–6), one that has "radically changed the landscape of how litigators can conduct informal discovery in cases involving medical treatment." *Law v. Zuckerman,* 307 F.Supp.2d 705, 711 (D.Md.2004). Under the rulemaking authority set forth in HIPAA, the Secretary of Health and Human Services has promulgated regulations to protect the privacy of protected health information. *National Abortion Fed'n,* 2004 U.S. Dist. LEXIS 4530 at *6–7.

Health information includes:

> any information, whether oral or recorded in any form or medium, that: (1) is created by a health care provider,[3] health plan, public health authority, employer, life insurer, school or university or health care clearinghouse; and (2) relates to the past, present or future physical or mental health or condition of an individual; the provision of health care to an individual; or the past, present or future payment for the provision of health care to an individual.

3 The court notes that HIPAA applies only to those entities who are included in the statute's definition of "health provider," and only such information as is included in its definition of "health information." Thus, the statute applies herein only to the two psychologists with whom Boston Market seeks to meet on an ex parte basis. The defendant claims that the psychologists did not treat Ms. Gagliardi, but HIPAA does not expressly

distinguish between treating and non-treating health providers, and there is no argument by either party on this issue. The court thus assumes that the psychologists are health providers as defined in the statute.

45 C.F.R. § 160.103.

HIPAA contains a preemption provision that the statute and the regulations promulgated thereunder should supersede "any contrary provision of State law" except as provided in 42 U.S.C. § 1320d–7 (a)(2). *See* 42 U.S.C. § 1320d–7(a)(1). Under the exception relevant to this motion, HIPAA does not preempt or supersede state law if the state law relates to the privacy of individually identifiable health information and is 'more stringent' than HIPAA's requirements. *See National Abortion Fed'n v. Ashcroft,* 2004 U.S. Dist LEXIS 1701 at *8 (citing 45 C.F.R. § 160.203(b) & *U.S. ex rel. Stewart v. Louisiana Clinic,* 2002 U.S. Dist. LEXIS 24062, *3 (E.D.La. Dec. 11, 2002)). A state privacy standard is more stringent than a HIPAA requirement if the state law "prohibits or restricts a use or disclosure in circumstances [under] which such use or disclosure otherwise would be permitted' under HIPAA." *National Abortion Fed'n,* 2004 LEXIS 4530 at *10 (quoting 45 C.F.R. § 160.202).

The plaintiff argues that New York law, specifically C.P.L.R. § 4507, which creates a statutory psychologist-patient privilege, is more stringent than HIPAA and should control here. Interpretation of the preemption provision is not, as the Seventh Circuit has observed, "free from doubt" (*Northwestern Mem'l Hosp. v. Ashcroft,* 362 F.3d 923, 925 (7th Cir.2004). A question arises as to the application of the preemption provision: does it mean that "more stringent" state laws trump HIPAA regulations and apply both in cases where state law provides the rule of decision *and* in cases where federal substantive law controls; or does it mean that HIPAA applies in cases where federal law provides the rule of decision and in cases where the applicable state law is not more stringent than HIPAA, but that more stringent state law, rather than HIPAA, applies in cases where state law controls? Different courts have come to different conclusions, as a comparison of the district court and appellate court decisions in the Illinois National Abortion Federation case demonstrates.

***4** District Judge Kocoras, of the northern District of Illinois, held that the more stringent Illinois law was "activated" through HIPAA's anti-preemption provision, which "demanded" its application, even though the case was before the court on federal question jurisdiction. 2004 U.S. Dist. LEXIS 1701 at *16–17. The Seventh Circuit, although it affirmed the district court's quashing of the underlying subpoena, disagreed with Judge Kocoras's interpretation of the preemption provision of HIPAA. The court found that "HIPAA regulations do not impose state evidentiary privileges on suits to enforce federal law." 362 F.3d at 925. More stringent state laws can be enforced "in suits in state court to enforce state law, and, by virtue of an express provision in Fed.R.Evid. 501, in suits in federal court (mainly diversity suits) as well [,] in which state law provides the rule of decision." *Id.* But more stringent state laws do not "govern in federal-question suits." *Id.; compare United States ex rel. Pogue v. Diabetes Treatment Ctrs. of America,* 2004 U.S. Dist. LEXIS 21830 (D.D.C. May 17, 2004) (applying "more stringent" Florida law in case brought "solely under the federal False Claims Act").

