Successfully Opposing The Discovery Of Plaintiffs' Medical Records In Employment And Civil Rights Cases

By Justin D. Cummins

INTRODUCTION[1]

Employers have been accustomed to obtaining independent medical examinations (IME)s under Rule 35 and, even more so, medical records under Rule 34 in connection with their defense of claims brought under employment and civil rights statutes, such as Title VII, the Americans with Disabilities Act, the Fair Housing Act, the Age Discrimination in Employment Act, and the Minnesota Human Rights Act. The prospect of discovery into one's medical history has discouraged some aggrieved parties from pursuing their compelling legal claims. This issue has also opened the door for abusive litigation tactics by some defense counsel.

Fortunately, courts in Minnesota and across the country are now ruling that employers cannot pursue an IME or even obtain medical records when a plaintiff's emotional damages are strictly "garden variety." In other words, a plaintiff's medical history is not discoverable simply because he or she alleges emotional harm that flows exclusively from the violation of Title VII or similar statutes.

I. PLAINTIFFS AS PRIVATE ATTORNEYS GENERAL

That an employer's demand for a plaintiff's private and highly sensitive medical information can have a chilling effect on enforcement activity is noteworthy. People who prosecute harassment, discrimination, or retaliation claims under Title VII and similar federal statutes play a pivotal role in protecting civil rights in this country. The Supreme Court has long recognized that "Congress has cast the Title VII plaintiff in the role of a 'private attorney general,' vindicating a policy 'of the highest priority.'"[2] Indeed, a plaintiff "not only redresses his [or her] own injury but also vindicate[s] the important congressional policy against discriminatory employment practices.[3]

In sum, both the Supreme Court and Congress have repeatedly reaffirmed that employees should not be intimidated or otherwise discouraged from pursuing their legal claims.[4] Plaintiff counsel would do well to remind the Court of this when opposing efforts to conduct discovery into their clients' medical history.

II. THE WELL SETTLED PRIVILEGE BARRING DISCOVERY OF MEDICAL RECORDS IN EMPLOYMENT AND CIVIL RIGHTS CASES

The Supreme Court has long held that a crucial privilege attaches to the medical records often sought in employment and other civil rights cases.[5] The Supreme Court has directed the lower courts to be vigilant in safeguarding the integrity of this axiomatic privilege:

> ***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.*** * * * "An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all."[6]

Notably, the Supreme Court has extended this privilege to an array of healthcare providers, including social workers.[7]

The Eighth Circuit recently weighed in, affirming the district court's refusal to permit discovery of medical data.[8] The Eighth Circuit's analysis turned on the fact that the demand for discovery of medical information would essentially require district courts to undertake the precise balancing test the Supreme Court prohibits.[9]

Given that medical records are privileged, "the appropriate inquiry is whether the plaintiff waived the privilege."[10] Under this legal framework, Minnesota's federal District Court recently affirmed the denial of the motion to compel medical records in a sex harassment and retaliation case.[11] In so ruling, the Court reasoned that a plaintiff's claim for "garden variety" emotional distress damages is "insufficient to place her mental condition in controversy."[12]

To be clear, "garden variety" emotional distress damages refer to those naturally resulting from discrimination, harassment, or retaliation.[13] In other words, "garden variety" emotional harm flows exclusively from violations of Title VII and other statutes, and it does not justify the discovery of a plaintiff's medical records.

A. A Narrow View Regarding Waiver Of The Medical Privilege

Since the Supreme Court's seminal ruling in *Jaffe v. Redmond*, 518 U.S. 1 (1996), numerous courts have barred the disclosure of a plaintiff's medical records to avoid embarrassment, oppression, undue burden, and other deleterious consequences. Many of these courts have taken the view that a plaintiff only waives the governing medical privilege if he or she affirmatively seeks to use privileged data by, for example,

presenting expert witness testimony on medical subject matter.[14]

One of the first cases to apply *Jaffe* cogently articulated why the medical privilege applies with such force in civil rights cases like those brought under Title VII:

> After *Jaffe*, a court cannot force disclosure of [medical] evidence solely because it may be extremely useful to the finder of fact. ***Giving weight to the usefulness of the evidence as a factor in a decision regarding the scope of the privilege would be a balancing exercise that [is] barred by Jaffe.****
> * * The act of seeking damages for emotional distress is analogous to seeking attorney's fees. The fact that a privileged communication has taken place may be relevant. But, the fact that a communication has taken place does not necessarily put its content at issue.[15]

