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United States District Court, E.D. Pennsylvania.

Catherine Natsu LANNING, et al.  
v.  
SOUTHEASTERN PENNSYLVANIA  
TRANSPORTATION AUTHORITY and Richard  
Evans  
UNITED STATES of America  
v.  
SOUTHEASTERN PENNSYLVANIA  
TRANSPORTATION AUTHORITY.

Nos. Civ. A. 97-593, Civ. A. 97-1161. | Sept. 17, 1997.

#### Attorneys and Law Firms

Jules Epstein, Kairys & Rudovsky, Philadelphia, PA, Lisa M. Rau, Kairys, Rudovsky, Kalman & Epstein, Philadelphia, PA, for Catherine Natsu Lanning, plaintiff.

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Jules Epstein, Lisa M. Rau, (See above), for Belinda Kelly Dodson, plaintiff.

Jules Epstein, Lisa M. Rau, (See above), for Denise Dougherty, plaintiff.

Jules Epstein, Lisa m. Rau, (See above), for Lynne Zirilli, plaintiff.

Saul h. Krenzel, Saul H. Krenzel and Associates, Philadelphia, PA, for Southeastern Pennsylvania Transportation Authority (SEPTA) defendant.

Saul H. Krenzel, (See above), for Richard Evans, Individually and in His Official Capacity as Chief of Septa Police Department, defendant.

Robert S. Libman, U.S. Dept. of Justice, Employment Litigation Section, Washington, DC, for United States of America, movant.

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Transportation Authority, defendant.

#### Opinion

#### MEMORANDUM AND ORDER

SCUDERI, Magistrate, J.

\*1 Presently before this court is defendant's motion to compel medical and psychiatric records of the individual plaintiffs, plaintiffs' response thereto and plaintiffs' cross-motion for a protective order. For the reasons discussed below, defendant's motion to compel is granted and plaintiffs' motion for a protective order is denied.

In its motion to compel, defendant requests that plaintiffs produce the names of psychological, psychiatric and gynecological providers as well as signed authorizations for the release of the providers' records. Defendant argues that plaintiffs have waived any applicable privilege by placing their mental condition directly at issue in this action and that matters which are not privileged are relevant to a determination of plaintiffs' physical state and alleged emotional distress.

Plaintiffs oppose the production of such information and seek a protective order to prohibit discovery of these matters. Plaintiffs contend that psychiatric and psychological records are privileged and that any request for such information should be denied as irrelevant and improper because: (1) plaintiffs have stipulated that they will not seek damages for psychiatric/psychological injury; (2) plaintiffs have stipulated that they will not offer expert testimony in support of their claim for emotional distress; (3) plaintiffs do not seek recovery for treatment of emotional distress; and (4) plaintiffs have not alleged an independent tort-like action for emotional distress. Plaintiffs also object to defendant's request for gynecological records on the grounds that the information requested is irrelevant, improper and an unnecessary invasion of privacy.

Under Fed.R.Civ.P. 26(b)(1), parties may obtain discovery regarding "any matter, not privileged, which is relevant to the subject matter involved in the pending action." The Rule's relevancy requirement is to be construed broadly, and material is relevant if it bears on, or reasonably could bear on, an issue that is or may be involved in the litigation. *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 350, 98 S.Ct. 2380, 57 L.Ed.2d 253 (1978). In some circumstances, however, Rule 26 permits a court to restrict discovery of relevant material upon a showing of good cause by the party seeking relief in order to protect "a party or person from annoyance,

embarrassment, oppression, or undue burden or expense.” Fed.R.Civ.P. 26(c). In such cases, the burden of persuasion is on the party seeking the protective order, and broad allegations of harm unsubstantiated by specific examples do not satisfy the Rule 26(c) test. *Cipollone v. Liggett Group, Inc.*, 785 F.2d 1108, 1121 (3d Cir.1986), cert. denied, 484 U.S. 976, 108 S.Ct. 487, 98 L.Ed.2d 485 (1987).

Plaintiff first argues that defendant is not entitled to plaintiffs’ psychiatric or psychological records because such records are privileged and because plaintiffs have not waived that privilege by placing their mental condition at issue. Plaintiffs rely on a recent Supreme Court case, *Jaffee v. Redmond*, 518 U.S. 1, 116 S.Ct. 1923, 135 L.Ed.2d 337 (1996), which recognizes a psychotherapist-patient privilege. *Jaffee* states: “confidential communications between a licensed psychotherapist and her patients in the course of diagnosis or treatment are protected from compelled disclosure ...” *Jaffee* at —, — U.S. at —, 116 S.Ct. at 1931. The Supreme Court did not address waiver of the federal common law privilege in *Jaffee*, however, explicitly leaving the contours of the new privilege to be fleshed out over time on a case-by-case basis. *Sarko v. Penn-Del Directory Co.*, 170 F.R.D. 127, 130 (E.D.Pa.1997)(citing *Jaffee* at —, — U.S. at —, 116 S.Ct. at 1932).