Prior to the Seventh Circuit's ruling, The Southern District of New York had come to the same conclusion about the preemption provision in the New York litigation involving the National Abortion Federation, noting that there is a difference "between a federal law that does not preempt a state law and a federal law that incorporates a state rule of law." 2004 U.S. Dist. LEXIS 4530 at *13. The former "merely allows the state law to continue to operate in its sphere of influence, unaffected by the federal statute," while the latter "gives the state law the force of federal law and makes it binding where it would not otherwise be." *Id.* HIPAA, the Southern District held, intended the former result, and C.F.R. section 264(c)(2) "does not equate to the positive power to create binding law in the federal domain—here, a case arising under federal law brought in federal court." *Id.* (citing *Blonder–Tongue Lab., Inc. v. University of Ill. Found.,* 402 U.S. 313, 324 n. 12, 91 S.Ct. 1434, 28 L.Ed.2d 788 (1971) ("In federal-question cases, the law applied is federal law."))

This court agrees with the reasoning the Seventh Circuit and Southern District opinions. As in *National Abortion Fed'n,* the C.P.L.R. section to which plaintiff points "remains the law in areas in which New York State has the authority to regulate, but it has not become the law in areas within the federal domain." *Id.* Accordingly, New York law does not apply here, and no comparison of HIPAA and New York law is necessary to determine if the state law is "more stringent.[4] The court thus turns to HIPAA for guidance on the issue of ex parte communications by adverse counsel with plaintiff's psychologists.

4 Indeed, such a comparison might well present "apples to oranges" issues. C.P.L.R. § 4507 is not a statute governing procedures for the release of medical information, but one that creates a psychologist-patient privilege. One court has expressed the opinion that HIPAA is not "rightly understood as an Act of Congress that creates a privilege." *Northwestern Mem. Hosp.,* 362 F.3d at 926. The impact of this distinction on a potential comparison of the two laws is unclear, but the court need not address the issue.

HIPAA expressly provides that a patient's health information may be disclosed in a judicial or administrative proceeding, subject to specified regulations. 45 C.F.R. § 164.512(e). The provision allows disclosure of health information without patient consent: (1) pursuant to a court order that allows the health care provider and other entities to disclose "only the protected health information expressly authorized by such an order;" or (2) in response to a subpoena or discovery request if the health care provider receives adequate assurance that the individual whose records are requested has been given sufficient notice of the request, or if reasonable efforts have been made to secure a protective order. *See National Abortion Fed'n,* 2004 U.S. Dist. LEXIS 4530 at *7; C.F.R. § 164.512(e)(1)(I), (ii). The protective order must "prohibit the parties from using or disclosing the protected health information for any purpose other than the litigation or proceeding for which such information was requested; and must require the return or destruction of the protected health information, including all copies, at the end of the litigation or proceeding. 45 C.F.R. § 164.512(e)(1)(v)(A) & (B).[5]

5 The regulation does not appear to require a protective order when the disclosure is made pursuant to court order, although the language in some opinions suggests otherwise. *See, e.g., A Helping Hand, LLC v. Baltimore County,* 295 F.Supp.2d 585, 592 (D.Md.2003) ("[T]he HIPAA regulations permit discovery of protected health information so long as a court order or agreement of the parties prohibits disclosure of the information outside the litigation and requires the return of the information once the proceedings are concluded.") A protective order is expressly required when the disclosure is pursuant to one of the other methods, such as subpoena or discovery request. *See National Abortion Fed'n,* 2004 U.S. Dist. LEXIS 4530 at *7 (section 164.512(e) permits disclosure without patient consent "in response to a court order, provided only the information specified in the court order is disclosed" or in response to a subpoena or discovery request where there has been notice or reasonable effort to secure a protective order). Even if not required by HIPAA, use of a protective order in conjunction with a court order advances the "strong federal policy in favor of protecting the privacy of patient medical records." *Law,* 307 F.Supp.2d at 711.

***5** HIPAA thus "set[s] forth the baseline for the release of health information" (*Law,* 307 F.Supp.2d at 708), and "places certain requirements on both the medical professional providing the information and the party seeking it." *Crenshaw v. MONY Life Ins. Co.,* 318 F.Supp.2d 1015, 1029 (S.D.Cal.2004). It does not expressly prohibit ex parte communications with health providers for an adverse party, but neither does it authorize such communications. Two courts have considered the propriety of ex parte communications with health care providers under HIPAA after those communications had already taken place.