A more recent case further explicated the logic of construing the privilege broadly:

> The Court recognizes that, at first blush, it may appear anomalous that a plaintiff who seeks damages for emotional pain and suffering may be privileged from producing medical records that may shed light on that claim. However, that is no more anomalous than allowing a defendant in a patent case to deny willful infringement and at the same maintain the privilege in an opinion letter of counsel that might shed light on that claim.[16]

In short, the broad view of the medical privilege does not permit discovery into medical records unless a plaintiff specifically relies on the privileged information in proving his or her claims.[17]

B. A Less Restrictive View Regarding Waiver Of The Medical Privilege

Some courts have ruled that the medical privilege may not attach if a plaintiff actually places his or her mental state "in controversy" within the meaning of Fed.R.Civ.P. 35.[18]
This alternative view has been expressly rejected by other courts as contrary to Supreme Court precedent:

> While a Rule 35(a) examination may compromise a litigant's privacy, waiver of the psychotherapist-patient privilege entails more than an invasion of privacy; it threatens access to treatment by breaking the "imperative need for confidence and trust" upon which psychotherapy is rooted. Furthermore, the use of a test for waiver that hinges on an after-the-fact judicial assessment of numerous qualitative factors introduces a risk of uncertainty that the Supreme Court in *Jaffe* sought to avoid.[19]

At any rate, the party demanding medical data must carry a heavy evidentiary burden in proving that a plaintiff has put his or her mental state at issue for purposes of Fed.R.Civ.P. 35.[20] In truth, plaintiffs do not place their mental condition "in controversy" unless one of the following clearly applies to their respective cases:

> (1) a cause of action for intentional or negligent infliction of emotional distress;

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(2) an allegation of a specific mental or psychiatric disorder;
(3) a claim of unusually severe emotional distress;
(4) the offer of expert testimony to support a claim of emotional distress damages; or
(5) the concession that mental condition is "in controversy" within the meaning of Fed.R.Civ.P. 35.[21]

In other words, courts in Minnesota and around the country have repeatedly and unequivocally held that plaintiffs in employment and other civil rights actions do not put their mental state at issue under Fed.R.Evid. 35 when they seek "garden variety" emotional distress damages.[22]

C. The Discoverability Of Medical Records Under State Law

Minnesota's state courts generally interpret state employment and civil rights statutes in accordance with how federal courts apply the analogous federal provisions.[23] Although few published state court decisions on point exist, one may nonetheless reasonably surmise that the analysis under state law would likely be similar to that under federal law.
To the extent state courts may diverge from the federal judiciary, it would likely be by construing the waiver of the medical privilege more narrowly. For purposes of state court proceedings, for example, the Minnesota Legislature has codified a broad concept of medical privilege.[24] Moreover, the Minnesota Supreme Court has long been reluctant to accept the argument that a plaintiff necessarily puts his or her mental condition at issue simply by seeking damages for emotional harm.[25]

D. Strategies For Minimizing The Abusive Use Of Document Requests And Medical Authorizations In Employment Cases

In addition to demonstrating that they have not waived the governing medical privilege as discussed above in Part II.A.-B., plaintiffs may also be able to assert that their records cannot be compelled because the documents are not in their custody or control within the meaning of Rules 26 and 34.[26]

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Moreover, plaintiffs may succeed with the argument that the requested medical records cannot be compelled because the discovery sought is overly intrusive or temporally remote.[27] Furthermore, plaintiffs should consider the propriety of seeking a protective order to preclude production or to limit the temporal and substantive scope of the medical records produced.[28] Plaintiffs establish good cause for issuance of a protective order under Rule 26 by, among other ways, demonstrating that the proposed discovery seeks irrelevant information or is unduly burdensome.[29] An employer's demand for a plaintiff's private and highly sensitive medical records in a case involving claims for "garden variety" emotional distress damages would plainly seek irrelevant information and be unduly burdensome.[30]

In any event, plaintiffs should insist that their counsel have the opportunity to review the medical records for relevancy before producing any such documents.[31]

CONCLUSION

Employers and other defendants are not entitled to that plaintiff's medical records unless that plaintiff has waived the governing medical privilege. Most courts, including those in Minnesota, have held that seeking damages for "garden variety" emotional distress does not constitute the requisite waiver. Plaintiff counsel must be prepared to seek a protective order and/or to oppose vigorously a motion to compel to protect their clients' privileged data. To avoid costly and invasive sideshows about medical information, plaintiff counsel also should ensure that the pleadings in these cases make clear their clients' emotional distress damages are "garden variety."

