

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

_____	)	
JUDITH BARNETT,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 04-1245 (RWR)
	)	
PA CONSULTING GROUP, INC.,	)	
	)	
Defendant.	)	
_____	)	

MEMORANDUM OPINION AND ORDER

Plaintiff Judith Barnett brought this employment discrimination action against her former employer, PA Consulting Group, Inc. ("PA"), alleging that PA terminated her employment because of her age and sex, in violation of the Age Discrimination in Employment Act, 29 U.S.C. §§ 621 et seq., and the District of Columbia Human Rights Act, D.C. Code §§ 2-1404.01 et seq. PA has moved for reconsideration of the magistrate judge's Order denying PA's motion to compel discovery of Barnett's general medical records as irrelevant, and mental health records as privileged. The magistrate judge's finding that Barnett's psychotherapy records were privileged was not contrary to clearly established law. However, because Barnett has not demonstrated the irrelevance of her non-psychotherapy records, PA's motion for reconsideration will be granted in part and denied in part.

BACKGROUND

Barnett seeks compensatory damages resulting from an allegedly discriminatory termination and claims that "wounding . . . has caused her pain and suffering." (See Pl.'s Am. Compl. at 4-5.) Prior to and throughout her employment with PA, Barnett underwent "counseling with a therapist for several years . . . focusing primarily on family issues, including her role as a single mother." (Pl.'s Opp'n to Def.'s Mot. for Recons. at 5.) Barnett claims that although the termination caused her to "experience[] feelings of anger, humiliation and anxiety," she "is not contending that the discrimination caused her any permanent or long-lasting emotional injury . . . ." (Pl.'s Resp. to Def.'s First Set of Interrogatories at 9.)

On May 17, 2004, PA propounded its first set of discovery requests on Barnett, seeking, among other things, information and documents relating to Barnett's medical history.<sup>1</sup> On July 7,

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<sup>1</sup> This request was contained in Interrogatory No. 10 and Document Request No. 26, which read as follows:

Interrogatory No. 10:

Given that Plaintiff claims damages for "pain and suffering," describe Plaintiff's medical history in detail, including every illness, injury, disorder, abnormal or disabling condition (physical, mental or emotional) or medical procedures and all treatment Plaintiff has had at any time (other than common virus, cold, flu or routine dental work), the date on which such condition began or became evident, the diagnosis of any such condition, all treatment received and the dates thereof, the identities of all current or former physicians, therapists, dentists,

2004, Barnett responded to these requests by objecting to Interrogatory No. 10 on the grounds that the medical information sought by PA was "an unwarranted invasion of personal privacy, irrelevant and overly burdensome." (Pl.'s Resp. to Def.'s First Set of Interrogatories at 12.) As a result of Barnett's objection, PA moved to compel production of the requested medical and mental health information. (See Def.'s Mot. to Compel Pl.'s Answers to Interrogatories & Production of Docs., Jan. 16, 2006.) The magistrate judge denied PA's request for Barnett's mental

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psychologists, hospitals, clinics, sanitariums, and other health care providers who diagnosed or treated Plaintiff for each such physical, emotional, mental, or psychological condition, and identify (or produce) all documents evidencing or relating to diagnosis or treatment of such conditions.

(Def.'s First Set of Interrogatories to Pl. at 15.)

Document Request No. 26:

Given that Plaintiff is seeking damages for emotional injury and/or "pain and suffering," any and all medical records and other documents, including, but not limited to, reports, office notes, evaluations, diagnoses, dental records, prescription forms, bills, letter to employers, and intake forms, reflecting or relating to the physical, mental, emotional or psychological health or condition and treatment of the Plaintiff, whether such documents are presently in Plaintiff's possession, custody or control, or in the possession, custody or control of her current or former physicians, therapists, dentists, psychologists, counselors, hospitals, clinics, sanitariums, and other health care providers and insurers or other indemnitors, excluding medical records relating solely to minor orthopedic conditions, common childhood illnesses, common virus, cold, flu or routine dental work.