In *Crenshaw,* the District Court for the Southern District of California, noting that HIPAA does not authorize ex parte communications, found that such communication "does not fall within HIPAA's requirement that confidential medical information be disclosed pursuant to a court order, subpoena or discovery request," and that where no protective order safeguarding the plaintiff's privacy was in place "only formal discovery requests could satisfy HIPAA." *Id.* Defense counsel's ex parte contacts with the plaintiff's doctor and the doctor's disclosures, the court held, thus violated the statute. *Id.*

In *Law,* the District Court for the District of Maryland considered whether adverse counsel's ex parte discussions with a treating physician regarding the scope of the physician's care violated HIPAA, and found that HIPAA does not "prohibit all *ex parte* communications with a treating physician for an adverse party. Mere contact between Plaintiff's physician and Defendant's counsel is not regulated by HIPAA." 307 F.Supp.2d at 707. Such contact, the court noted, might include such "benign topics" as "the best methods for service of a subpoena, determining convenient dates to provide trial testimony, or the most convenient location for the anticipated deposition of the physician." *Id.*

However, the court continued, "HIPAA clearly regulates the methods by which a physician may release a patient's health information, including 'oral' medical records." *Id.* Release of that information, the *Law* court suggested, can be made only pursuant to the methods set forth in the statute, and that ex parte communications in the absence of strict compliance with HIPAA are prohibited. *Id.* at 707, 711; *and see In re PPA Litigation,* 372 N.J.Super. 105, 855 A.2d 608 (N.J.Super. Ct. Law Div.2003) (HIPAA does not expressly bar ex parte communications, and does not preempt New Jersey's allowable informal discovery of physicians, but does require compliance with certain procedures). Thus, the *Law* court found, there had been a HIPAA violation, and the court warned that counsel "should now be far more cautious in their contacts with medical fact witnesses when compared to other fact witnesses to ensure that they do not run afoul of HIPAA's regulatory scheme." 307 F.Supp.2d at 711.

This court finds that ex parte communications regarding the disclosure of health information, while not expressly prohibited by HIPAA, create, as the court in *Law* warned, too great a risk of running afoul of that statute's strong federal policy in favor of protecting the privacy of patient medical records. Although the exchange of non-health related information such as the time or place of depositions might be discussed in ex parte encounters

between health providers and counsel for a party adverse to the patient, release of health information is to be made only through the use of the methods listed in HIPAA, that is, pursuant to a court order that specifies the substance of the information to be released, or pursuant to a subpoena or discovery request that adheres to the notice and protective order requirements of that statute. As a practical matter, it is unlikely that many health care providers would be willing to meet with adverse counsel, for fear of violating HIPAA.

***6** The court notes that HIPAA's limitation of the ways in which health information may be released is separate and apart from any claim of privilege that the plaintiff may have had or waived. In this federal question case, issues of privilege are, as noted earlier, governed by federal common law, here, the federal psychologist-patient privilege recognized by the Supreme Court in *Jaffee v. Redmond,* 518 U.S. 1, 116 S.Ct. 1923, 135 L.Ed.2d 337 (1996). That privilege, like other testimonial privileges, can be waived. 518 U.S. 1 at 15 n. 14, 116 S.Ct. 1923, 135 L.Ed.2d 337. Generally, a patient waives the psychotherapist-patient privilege by raising her mental condition as an element of her claim or defense. *See Tesser v. Board of Educ.,* 154 F.Supp.2d 388, 395 n. 4 (E.D.N.Y.2001). Here, Gagliardi has waived the privilege applying to health information that she has put at issue, including relevant information from her psychologists, and she does not appear to dispute that the defendant is entitled to her health information insofar as it relates to the claims and damages that she has put at issue in this lawsuit. Gagliardi has authorized, through Howlett, the release of her medical, health, educational, rehabilitation and employment records to the defendant and has authorized the defendant's deposition of her doctors. She has also authorized her own attorneys to speak ex parte with her doctors, with BOCES, and with the DA, and has authorized counsel for the other plaintiff, the EEOC, to "speak privately" with BOCES.

Thus, to the extent that the defendant wants the court to order Gagliardi to permit ex parte release of her health information by the psychologists, with the entry of a protective order that meets HIPAA's requirements, the court declines to do so. Boston Market has not cited to any post-HIPAA case that has allowed ex parte contact with plaintiff's health providers by defense counsel, and this court will not enter such an order. The strong policy underlying HIPAA would appear to trump the reasoning of those pre-HIPAA decisions that allowed defense counsel ex parte access to plaintiff's treating physicians, finding it unfair to "permit plaintiff's counsel unrestricted access to these crucial witnesses while denying defense counsel the same." *Horner v. Rowan Cos.,* 153 F.R.D. 597, 600 (S.D.Tex.1994) (citing *Bryant v. Hilst,* 136 F.R.D. 487 (D.Kan.1991)).

