

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF IOWA  
DAVENPORT DIVISION

EQUAL EMPLOYMENT OPPORTUNITY	)	
COMMISSION,	)	NO. 3:02-cv-10063
	)	
Plaintiff,	)	RULING ON DEFENDANT
	)	FIRST STUDENT'S MOTION
vs.	)	TO COMPEL AND PLAINTIFF
	)	EEOC'S MOTION FOR
FIRST STUDENT, INC.,	)	PROTECTIVE ORDER
	)	
Defendant.	)	

The above resisted motions are before the Court (§s 15 & 9). They deal with the same subject matter, certain discovery requests propounded by First Student. First Student requests oral argument on its motion to compel, however, the briefs are very thorough and the Court does not believe determination of the motions would be aided by oral argument. Accordingly, the Court has considered the motions on the motion papers.

Together the motions raise three issues: (1) whether the EEOC must produce requested medical and psychological history information concerning the person on whose behalf it sues, Mr. James Doorley; (2) the need for supplemental discovery responses on the economic losses claimed on behalf of Mr. Doorley; and (3) the validity of the EEOC's asserted "deliberative" and "conciliation" privileges as they may apply to disputed documents. The Court will consider each of these subject areas in turn.

## **Medical and Psychological History**

The Complaint alleges First Student retaliated against Mr. Doorley after he complained about racial and/or sexual discrimination and harassment. The retaliation allegedly resulted in mental and emotional pain and suffering for which the EEOC seeks recovery on Doorley's behalf. The Complaint also seeks recovery of Doorley's medical expenses, however, in its interrogatory answer, the EEOC states Mr. Doorley did not seek treatment for the claimed emotional distress and accordingly no medical expenses are claimed for such treatment. Rather, the claim is for general emotional distress damages. Mr. Doorley has testified to certain physical symptoms which he attributes to his emotional distress, including sleeplessness, weight gain and headaches.

In its second set of discovery requests, First Student propounded an interrogatory which asked the EEOC to identify all health care professionals who had examined or treated Mr. Doorley in the last ten years, including the dates of treatment and examinations and the purpose of each treatment and examination. In a related document request First Student asked, essentially, for all medical records pertaining to treatment or examination within the requested ten-year period. The EEOC was given the option of producing authorizations allowing First Student to obtain medical records. The EEOC objected on the basis of discovery relevancy, violation of the physician-patient privilege, privacy, breadth and

burden. At Mr. Doorley's deposition EEOC's counsel directed Mr. Doorley not to respond to questions about his medical and mental health history.

As the Court understands the EEOC's responses to the discovery requests as clarified in its brief, Mr. Doorley has not been treated or examined by any mental health professional or counselor within the requested ten year time period, and accordingly there are no mental health records to produce.

In resisting First Student's motion to compel and seeking a protective order the EEOC argues, respectively, that First Student is not entitled to "unfettered access" or "unlimited discovery" of medical and psychological information. The Court agrees, but it does not necessarily follow that First Student is entitled to no medical information. Generally, a party may obtain discovery regarding any non-privileged matter that is "relevant to the claim or defense of any party . . . ." Fed. R. Civ. P. 26(b)(1). The EEOC, on Doorley's behalf, claims damages for a mental or emotional injury. As a result, First Student "is entitled to discover whether there have been other stressors relating to plaintiff's mental and physical health during the relevant time period which may have contributed to the claimed emotional distress." Gatewood v. Stone Container Corp., 170 F.R.D. 455, 460 (S.D. Ia. 1996). People do not compartmentalize the things that affect their emotional state. Worry and anxiety may

have many, interrelated causes. If, for example, Mr. Doorley was suffering from a serious illness at the time he complains of employment-related emotional distress, First Student could argue the illness independently contributed to his emotional injury and was the cause of his physical symptoms. The relevance of medical discovery is not negated by the fact Mr. Doorley has not sought care or treatment for the claimed emotional distress. On the other hand, because of the privacy interest involved, First Student is not entitled, as the EEOC says, to unfettered or unlimited disclosure of medical or mental health information. Id. There is a balance to be made.

First Student is entitled to discovery of medical information reasonably calculated to lead to the discovery of admissible evidence bearing on Mr. Doorley's claim of emotional injury. Fed. R. Civ. P. 26(b)(1). Subject to the limitations of reasonableness in light of the competing interests, Mr. Doorley's physician-patient privilege and right of privacy are waived by the allegation of emotional injury. See Schoffstall v. Henderson, 223 F.3d 818, 823 (8th Cir. 2000); Sanchez v. U.S. Airways, Inc., 202 F.R.D. 131, 136 (E.D. Pa. 2001); EEOC v. Danka Indus., Inc., 990 F. Supp. 1138, 1142-43 (E.D. Mo. 1997); Gatewood, 140 F.R.D. at 460; see also Iowa Code § 622.10.

The Court agrees with the EEOC that the ten-year period requested by First Student is overly broad. Long ago, resolved

medical conditions are unlikely to have had any relationship to Mr. Doorley's emotional reaction to the alleged retaliation. It follows discovery of such information is not reasonably calculated to lead to the discovery of admissible evidence. On the other hand, allowing discovery only from the date of the first claimed retaliatory act as the EEOC proposes is too limited. Conditions which originated before the claimed retaliation may have continued to have emotionally distressing effects at the time of the alleged retaliation. The Court believes the past five years from the date hereof is sufficient for temporal relevancy.

