Commission on Human Rights and Opportunities ex rel. John Pappy	: Commission on Human Rights and Opportunities
	: CHRO No. 0730288
v.	: EEOC No. 16a200700678
Southern Connecticut State University	: June 28, 2010

Ruling re: the respondent's motion for an order to compel the complainant to produce documents

On January 22, 2007, the complainant filed an affidavit of illegal discriminatory practice with the commission. In his affidavit, he alleged that the respondent violated Title VII and General Statutes §§ 46a-58 (a) and 46a-60 (a) (1) and (4) when it issued him warnings, retaliated against him, harassed him, denied him a raise and did not promote him because of his race and national origin. On April 30, 2008, the complainant filed an "amended and consolidated charging affidavit;" and, on February 26, 2009, the complainant filed an amendment alleging that the respondent had also violated General Statutes § 46a-70 (a) and (e). On November 23, 2009, the case was certified for public hearing. The respondent filed its post-certification answer and affirmative defenses denying the allegations of discrimination on January 15, 2010.

On February 18, 2010, the respondent filed notice that it had served separate production requests on the commission and the complainant. On March 15, 2010, the

complainant filed his objections to production requests numbered 3-5, 8, 14-16 and 18 (objection). On May 27, 2010, the respondent filed a motion (motion) with a supporting memorandum of law (memorandum) moving for an order to compel the complainant to produce documents responsive to its requests for production numbered 1, 2, 6, 7, and 9-16.

I

In response to the motion, a status conference was held on June 24, 2010. Attending the conference were Attorney James Sabatini, on behalf of the complainant; Attorney David Kent, on behalf of the commission; and Attorneys Jaye Bailey and Eleanor Mullen, on behalf of the respondent. At the status conference, the respondent reported that, since the filing of the motion, the complainant had produced documents responsive to its requests numbered 1, 2, 6, 7 and 9-13.

As set forth herein, the motion to compel is denied as to the remaining production requests, 14, 15 and 16.

II

A

General Statues § 4-177c provides in relevant part: “(a) In a contested case, each party and the agency conducting the proceeding shall be afford the opportunity (1) to inspect and copy relevant and material records, papers and documents not in the possession of the party or such agency, except as otherwise provided by federal law or

any other provision of the general statutes . . . .” Further, General Statutes § 4-178 (2) requires that “agencies shall give effect to the rules of privilege recognized by law”.

In its production request numbered 14, the respondent seeks “Copies of any and ***all*** healthcare documents that relate to ***any*** treatment, examination or consultation that you received ***from 1997 to the present*** for ***any*** medical, psychiatric or psychological illness, disorder or condition, including but not limited to, nurse’s notes, charts, treatment summaries, physicians reports, bills or statements for prescription drugs or medicines, physician’s services, hospital and/or operating room expenses, appliances, ambulance costs, recovery expenses and any other bills, costs or expenses.” (Emphasis added.) Memorandum, p. 2. In its production request numbered 15, the respondent seeks “Copies of the attached medical releases signed by complainant, indicating his date of birth and social security number and containing the requisite identifying information for all health care provides identified in Production Requests No. 13 and 14 above.” Id.

The respondent seeks the medical information because to “the extent that the Complainant saw such a treater and made admissions or statements, to the extent that Complainant may have been diagnosed with any type of disorder that calls into question [his] perception of reality or judgment, these documents are relevant and Respondent is entitled to such documentation. . . . As to the physician-patient privilege referred to by Complainant, the case law is clear that once plaintiff places his/her mental condition at

issue with a claim for emotional distress damages, he/she waives his right to prevent disclosure of his/her mental health records under the psychotherapist-patient privilege recognized by federal common law." Memorandum, pp. 3-4.

The complainant objects to producing the requested documents because, inter alia, the respondent "seeks information protected by the physician-patient privilege . . . ." Objection, p. 4. At the status conference, counsel for the complainant also represented that the complainant has not sought therapy or medical treatment for his emotional distress, and counsel represented the complainant's emotional distress as being stress, anxiety and nervousness.