(Def.'s First Request for Production of Docs. to Pl. At 8.)

health records, finding that the information sought was privileged under the psychotherapist-patient privilege and that Barnett had not waived that privilege by failing to provide a written response to the document production request, by not expressly stating any privilege in her objection, or by claiming an emotional injury. See Mag. J. Mem. Order of June 30, 2006 at 3, 6-8. With respect to PA's request for Barnett's general medical records, the magistrate judge declined to order the production of those records, concluding they were not relevant to Barnett's discrimination claim. See id. at 5-6. PA has now filed a motion for reconsideration of the magistrate judge's decision not to compel production of Barnett's general medical and mental health records, alleging that the magistrate judge's ruling was contrary to established precedent.

#### DISCUSSION

Fed. R. Civ. P. 72(a) and LCvR 72.2(b) allow a party to seek reconsideration of a magistrate judge's decision in a discovery dispute. "On review, the magistrate judge's decision is entitled to great deference unless it is clearly erroneous or contrary to law, that is, if on the entire evidence the court is left with the definite and firm conviction that a mistake has been committed." Pulliam v. Cont'l Cas. Co., No. 02-370, 2006 WL 3003977, at \*2 (D.D.C. Oct. 20, 2006) (citing Virtual Def. & Dev. Int'l, Inc. v. Rep. of Mold., 133 F. Supp. 2d 9, 20 (D.D.C. 2001)

(quoting Neuder v. Battelle Pac. Nw. Nat. Lab., 194 F.R.D. 289, 292 (D.D.C. 2000)) (internal quotations omitted); see also LCvR 72.2(c) ("Upon a motion for reconsideration . . . a judge may modify or set aside any portion of a magistrate judge's order . . . found to be clearly erroneous or contrary to law.").

#### I. PSYCHOTHERAPIST-PATIENT PRIVILEGE

PA alleges that the magistrate judge erred by not finding that Barnett had waived her psychotherapist-patient privilege. (See Def.'s Mem. in Support of Mot. for Recons. at 1, 3.) PA argues that Barnett waived this privilege by failing to object to PA's document request, failing to assert her privilege in response to PA's interrogatory, and by claiming an emotional injury. (See id. at 3-4.)

"[C]onfidential communications between a licensed psychotherapist and her patients in the course of diagnosis or treatment are protected from compelled disclosure under Rule 501 of the Federal Rules of Evidence." Jaffee v. Redmond, 518 U.S. 1, 15 (1996). "Effective psychotherapy . . . depends upon an atmosphere of confidence and trust in which the patient is willing to make a frank and complete disclosure of facts, emotions, memories, and fears." Id. at 10; see also In re Sealed Case (Medical Records), 381 F.3d 1205, 1210 (D.C. Cir. 2004) ("Like the spousal and attorney-client privileges, . . . the psychotherapist-patient privilege is rooted in the imperative

need for confidence and trust . . . ." (internal quotations omitted)).

A. Failure to object and timely assert privilege

Rule 34 of the Federal Rules of Civil Procedure provides that "[t]he party upon whom the [document] request is served shall serve a written response within 30 days after the service of the request." Fed. R. Civ. P. 34(b). If the request is objected to, the response should state the "reasons for the objection." Id. "When a party withholds information otherwise discoverable . . . by claiming that it is privileged . . ., the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged . . ., will enable other parties to assess the applicability of the privilege . . . ." Fed. R. Civ. P. 26(b)(5). However, failure to comply with these rules does not automatically constitute waiver of the privilege. See United States v. Philip Morris Inc., 347 F.3d 951, 954 (D.C. Cir. 2003) (explaining that waiver of the attorney-client privilege is not automatic, especially where a party failed to list a document in its privilege log that it believed was covered by its outstanding objection to the scope of the discovery request). "[W]aiver of a privilege is a serious sanction most suitable for cases of

unjustified delay, inexcusable conduct, and bad faith." Id.  
(citation and internal quotation omitted).

While the magistrate judge admonished Barnett for not responding to Document Request No. 26 in writing and not expressly asserting the psychotherapist-patient privilege in response to Interrogatory No. 10, he found that Barnett had preserved her privilege objection by objecting to Interrogatory No. 10, see Mag. J. Mem. Order of June 30, 2006 at 3, which sought identical information about Barnett's medical history, "as an unwarranted invasion of personal privacy, irrelevant and overly burdensome." (Pl.'s Resp. to Def.'s First Set of Interrogatories at 12.) Although PA alleges that it was "contrary to well established law" for the magistrate judge to not find that Barnett's "failure to provide any written objections to PA's document requests and/or to produce a privilege log . . . result[ed] in waiver of any applicable privilege" (Def.'s Mem. in Support of Mot. for Recons. at 3, 4 (emphasis omitted)), such a harsh sanction is not warranted under the circumstances. The facts do not demonstrate, nor does PA allege, that Barnett's failure to respond was due to anything but carelessness. See Mag. J. Mem. Order of June 30, 2006 at 3 (cautioning Barnett to "exercise greater care in the future," when objecting to discovery requests). The magistrate judge's finding that Barnett had preserved her privilege objection in