Only serious medical conditions and/or those of some duration can reasonably be expected to have contributed in a material way to Mr. Doorley's emotional health. Accordingly, similar to the result in Gatewood, and subject to a suitable protective order, the EEOC will be required to answer the relevant interrogatory and produce medical records, and Mr. Doorley will be required to respond in testimony (1) with respect to conditions which resulted in surgery, in-patient hospitalization, or involved illness not cured within six months or treated for six months or more, or which were life threatening or disabling in any way, and (2) with respect to any complaint, condition or record involving the same or similar physical symptoms Mr. Doorley has attributed to

the emotional distress claimed in this case.<sup>1</sup> At the EEOC's request, the Court will review in camera specific records subject to production under this Order concerning which Mr. Doorley claims a particular interest in maintaining the privacy of the information that outweighs the need for discovery. The motion to compel and the motion for protective order are granted in part and denied in part in conformity with the scope of disclosure hereby permitted.

### **Economic Loss Information**

First Student propounded an interrogatory which sought the EEOC's calculation for each item of damages. The EEOC is seeking back pay for Mr. Doorley and has requested reinstatement rather than front pay. In resisting the motion to compel the EEOC says that it has not been able to completely calculate the back pay amount because First Student had not, to the date of EEOC's resistance, produced complete information about its bonus system. The EEOC did in response to the interrogatory reveal the method by which it calculated back pay. Concerning front pay, the EEOC responds front pay will only be an issue if the Court determines reinstatement is not appropriate and that it would invade the Court's discretion to advance a front pay calculation.

---

<sup>1</sup>Again, the Court has assumed from the EEOC's statements that Mr. Doorley was not examined or treated by a mental health professional or for any mental health reason during the relevant time period, and that there are therefore no mental health records. If there are any mental health records within the relevant time period, they should be produced subject to the opportunity for in camera review. See Schoffstall, 223 F.3d at 823.

Presumably by now the EEOC has received the bonus information necessary to make a complete calculation of claimed back pay. The motion to compel is granted to require the EEOC to supplement its answer to Interrogatory No. 1 of First Student's first set of interrogatories to provide a calculation of back pay claimed. The answer may, of course, note the continuing accumulation of back pay and the insufficiency, if any remains, of pay and benefit information provided to it, but the EEOC will make its best dollar estimate of the claimed back pay. With respect to front pay, though the EEOC is seeking reinstatement whether that form of equitable relief is a viable alternative will not be determined until trial, too late for front pay discovery. If the Court decides to award front pay the EEOC undoubtedly will have a figure in mind. It does not invade the Court's authority for the EEOC to provide information about what it will claim for front pay in the event the Court determines that form of relief is most appropriate.

The motion to compel is granted with respect to back pay and front pay information as above.

### **Privileges**

The EEOC has produced a privilege log in which it identifies a number of documents withheld on the basis of the government deliberative and conciliation privileges. First Student describes the documents as those identified as 00001-00006, 00009,

00014-00015, 00024-00040, 00061-00064, 00094-00098, 00107. The EEOC has also objected to certain interrogatories and document requests on the basis of the privileges. The Court assumes the numbered documents identified are those documents within the scope of the objected to discovery requests (Nos. 1, 3, 4, and 7-13 of First Student's first set).

The parties dispute the scope and extent of both privileges and both suggest it would be appropriate for the Court to make an in camera review of the disputed documents. The Court believes it is appropriate to do so in light of the privileges claimed. The EEOC shall produce the documents for in camera inspection within the time period provided below. The Court does not understand First Student to be seeking those documents withheld by the EEOC solely on the basis of the attorney-client privilege or work product doctrine, and these need not be produced with the in camera materials. However, documents in connection with which the attorney-client privilege and/or work product production are claimed in addition to the deliberative or conciliation privileges should be produced for inspection.

In view of the foregoing, the following orders are entered:

1. First Student's motion to compel and the EEOC's motion for protective order are granted in part and denied in part;



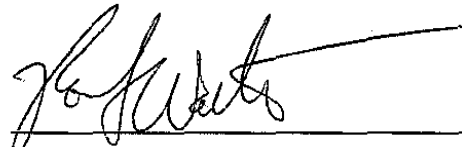
2. Supplementation to answers to interrogatories and requests for production relating to medical records and information shall be made by the EEOC in conformity with the foregoing within **thirty (30) days** of the date hereof. The EEOC may, at its or Mr. Doorley's election, provide patient authorizations to First Student's counsel to obtain medical records. The parties shall confer and agree on an appropriate protective order which, in general, limits the disclosure of Mr. Doorley's medical records and information to persons with a need to know for use solely in connection with this action;

3. Within **thirty (30) days** of the date hereof, the EEOC shall produce claimed privileged documents within the scope of the discussion above for in camera review by the Court. Within the same time period, the EEOC may produce specific medical records subject to disclosure under this ruling as discussed above. The Court strongly encourages counsel to confer to minimize the submission of in camera medical records as many types of medical records may not be of much use to First Student;

4. Both sides having prevailed in part, the Court elects not to undertake an apportionment of expenses incurred in relation to the motions, hence no party is awarded fees or expenses. Fed. R. Civ. P. 37(a)(4)(C).

IT IS SO ORDERED.

Dated this 24th day of April, 2003.

A handwritten signature in cursive script, appearing to read 'Ross A. Walters', is written over a horizontal line.

ROSS A. WALTERS

CHIEF UNITED STATES MAGISTRATE JUDGE