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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

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JUL 12 2005

CIVIL MINUTES - GENERAL

Case No. CV 04-07703-RGK (VBK) Date July 12, 2005
Title Equal Employment Opportunity Commission v. Big Lots, Inc., et al.

Present: The Honorable Victor B. Kenton, United States Magistrate Judge

Roxanne Horan

Deputy Clerk Court Reporter / Recorder Tape No.

Attorneys Present for Plaintiffs:

Attorneys Present for Defendants:

Sue J. Noh

C. Craig Woo

Proceedings:

AMENDED DECISION RE: PLAINTIFFS' MOTION TO QUASH SUBPOENA

Defendants (hereinafter "Big Lots") have subpoenaed the notes of Dr. Bonny Shapin. Toya Stamps, a former employee of Big Lots on whose behalf Plaintiff (hereinafter "EEOC") filed this lawsuit, sought counseling from Dr. Shapin, a psychotherapist, at or around the time an employee of Big Lots allegedly subjected Ms. Stamps to sexual harassment.¹ EEOC has filed a Motion to Quash the Subpoena. The parties have filed a Joint Stipulation Re: EEOC's Motion to Quash Subpoena to Dr. Bonny Shapin ("JS") in which they present various declarations, points and authorities, and exhibits, all of which the Court reviewed.

BACKGROUND

In this lawsuit, among other things, EEOC asserts that Ms. Stamps was subjected to sexual harassment in violation of Section 703(a) of Title VII, 42 U.S.C. § 200e-2(a)(1). (Complaint, ¶ 10-11). EEOC has filed suit seeking compensation for injuries suffered by Ms. Stamps that include but are not limited to emotional pain and suffering, loss of enjoyment of life, and humiliation. (*Id.*, ¶ D).

Big Lots learned that at or around the time of the alleged sexual harassment, Ms. Stamps sought counseling from Dr. Shapin. Big Lots learned of Ms. Stamps' visits to Dr. Shapin in part because Ms. Stamps filed a work-related accident report with Big Lots, in which she mentioned that she was seeing a psychologist "for stress." (JS Ex. D). On May 17, Big Lots issued a subpoena seeking Dr. Shapin's medical, psychological, psychiatric, and hospital records pertaining to her treatment of Ms. Stamps. (JS Ex. 2).

EEOC filed a Motion to Quash the Subpoena on the ground that the records requested are protected by the psychotherapist-patient privilege. (JS at 6). Big Lots argues that EEOC waived the privilege by seeking damages for emotional distress and thereby placed Ms. Stamps' mental state at issue. Big Lots also argues

¹ The sexual harassment allegedly began on July 26, 2004 (JS Ex. C). Ms. Stamps received treatment from from Dr. Shapin from July 31, 2003 to October 14, 2003 (see JS at 4).

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that Ms. Stamps affirmatively waived the privilege in the course of filing work-related accident and worker's compensation forms that disclosed some of the substance of her communications with a psychotherapist and authorized the release of medical documents. (Id. at p. 14). The issue at hand is whether the psychotherapist-patient privilege has been waived.

ANALYSIS

In Jaffee v. Redmond, 518 U.S. 1, 11 (1996), the Supreme Court recognized a psychotherapist-patient privilege to protect the confidentiality of psychotherapeutic counseling sessions. The Supreme Court rejected a balancing test which had been used in prior federal decisions that weighed the evidentiary need for a psychotherapist's materials against the patient's privacy interest. (Id. at 17-18). The Jaffee opinion concluded that "making the promise of confidentiality contingent upon a trial judge's later evaluation of the relative importance of the patient's interest in privacy and the evidentiary need for disclosure would eviscerate the effectiveness of the privilege." (Id. at 17).

Jaffee did not define the scope of the psychotherapist-patient privilege, thus allowing subsequent decisions to develop the privilege's limitations. (Id. at 18). The Supreme Court did, however, note that the psychotherapist-patient privilege may be waived like any other testimonial privilege. (Id. at 15 n.14). Additionally, because Jaffee repeatedly analogized the psychotherapist-patient privilege to the attorney-client privilege, courts have generally held that the limitations of both privileges are analogous. (See, e.g., ; Vanderbilt v. Preston, 174 F.R.D. 225, 229 (D. Mass. 1997); Sarko v. Penn-Del Directory Co., 170 F.R.D. 127, 130 (E.D. Pa. 1997)).

Two lines of cases have developed regarding waiver of the psychotherapist-patient privilege since its recognition in Jaffee. Under the so-called broad view, a plaintiff waives the privilege by alleging emotional distress, thereby placing her emotional state at issue. Under the narrow view, a plaintiff does not waive the privilege merely by seeking damages for emotional distress. Rather, the privilege is waived when a plaintiff affirmatively relies on the substance of psychotherapist-patient communications to prove her case.

The first case to define the broad waiver was Sarko v. Penn-Del Directory Co., 170 F.R.D. 127 (E.D. Pa. 1997). In Sarko, plaintiff alleged that her employer wrongfully terminated her because she suffered from clinical depression. The Court held that the plaintiff waived the psychotherapist-patient privilege by raising the issue of her clinical depression.

The Sarko decision was based on three grounds. First, the Court cited decisions prior to Jaffee that recognized a qualified psychotherapist-patient privilege. Second, Sarko referenced the analogy to the attorney-client privilege utilized by Jaffee. Sarko held that just as the attorney-client privilege is waived when the advice of counsel is placed at issue in litigation, the psychotherapist-patient privilege is waived when the plaintiff's mental state is placed at issue. Finally, the Court held that denying the defendant access to the plaintiff's psychological records when the plaintiff's condition is placed directly at issue in the litigation "would simply be contrary to the most basic sense of fairness and justice." (Id. at 130) (citing Premack v. J.C.J. Ogar, Inc., 148 F.R.D. 140, 145 (Pa. Cmwlth. 1995)).