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[1] An earlier version of this article appeared in the 2007 Employment Law Institute manual.

[2] *N.Y. Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 63 (1980) (quoting *Christiansburg Garment Co. v. E.E.O.C.*, 434 U.S. 412,416-17 (1978)); *see also Burlington North and Santa Fe Ry. Co. v. White*, 126 S.Ct. 2405, 2416 (2006) ("Title VI depends for its enforcement upon the cooperation of employees who are willing to file complaints. . . .").

[3] *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974); *see also McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352, 358 (1995) (citing *Alexander* with approval).

[4] *White*, 126 S.Ct. at 2416; *McKennon*, 513 U.S. at 358; *Carey*, 447 U.S. at 63.

[5] *Jaffe v. Redmond*, 518 U.S. 1, 15-18 (1996) (holding that, pursuant to Fed.R.Evid. 501, the disclosure of medical data could not be compelled).

[6] *Jaffe*, 518 U.S. 17-18 (quoting *Upjohn Co. v. U.S.*, 449 U.S. 383 (1981)) (emphasis added).

[7] *Id.*

[8] *Newton v. Kemna,* 354 F.3d 776, 785 (8th Cir. 2004) (agreeing that the district court properly prohibited discovery of medical records).

[9] *Newton*, 354 F.3d at 784-85.

[10] *Dochniak v. Dominium Management Services*, 240 F.R.D. 451, 452 (D.Minn. 2006).

[11] *Dochniak*, 240 F.R.D. at 453

[12] *Dochniak*, 240 F.R.D. at 452; *see also Blake v. U.S. Bank*, Civ. No. 03-6084, pp.15-16 PAM/RLE, Order, (D.Minn. 2004) (denying the motion to compel medical records in a sex harassment case).

[13] *See, e.g., Dochniak,* 240 F.R.D. at 452; *see also infra* Part I.A.-B.

[14] *Fitzgerald v. Cassil*, 216 F.R.D. 632, 633 (N.D. Cal. 2003) (holding that the plaintiffs did not waive their medical privilege in a discrimination case); *Fritsch v. City of Chula Vista*, 187 F.R.D. 614, 632 (C.D. Cal. 1999) (ruling that the seeking of "garden variety" emotional distress damages does not waive the applicable medical privilege in a disability discrimination and retaliation case); *Hucko v. City of Oak Forest*, 185 F.R.D. 526, 530 (N.D. Ill. 1999) (holding that there was no waiver because "the very nature of a privilege is that it prevents disclosure of information that may be relevant in the case, in order to serve interests that are of over-arching importance."); *Burrell v. Crown Cent. Petroleum, Inc.*, 177 F.R.D. 376, 384 (E.D. Tex. 1997) (denying the defendant's motion to compel medical records in a race discrimination case); *Vanderbilt v. Town of Chilmark*, 174 F.R.D. 225, 230 (D.Mass. 1997) (holding that the plaintiff did not waive the relevant medical privilege in a discrimination and retaliation case).

[15] *Vanderbilt*, 174 F.R.D. at 229 (emphasis added).

[16] *Hucko*, 185 F.R.D. at 531.

[17] *Fitzgerald*, 216 F.R.D. at 633; *Fritsch*, 187 F.R.D. at 632; *Hucko*, 185 F.R.D. at 530; *Burrell*, 177 F.R.D. at 384; *Vanderbilt*, 174 F.R.D. at 229; *see also Jaffe,* 518 U.S. 17-18; *Newton*, 354 F.3d at 784-85.