\*2 A party waives the federal common law psychotherapist-patient privilege by placing his/her mental condition at issue. *Sarko* at 130. Plaintiffs have set forth a claim for compensation for injury to their emotional well-being. In support of their argument that plaintiffs have not placed their mental state at issue, plaintiffs rely upon caselaw which addresses the more restrictive issue of whether or not to compel the mental examination of a party under Fed .R.Civ.P. 35(a). Our focus in determining whether or not plaintiffs have waived their psychotherapist-patient privilege is on the nature of plaintiffs’ claims. Despite plaintiffs’ attempts to limit damages regarding emotional distress, the claim for emotional distress remains a part of plaintiffs’ action. As the district court has stated:

We are not persuaded, however, that waiver of the privilege should be made to turn on the nature of the plaintiff’s evidence rather than on the nature of her claim. Implied waivers of privilege are justified by the interests of the state in seeing that truth is ascertained in legal proceedings and fairness to the adversary ... If a plaintiff seeks damages for alleged emotional or psychological injuries, the defendant’s case ought not be

limited by the plaintiff’s decision not to introduce available medical or psychological testimony that bears directly on the truth of the claim.

*Thorne v. Universal Properties, Inc.*, 1987 WL 7683, \*2 (E.D.Pa.). Although plaintiffs do not intend to introduce expert testimony regarding damages due to emotional distress, defendant correctly points out that plaintiffs can establish their emotional distress claim through their own testimony. Defense counsel has a right to inquire into plaintiffs’ pasts for the purpose of showing that their emotional distress was caused at least in part by events and circumstances that were not job related. *Lowe v. Philadelphia Newspapers Inc.*, 101 F.R.D. 296, 298 (E.D.Pa.1983). Consequently, in the interest of adequate and fair discovery, I find that plaintiffs have placed their mental condition at issue thereby waiving the psychotherapist-patient privilege.

Plaintiffs also argue, however, that defendant’s request for gynecological records is irrelevant and that defendant’s entire motion is an attempt to harass and intimidate plaintiffs by seeking to delve into personal and sensitive information. Although the release of information about plaintiffs’ medical histories is to some extent an intrusion on the privacy, such an inquiry is warranted since it may provide relevant information regarding plaintiffs’ physical state. The “right of privacy as to plaintiffs’ personal history that a plaintiff may otherwise have must be balanced against the defendant’s right to a fair trial.” *Lowe v. Philadelphia Newspapers Inc.*, 101 F.R.D. 296, 298 (E.D.Pa.1983).

Rather than creating a “chilling effect” as plaintiffs contend, disclosure of the information requested by defendants is required in the interest of fairness and justice. See *Sarko* at 130 (citing *Premack v. J.C.J. Ogar, Inc.*, 148 F.R.D. 140)(it would be contrary to the most basic sense of fairness and justice to allow a plaintiff to hide behind a claim of privilege when that condition is placed directly at issue in a case). Consequently, the court will grant defendants’ motion and deny plaintiffs’ cross motion for a protective order in the interests of adequate and fair discovery and the search for truth. In allowing defendants to inquire into plaintiffs’ medical and psychiatric records, however, it must be emphasized that defendants may not engage in a fishing expedition by inquiring into matters totally irrelevant to the issue of plaintiffs’ physical state at the time of the test at issue or plaintiffs’ emotional distress. Defendants will therefore restrict their inquiry to these areas.

An appropriate order follows.

**ORDER**

\*3 AND NOW, this 17<sup>th</sup> day of September, 1997, upon consideration of Defendant's Motion to Compel Medical and Psychiatric Records of the Individual and Plaintiffs' Motion for Protective Order in Response to Defendant's Motion to Compel Plaintiffs' Medical and Psychiatric Records, IT IS HEREBY ORDERED that Defendant's motion to compel is GRANTED and Plaintiffs' motion for a protective order is DENIED.

IT IS FURTHER ORDERED that individual plaintiffs shall:

(1) produce the names of psychological, psychiatric, and gynecological providers from whom treatment has been sought within five (5) days of the date of this Order accompanied by a signed authorization for the release of all such records and

(2) make themselves available for deposition to answer questions relating to the aforesaid medical treatment within ten (10) days of receipt of the aforesaid records.