B

1

As our Supreme Court has "previously observed, [t]he people of this state enjoy a broad privilege in the confidentiality of their psychiatric communications and records . . . and the principal purpose of that privilege is to give the patient an incentive to make full disclosure to a physician in order to obtain effective treatment free from the embarrassment and invasion of privacy which could result from a doctor's testimony. . . . Accordingly, the exceptions to the general rule of nondisclosure of communications between psychiatrist and patient were drafted narrowly to ensure that the confidentiality of such communications would be protected unless important countervailing

considerations required their disclosure." (Citations omitted; internal quotation marks omitted.) *Falco v. Institute of Living*, 254 Conn. 321, 328 (2000).

Sections 52-146c (privileged communications between psychologist and patient), 52-146d – 52-146e (privileged communications between psychiatrist and patient) and 52-146o (privileged communications between a physician and patient) address the confidentiality of medical communications and records. These statutes generally require the consent of the patient prior to the disclosure of medical communications and records. Consent of the patient, however, is not required if the patient introduces his mental or psychological condition as an element of his claim or defense. §§ 52-146c (c) (2), 52-146f (5). The issue, then, is whether the complainant's psychological or mental condition is an element in a claim for emotional distress damages.

In interpreting state employment law, it is appropriate to review federal case law for guidance. *Levy v. Commission on Human Rights & Opportunities*, 236 Conn. 96, 103 (1996). In applying federal rules of evidence similar to Connecticut's medical privileges, federal courts distinguish those claims and defenses in which the plaintiff has placed his mental health at issue, and thereby has expressly or impliedly waived the confidentiality privilege, from those claims for "garden variety" emotional distress damages that do not constitute an express or implied waiver of the privilege. *Jaffee v. Redmond*, 518 U.S. 1 (1996); *In re Sims*, 534 F.3d 117 (2d Cir. 2008); *In re Consolidated RNC Cases*, United States District Court, (S.D.N.Y. January 8, 2009) (2009 WL 130178); *Green v. St.*

Vincent's Medical Center, 252 F.R.D. 125 (D. Conn. September 15, 2008); *Brown v. Kelly*, United States District Court, Docket No. 05 Civ 5442(SAS) (S.D.N.Y. April 16, 2007) (2007 WL 1138877); *Gattegno v. PriceWaterhouseCoopers, LLP.*, 204 F.R.D. 228 (D. Conn. October 30, 2001); *Ruhlmann v. Ulster County Dept. of Social Services*, 194 F.R.D. 445 (N.D.N.Y. July 6, 2000); *Vanderbilt v Chilmark*, 174 F.R.D. 225 (D. Mass. June 18, 1997). A garden variety emotional distress claim is the type of emotional injury that would ordinary result from the alleged conduct. *In re Sims*, supra, 534 F.3d 129. Such emotional distress is incidental to the alleged misconduct and has no long term or lasting effect. *In re Consolidated RNC Cases*, supra, 2009 WL 130178, 6.

The Second Circuit has expressly (1) rejected "contentions that anybody who requests damages for pain and suffering has waived the psychiatric privilege because the psychiatric records might conceivably disprove the experiencing of pain and suffering;" (2) rejected contentions "that any claim of even . . . garden variety injury waives the psychotherapist-patient privilege" and (3) rejected contentions "that a plaintiff's mental health is placed in issue whenever the plaintiff's claim for unspecified damages may include[ ] some sort of mental injury . . . ." (Citations omitted; internal quotation marks omitted.) *In re Sims*, supra, 534 F.3d 141. The court noted that to breach the privilege whenever there was a possibility that the records might be useful in testing a complainant's credibility or might have some other probative value would eliminate the privilege in virtually every case. Id., 141-42.

As the United States Supreme Court has observed, “[e]ffective 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. Because of the sensitive nature of the problems for which individuals consult psychotherapists, disclosure of confidential communications made during counseling sessions may cause embarrassment or disgrace. For this reason, the mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment.” *Jaffee v. Redmond*, supra, 518 U.S. 10.

“The psychotherapist privilege serves the public interest by facilitating the provision of appropriate treatment for individuals suffering the effects of a mental or emotional problem. The mental health of our citizenry, no less than its physical health, is a public good of transcendent importance.” Id.

“In contrast to the significant public and private interests supporting recognition of the privilege, the likely evidentiary benefit that would result from the denial of the privilege is modest. If the privilege were rejected, confidential conversations between psychotherapists and their patients would surely be chilled, particularly when it is obvious that the circumstances that give rise to the need for treatment will probably result in litigation. Without a privilege, much of the desirable evidence to which litigants such as petitioner seek access – for example, admissions against interest by a party –

is unlikely to come into being. This unspoken 'evidence' will therefore serve no greater truth-seeking function than it had been spoken and privileged." Id., 11-12.