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Numerous other decisions have relied on Sarko to extend the broad waiver to cases involving claims of emotional distress. (See, e.g., Sanchez v. U.S. Airways, Inc., 202 F.R.D. 131 (E.D. Pa. 2001); Vascancellos v. Cybex Int'l, Inc., 962 F. Supp. 701 (D. Md. 1997)). However, a separate line of cases promulgating the narrow waiver found that Sarko undermined the policy considerations at the heart of Jaffee.

In Vanderbilt v. Preston, 174 F.R.D. 225 (D. Mass. 1997), the Court took issue with each of the three grounds set out in Sarko. First, the Court held that Sarko inappropriately relied on pre-Jaffee decisions, given the dramatic change in federal common law encompassed in the Supreme Court's rejection of the balancing test in Jaffee. Second, the Court agreed with the analogy to waiver of the attorney-client privilege, but found that Sarko misapplied the analogy. Vanderbilt held that, as with the attorney-client privilege, the psychotherapist-patient privilege is only waived when a plaintiff places the *substance* of the communications at issue in the litigation. Merely placing the plaintiff's emotional state at issue in the litigation is not sufficient. Until a plaintiff seeks to, e.g., call an expert witness to testify on the plaintiff's emotional state, the contents of her prior counseling sessions are not discoverable. Finally, the Court found that the privilege is not unfair to defendants so long as the plaintiff does not introduce the substance of her communications with her psychotherapist.

Vanderbilt's analogy to the attorney-client privilege is persuasive. The Supreme Court in Jaffee repeatedly analogized the policy considerations underlying the psychotherapist-patient privilege to those of the attorney-client privilege. Accordingly, the basis to find a waiver of both privileges should cohere.

Waiver of privileged attorney-client communications occurs when a plaintiff raises issues dealing with the content of those communications. Similarly, the psychotherapist-patient privilege is waived if the plaintiff testifies about the substance of her counseling sessions or utilizes expert testimony. Merely seeking damages for emotional distress does neither and thus does not waive the privilege.

However, a plaintiff impliedly waives the psychotherapist-patient privilege where she has not foreclosed the possibility of introducing evidence that she received psychotherapy in connection with the alleged incident underlying her complaint, even if she does not disclose the content of those communications. This would be akin to a party asserting the advice of counsel defense without disclosing the content of the privileged communications. Moreover, even if the plaintiff does not rely on evidence of psychotherapy to prove her emotional distress damages, the defendant may still inquire into whether and how often plaintiff received such therapy in connection with the alleged incident. (Vanderbilt, 174 F.R.D. at 230).

At the June 28 hearing before this Court, EEOC represented that it will not introduce any evidence in its case in chief regarding psychotherapeutic counseling sought by Ms. Stamps, nor will it introduce other medical expert testimony regarding Ms. Stamps' mental or emotional condition. Based on these representations, this Court finds Ms. Stamps has not waived the psychotherapist-patient privilege by virtue of the fact that this lawsuit seeks damages for emotional distress and to that extent places Ms. Stamps' emotional state at issue.

Big Lots also argues that in the process of filing forms related to her worker's compensation claims, Ms. Stamps waived the privilege by disclosing some of the substance of her psychotherapist-patient

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communications and authorizing the release of medical documents.

In an Associate's Report of Work Related Accident (hereinafter "accident report"), filed by Ms. Stamps with Big Lots on August 5, 2003, Ms. Stamps states that she was "seeing a psychologist for stress" and taking Paxil for depression, anxiety, and loss of sleep. (JS Ex. C). The document was filed in connection with Ms. Stamps' claim for worker's compensation. Big Lots argues that Ms. Stamps voluntarily disclosed privileged psychotherapist-patient information and thereby waived the privilege. (JS at 18). EEOC responds that Ms. Stamps did not waive her privilege because EEOC "will not be presenting any diagnosis or testimony of any health care professional as to Ms. Stamps at trial." (EEOC's Supplemental Memorandum Re: EEOC's Motion to Quash the Subpoena to Dr. Bonny Shapin (hereinafter "supplemental memorandum") at 5). EEOC's argument skirts the issue; regardless of the witnesses EEOC will utilize, the privilege could have been waived by Ms. Stamps by filing the accident report.

Ms. Stamps made the disclosure in response to a question on the accident report that asked, "Have you received any medical treatment for the accident? If so, from whom?" (JS Ex. C). Ms. Stamps' statement was therefore issued directly in response to a question posed by an accident report form provided by Big Lots or its worker's compensation carrier. Thus, the disclosure of the otherwise-privileged information was not sufficiently voluntary or extensive to constitute waiver of the psychotherapist-patient privilege.

Additionally, Ms. Stamps signed a Medical Authorization Form on August 7, 2003, which stated that she permitted the release of "any and all medical information, records, charts, diagnosis, and reports of any kind." (JS ex. D). Big Lots argues that Ms. Stamps waived the psychotherapist-patient privilege by signing this form. (JS at 18). EEOC states that when Big Lots' worker's compensation carrier sought Ms. Stamps' records in 2003, she specifically withdrew the authorization and prohibited disclosure of the records. (Supplemental memorandum at 8, Declaration of Sue J. Noh ¶ 5). Based on the facts in the record, the Court declines to find that a waiver was made.

In sum, the Court finds that the psychotherapist-patient privilege has not been waived by Ms. Stamps. Consequently, the Motion for Protective Order and to Quash the Subpoena is **GRANTED**.

IT IS SO ORDERED.

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