light of her response to Interrogatory No. 10 and her assertion of privilege in opposition to PA's motion to compel is not contrary to law and will be affirmed.

B. Emotional injury claim

PA alleges that the magistrate judge "misapplied established precedent" by finding that Barnett had not waived her psychotherapist-patient privilege by claiming emotional damages. (See Def.'s Mem. in Support of Mot. for Recons. at 4.) In seeking compensatory damages, Barnett alleged that PA's termination of her employment "caused her pain and suffering." (See Pl.'s Am. Compl. at 5.) Responding to PA's Interrogatory No. 5, which sought an explanation of the damages sought, Barnett stated that she was seeking compensatory damages in part because of the "humiliation and anger that she experienced from defendant's unlawful conduct" and because she had "experienced feelings of anger, humiliation and anxiety from the sudden discharge and discrimination." (See Pl.'s Resp. to Def.'s First Set of Interrogatories at 8-9.) However, Barnett made clear that she was "not contending that the discrimination caused her any permanent or long-lasting emotional injury . . . ." (See id. at 9.) Based on these responses, the magistrate judge stated that because Barnett had neither alleged "that her distress was particularly severe," nor "indicated that she plan[ned] to use the substance of her conversations with her therapist or her

therapist's testimony as evidence," she had not placed her mental state at issue. See Mag. J. Mem. Order of June 30, 2006 at 7.

Kalinosky v. Evans, 377 F. Supp. 2d 136 (D.D.C. 2005), the only opinion found in this district to address the issue of waiver of the psychotherapist-patient privilege by a claim for emotional damages, concluded that "the psychotherapist privilege is waived when a plaintiff places her mental state at issue." Id. at 137-38 (citing Schoffstall v. Henderson, 223 F.3d 818, 823 (8th Cir. 2000) ("Numerous courts since *Jaffee* have concluded that, similar to [the] attorney-client privilege that can be waived when the client places the attorney's representation at issue, a plaintiff waives the psychotherapist-patient privilege by placing his or her medical condition at issue.")); see also Fox v. The Gates Corp., 179 F.R.D. 303, 306 (D. Colo. 1998) (holding that a plaintiff waives the psychotherapist-patient privilege by claiming damages for emotional distress) (interpreting the holding in Dixon v. City of Lawton, 898 F.2d 1443 (10th Cir. 1990), as providing that "a plaintiff who relies on her medical condition as an element of her claim may not assert the psychotherapist-patient privilege to preclude a defendant from obtaining discovery of her mental health records."<sup>2</sup>).

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<sup>2</sup> Given that a federal psychotherapist-patient privilege cognizable under Federal Rule of Evidence 501 had yet to be articulated by either the Supreme Court or the Tenth Circuit, the

In Kalinosky, the court held that the plaintiff had placed her mental health at issue "through her allegations that defendant's actions caused her severe emotional distress and led her to seek the services of a mental health professional." Kalinosky, 377 F. Supp. 2d at 138. By contrast, Barnett does not contend that PA's actions caused her severe emotional distress, but rather claims that the termination did not cause any "permanent or long-lasting emotional injury." (See Pl.'s Resp. to Def.'s First Set of Interrogatories at 9.) Moreover, unlike in Kalinosky, where the plaintiff claimed that the defendant's actions triggered her need for mental health services, Barnett makes no such claim. She acknowledges that she has "undergone counseling with a therapist for several years starting before working for PA, focusing primarily on family issues, including her role as a single mother[,] " and that while the "termination . . . affected her[,] . . . it did not spark any change in her therapy or treatment regimen." (Pl.'s Opp'n to Def.'s Mot. to Recons. at 5.) Since PA has presented no controlling authority showing that Barnett's allegations of an ordinary reaction of anger, humiliation and anxiety at being fired placed her mental state at issue, the magistrate judge's decision is not contrary to established law.