Non-exhaustive situations where the confidentiality privilege is expressly or impliedly waived may occur when a complainant has alleged or seeks damages for: (1) intentional or negligent infliction of emotional distress; *Green v. St. Vincent's Medical Center*, supra, 252 F.R.D. 129; *Gattegno v. PriceWaterhouseCoopers, LLP.*, supra, 204 F.R.D. 231; (2) a specific mental or psychiatric disorder or injury; *In re Sims*, supra, 534 F.3d 129; *Gattegno v. PriceWaterhouseCoopers, LLP.*, supra, 204 F.R.D. 231; *In re Consolidated RNC Cases*, supra, 2009 WL 130178, 6; (3) unusually severe emotional distress; *In re Sims*, supra, 534 F.3d 129; *Gattegno v. PriceWaterhouseCoopers, LLP.*, supra, 204 F.R.D. 231; *Green v. St. Vincent's Medical Center*, supra, 252 F.R.D. 129; *Brown v. Kelly*, supra, 2007 WL 113877, 2 or (4) past, continuing, long term or possible permanent emotional injuries; *Gattegno v. PriceWaterhouseCoopers, LLP.*, supra, 204 F.R.D. 231; *Ruhlmann v. Ulster County Dept. of Social Services*, supra, 194 F.R.D. 449; *In re Consolidated RNC Cases*, supra, 2009 WL 130178, 6. A complainant also waives the privilege if he takes affirmative steps to inject privileged communications into the litigation, such as selective use of privileged communications or calling his therapist as a witness. *In re Sims*, supra, 534 F.3d 132-34; *In re Consolidated RNC Cases*, supra, 2009 WL 130178, 6; *Vanderbilt v Chilmark*, supra, 174 F.R.D. 230.

The respondents proposed thirteen-year search of all the complainant's medical records for a diagnosed mental health condition, admission or statement; Memorandum, p. 3; is exactly the situation state and federal courts have declared that the confidentiality privilege is intended to protect against. Given the strong state and federal public policies in support of maintaining the confidentiality privilege of physician–patient communications and the trend in the federal courts to apply the privilege in garden variety emotional distress claims, I conclude: first, that a complainant's mental and psychological condition are not elements in a garden variety emotional distress damage claim sought under § 46a-58 (a); second, that the confidentiality privileges of §§ 52-146c et seq, apply to garden variety emotional distress damages; and, third, medical communications and records relating to garden variety emotional distress damages are exempted from disclosure under § 4-177c pursuant to § 4-178 (2).

C

At the status conference, the complainant's attorney represented that the complainant has not sought therapy or medical treatment for his emotional distress and that the emotional distress suffered by the complainant is stress, anxiety and nervousness. Further, the primary relief the complainant is seeking is back pay, a change in his job title classification, merit increases, supervision by someone other than Joseph Brignola and attorney's fees. Amended and consolidated charging affidavit,

¶¶ 39 – 43. I conclude, therefore, that the complainant's claim is for garden variety emotional distress damages, that his psychological and mental conditions are not elements in his claim for garden variety emotional distress damages and that his medical communications and records are exempted from disclosure.

D

Due to the "notice-only" informality of administrative pleadings and the inability of the respondent to compel the complainant to respond to interrogatories or to participate in a deposition, the actual extent of the complainant's emotional distress claim may not be evident until the public hearing. To avoid prejudice to the respondent, in the event that the complainant's evidence reveals that his emotional distress claims are actually non-garden variety, the respondent may renew its motion to compel and seek a continuance of the public hearing.

III

In its production request numbered 16, the respondent seeks "Copies of the attached employment authorization form signed by complainant, indicating his date of birth and social security number and containing the requisite identifying information for any and all of the complainant's employers prior to becoming employed by the respondent in 1989 and since obtaining his B.A. degree, including but not limited to Norwalk Community College." Memorandum, p. 2. Employment records from a prior employer could be relevant and material if the complainant had worked for the

respondent for only a short period of time prior to filing his affidavit. Here, though, the complainant has been employed by the respondent since 1989. Employment records from over twenty years ago are not relevant and material to the employment conditions alleged by the complainant or to the defenses raised by the respondent in its answer.

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Hon. Jon P. FitzGerald
Presiding Human Rights Referee

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