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[18] *See generally Ruhlmann v. Ulster County Dep't. of Soc. Serv.*, 194 F.R.D. 445 (N.D.N.Y. 2000).
[19] *Fitzgerald*, 216 F.R.D. at 638-39; *see also Fritsch*, 187 F.R.D. at 632 (rejecting a less liberal construction of the medical privilege); *Hucko*, 185 F.R.D. at 530 (same); *Burrell*, 177 F.R.D. at 384 (same); *Vanderbilt*, 174 F.R.D. at 229 (same).
[20] *O'Sullivan v. State of Minnesota*, 176 F.R.D. 325, 328 (D.Minn. 1997) (denying the motion to compel an IME and related medical information under Rule 35).
[21] *O'Sullivan*, 176 F.R.D. at 328.
[22] *Id.*; *see also Bowen v. Parking Authority*, 214 F.R.D. 188, 192-95 (D.N.J. 2003) (denying the motion to compel an IME); *Ricks v. Abbott Laboratories*, 198 F.R.D. 647, 648-49 (D.Md. 2001) (same); *Ford v. Contra Costa County*, 179 F.R.D. 579, 580 (N.D. Cal. 1998) (same); *Fox v. The Gates Corp.*, 179 F.R.D. 303, 307 (D.Colo. 1998) (same); *E.E.O.C. v. Old Western Furniture Corp.*, 173 F.R.D. 444, 446 (W.D. Tex. 1996) (same); *Neal v. Siegel-Robert, Inc.*, 171 F.R.D. 264, 266 (E.D. Mo. 1996) (same); *Smith v. J.I. Case Corp.*, 163 F.R.D. 229, 230 (E.D. Pa.1995) (same); *Turner v. Imperial Stores*, 161 F.R.D. 89, 97-98 (S.D. Cal. 1995) (same); *Bridges v. Eastman Kodak Co.*, 850 F.Supp. 216, 221-22 (S.D.N.Y. 1994) (same); *Curtis v. Express, Inc.*, 868 F.Supp. 467, 469 (N.D.N.Y. 1994) (same); *Robinson v. Jacksonville Shipyards*, 118 F.R.D. 525, 531 (M.D. Fla. 1988) (same); *Cody v. Marriott Corp.*, 103 F.R.D. 421, 422 (D.Mass. 1984) (same); *Marroni v. Matey*, 82 F.R.D. 371, 372 (D.C. Pa. 1979) (same).
[23] *Bevan v. Honeywell*, 118 F.3d 603, 613 (8th Cir. 1997) (observing that the Minnesota Supreme Court has construed the Minnesota Human Rights Act in conformity with federal precedent).
[24] *See* Minn.Stat. § 595.02, Subd. 1(d) (prohibiting medical providers from disclosing medical information without the formal consent of the patient).
[25] *See, e.g., Haynes v. Anderson*, 232 N.W.2d 196, 199-200 (Minn. 1975) (vacating the order compelling an IME).
[26] *Neal v. Boulder*, 142 F.R.D. 325, 327 (D.Colo. 1992) (ruling that the discovery rules do not authorize courts to compel a plaintiff to sign medical releases because the relationship with the treating doctor was insufficient to establish control over the plaintiff's medical records); *see also Clark v. Vega Wholesale, Inc.*, 181 F.R.D. 470, 471-72 (D.Nev. 1998).
[27] *Broderick v. Shad*, 117 F.R.D. 306, 309 (D.D.C. 1987) (denying the motion to compel medical records because the discovery was overly invasive and irrelevant); *see also Sabree v. United Brotherhood of Carpenters & Joiners*, 126 F.R.D. 422, 426 (D.Mass 1989).
[28] *See* Fed.R.Civ.P. 26(c)(1) (stating that a court may "make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression or undue burden or expense . . . that the disclosure or discovery not be had."); *see also* Fed.R.Civ.P. 26(c)(4) (authorizing the limitation or preclusion of discovery).
[29] *Smith v. Dowson*, 158 F.R.D. 138, 140 (D.Minn. 1994) (citations omitted) (issuing a protective order because "a showing of irrelevancy of proposed discovery can satisfy the 'good cause' requirement of Rule 26(c).").
[30] *See, e.g., Dochniak*, 240 F.R.D. at 452-453; *Fitzgerald*, 216 F.R.D. at 633; *Fritsch*, 187 F.R.D. at 632; *Hucko*, 185 F.R.D. at 530; *Burrell*, 177 F.R.D. at 384; *Vanderbilt*, 174 F.R.D. at 229.
[31] *J.J.C. v. Fridell*, 165 F.R.D. 513, 517 (D.Minn. 1995).