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Dixon court assumed, but did not decide, that such a privilege existed in supporting its holding. See Dixon v. City of Lawton, 898 F.2d 1443, 1450-51 (10th Cir. 1990).

II. GENERAL MEDICAL RECORDS AND NON-PRIVILEGED MENTAL HEALTH HISTORY

"Parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party . . . ." Fed. R. Civ. P. 26(b)(1). "Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." Id. "For the purposes of discovery, relevancy is broadly construed and encompasses any material that bears on, or that reasonably leads to other matters that could bear on, any issue that is or may be in the case." Alexander v. F.B.I., 194 F.R.D. 316, 325 (D.D.C. 2000). "Where a plaintiff alleges emotional distress, a defendant is entitled to explore whether causes unrelated to the alleged wrong contributed to plaintiff's claimed emotional distress, and a defendant may propound discovery of any relevant medical records of plaintiff in an effort to do so." Moore v. Chertoff, Civil Action No. 00-953, 2006 WL 1442447, at \*2 (D.D.C. May 22, 2006). Where information sought appears to be relevant, the party resisting disclosure bears the burden of "demonstrating that the requested discovery either does not come within the broad scope of relevance as defined under Fed. R. Civ. P. 26(b)(1) or is of such marginal relevance that the potential harm occasioned by discovery would outweigh the ordinary presumption in favor of broad disclosure.'" "

Id. (quoting Merrill v. Waffle House, Inc., 227 F.R.D. 467, 470-71 (N.D. Tex. 2005)).

Based on Barnett's claims that the "firing itself was wounding . . . and caused her pain and suffering" (see Pl.'s Am. Compl. at 5), and that she "experienced feelings of anger, humiliation and anxiety from the sudden discharge and discrimination" (see Pl.'s Resp. to Def.'s First Set of Interrogatories at 9), PA is entitled to seek discovery of any relevant medical records. PA alleges that the magistrate judge erred in refusing to order discovery of both Barnett's general medical records and any non-privileged mental health information because these documents are relevant to her claims of pain and suffering, humiliation, anger, anxiety, and to other factors, besides her termination, that may have affected her mental and emotional state. (See Def.'s Mem. in Support of Mot. for Recons. at 7, 8.)

Barnett satisfied her burden of showing that the harm of disclosing her privileged therapy records far outweighed their marginal relevance. She alleges that her general medical records are irrelevant because she is not claiming that "[t]he termination . . . caused any permanent or long-lasting emotional injury," and because she will not present evidence from "medical providers . . . that she needed treatment for stress stemming from the termination of her employment." (See Pl.'s Opp'n to

Def.'s Mot. to Recons. at 5.) A plaintiff's pledge not to prove damages through expert testimony does not entitle that plaintiff to withhold relevant medical records from a defendant. Moore, 2006 WL 1442447, at \*2. If Barnett received any medical treatment for any development that may have created the type of transitory mental and emotional stress that she alleges PA's termination of her employment caused, it may be that this information is relevant for discovery purposes. Because Barnett has provided only the conclusory statement that the requested information is irrelevant, without more, she has not carried her burden of demonstrating its irrelevance or that the harm from disclosure would outweigh its marginal relevance. The magistrate judge's refusal to order production of Barnett's general medical records and non-privileged mental health information, without substantiation from Barnett as to why production of this information would be irrelevant, will not be upheld.

#### CONCLUSION AND ORDER

Because the magistrate judge's finding that Barnett did not waive her psychotherapist-patient privilege was not contrary to law, PA's motion to reconsider that finding will be denied. Because Barnett has not demonstrated any harm from disclosure of her relevant non-therapy medical and mental health records or their irrelevance, PA's motion for reconsideration of that finding will be granted. Accordingly, it is hereby

ORDERED that PA's motion for reconsideration be, and hereby is, GRANTED in part and DENIED in part. The magistrate judge's finding that Barnett did not waive her psychotherapist-patient privilege is upheld. That part of the magistrate judge's Order denying PA's motion to compel discovery of Barnett's non-therapy medical and mental health records is set aside and remanded for further proceedings consistent with this Memorandum Opinion.

SIGNED this 19th day of March, 2007.

/s/  
RICHARD W. ROBERTS  
United States District Judge