The court does, however, accept the defendant's suggestion that a new protective order that includes the details required by HIPAA be entered, so that the defendant can proceed with discovery from the psychologists and other health care providers pursuant to the methods set forth in HIPAA. The plaintiffs shall review the proposed amended protective order submitted by the defendant as Exhibit D to its motion. When the parties have agreed on the terms, they shall submit the proposed order for the court's approval. The court now turns to the other non-parties that the defendant seeks to contact in ex parte communications, to whom HIPAA does not apply.

2.) Ex parte communications with the D.A.'s office:

***7** The defendant seeks ex parte contact with representatives of the D.A.'s office who handled Gagliardi's criminal complaint against Mr. Padilla. The plaintiffs oppose such contact, and the EEOC argues that the Federal Rules of Civil Procedure do not contain any provision for ex parte interviews, and that Boston Market should be limited to the methods of discovery set forth in those rules—interrogatories, depositions, and subpoenas—subject to relevant privileges and privacy concerns. Keenan Letter at 2. Depositions of witnesses, EEOC argues, "where EEOC and counsel for Christine Gagliardi can hear the questions being asked by defense counsel and interpose objections, if warranted, provides defendant ample opportunity to obtain relevant information while protecting against disclosure of information to which defendant is not entitled." *Id.* While the federal discovery rules do not include ex parte interviews as a discovery tool, neither do they bar such interviews, which are a commonly used discovery technique.

Thus, while court cannot order a non-party to engage in ex parte discussions, the defendant is free to approach the D.A.'s office on an ex parte basis if it wishes to do so, and the representatives of that organization can respond as they see fit. Although the defendant states that Gagliardi has authorized private discussions between the D.A. and her attorneys (11/04/04 Letter at 1), but has not authorized such discussions between the D.A. and Boston Market, the court is not aware of any power that Ms. Gagliardi has to approve of or bar the release of information by that entity, and will not order such an authorization.

If the representatives of the D.A.'s office refuse to speak privately with defense counsel, the defendant can subpoena them for depositions. Although this may be more expensive and time consuming, there is no suggestion that the defendant has been or will be deprived of information from these sources to which it is entitled, and there is no undue prejudice to Boston Market.

3. Ex parte communication with BOCES and Adult Protective Services:
The defendant also seeks ex parte contact with Elaine Laverty and Brian McIlvain, employees of BOCES, who allegedly helped Ms. Gagliardi to find jobs and who met and spoke with Gagliardi while she worked at Boston Market. The parties agree that BOCES treats its records and information as confidential, and their procedures specifically provide for disclosure with the written consent of the individual about whom information is sought or pursuant to subpoena after notification to the individual. 11/10/04 Keenan Letter, Ex. 5; 11/30/04 Schmidt Letter at 2 n. 2.

Gagliardi, through Howlett, has authorized her own attorneys to speak ex parte with BOCES, and has authorized counsel for the other plaintiff, the EEOC, to “speak privately” with BOCES. She specifically told BOCES that such authorization did not extend to Boston Market, unless is was rendered in a separate document. See 11/04/04 Finger Letter, Ex. A. Under these circumstance, there would appear to be little point in the defendant’s attempting to contact BOCES on an ex parte basis, given their procedures for access to information. It is unclear whether the defendant has asked Gagliardi for authorization, but if she will not grant it, the defendant can proceed by subpoena.

***8** The parties do not specify the procedures used by Adult Protective Services for the release of information, but, like BOCES, it treats its information as confidential. Indeed, before the court is a request by the New York State Office of Children & Family Services (“OCFS”) on behalf of Adult Protective Services that the court conduct an *in camera* review of Adult Protective Services documents responsive to a document subpoena served by the defendants. 12/10/04 Bray Letter. OCFS states that the documents and the information contained therein are confidential pursuant to Section 473–e of the New York State Social Services Law. There is little or no likelihood that representatives of APS will meet ex parte with defense counsel, and the court will not order such contact. As with the D.A. and BOCES, the defendant may subpoena the APS witnesses if it appears that they have relevant information. The court will issue a ruling on the request for *in camera* review of the APS documents in a separate order, and that order may or may not influence the defendant’s decision on how to proceed.

On a separate issue, the court notes its receipt of the December 14, 2004 letter from counsel for the EEOC, Ms. Keenan, which states the EEOC’s decision not to pursue the sanctions allowed in the court’s order of November 30. The court accepts the EEOC’s position, and the sanctions awarded in the November 30 order are vacated. As to the unusual statement in Ms. Keenan’s letter that neither the plaintiffs nor the defendant would seek sanctions for the instant motion, the court notes that there was no sanctionable conduct involved, and no sanctions would have been awarded.

SO ORDERED.