Mary K. O'Sullivan	: Office of Public Hearings
	:
v.	: OPH/WBR No. 2008-086
	:
Helene Vartelas, et al	: February 20, 2009

Ruling re: reconsideration of the order granting the respondents' motion for an order to compel the complainant to produce documents

By motion filed on January 22, 2009, the respondents moved for an order to compel the complainant to produce documents responsive to their requests for production numbered 7, 8, 9 and 29. The motion was granted on January 26, 2009. The complainant's subsequent motion to file a memorandum in opposition to the motion to compel (memorandum in opposition) was granted and, on February 2, 2009, the complainant filed her memorandum in opposition. The respondents filed their memorandum in support of their motion to compel (memorandum in support) on February 10, 2009.

I

Tthe respondents report that the complainant has complied to their satisfaction with the order to produce documents responsive to their requests numbered 7 and 29. Memorandum in support, pp. 5-6.

II

With respect to request number 9, the respondents contend that the supplemental affidavit submitted by the complainant, averring that she has no documents responsive to that request, is inconsistent with her previous objection to the request on the basis of patient – client and attorney – client privileges. The complainant's affidavit complied with the order to produce either responsive documents or an affidavit that she does not possess or have access to responsive documents. To the extent that the undersigned determines that such information is relevant and material, the respondents may examine the complainant during the public hearing as to any lawsuit, complaint or labor grievance of any kind filed by or on behalf of the complainant against her current employer, agency fellow employee or co-worker in regard to the incidents involved in this instant action.

III

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 possess of the party or such agency, except as otherwise provided by federal law or

any other provision of the general statutes . . . .” In their production request number 8, the respondents sought “[a]ll documents that relate to any alleged loss, damage, suffering, injury, distress or harm sustained relating to or resulting from any of the events or circumstances alleged in the complaint.” The ruling granting the respondents’ motion to compel ordered the complainant to “produce documentation sufficient to show damages, other than attorney’s fees, for which the complainant is seeking an award. If the complainant is seeking an award for mental or emotional distress, the complainant shall provide her medical, psychological and counseling records, including records of therapy treatment, for the period from August 1, 2007 to January 26, 2009.”

The respondents contend that the medical “records are relevant both to plaintiff’s causation and damages claims. The information from such records may explain her misperceptions of alleged threats by the respondents, thus eliminating any causation. The information may reflect that complainant suffers from a diagnosed condition such as paranoia, or severe anxiety. If the records were to disclose that in fact she expressly informed her therapist that she was not suffering any emotional distress from any actions in the workplace, but from some event in her life, then such information would vitiate any claim to damages caused by the respondents’ alleged threats.” Memorandum in support, p. 5.

Citing General Statutes §§ 52-146c – 52-146i and 52-146o – 52-146q (without identifying which statute was applicable to her case) and to case law regarding the

confidentiality of medical and mental health records, the complainant asserts that disclosure of medical records is exempted from disclosure under § 4-177c. The complainant contends that "she has not waived her right to confidentiality of medical and psychological records merely by bringing this whistleblower claim and seeking damages for garden variety emotional distress." Memorandum in opposition, p. 1. "Garden-variety claims, also known as generic or incidental claims, represent emotional distress claims which are considered usual or simple. *Ruhlmann v. Ulster County Dep't of Soc. Services*, 194 F.R.D. 445, 450 (N.D.N.Y. 2000). Garden variety is defined as ordinary or commonplace. *Ruhlmann*, 194 F.R.D. at n. 6." Memorandum in opposition, p. 5. Waiver of the confidentiality privilege only occurs when "the person's mental condition is an element of her claim or defense. Since the mental condition of a Plaintiff is not an element of a statutory whistleblower claim, the plaintiff's mental condition is not placed in issue by filing a complaint." Memorandum in opposition, p. 8.

The respondents note that the "complainant's citation to Connecticut statutory protection glaringly omits any reference to the exceptions to such statutory privileges, which permit disclosure without consent of the patient in a civil proceeding in which the person introduces his mental condition as an element of his claim or defense." Memorandum in support, p. 1. According to the respondents, the complainant's mental condition "clearly is an element of her claim for relief, which is all that is necessary." Memorandum in support, p. 4. They further note that the "complainant defines 'garden

variety' emotional distress to be those considered 'usual or simple,' and 'ordinary or commonplace' without further delineation of what that means and without any citation to Connecticut law in support of such a definition." Memorandum in support, p. 3.

B

1

As our Supreme Court has "previously observed, [t]he people of this state enjoy a broad privilege in the confidentiality of they 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 her mental or psychological condition as an element of her claim or defense. §§ 52-146c (c) (2), 52-146f (5), 52-146o (a). The issue, then, is whether the complainant's psychological or mental condition is an element in a claim for "garden variety" emotional distress damages and, therefore, excepted from disclosure under § 4-177c (a).

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 her mental health at issue, and thereby has expressly or impliedly waived the 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 113877); *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. Such emotional distress is incidental to the alleged misconduct and has no long term or lasting effect. *In re Sims*, supra, 534 F.3d 129; *In re Consolidated RNC Cases*, supra, 2009 WL 130178, 6.

The Second Circuit has expressly “reject[ed] . . . 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 . . . that any claim of even . . . ‘garden variety’ injury waives the psychotherapist-patient privilege . . . and 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 may 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 that its physical health, is a public good of transcendent importance.

"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 complainant expressly or implied waives the privilege may occur when the complainant has alleged or seeks damages for: (1) intentional or negligent infliction of emotional distress (in this forum or in parallel proceedings in a judicial or administrative forum); *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 she takes affirmative steps to inject privileged communications into the litigation, such as selective use of privileged communications or calling her 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.

2

The respondents proposed search of the complainant's records for a diagnosed mental health condition or an admission against interest; Memorandum in support, p. 5; is exactly what the courts have stated the privileged 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: (1) a complainant's mental and psychological condition are not elements in a garden variety emotional distress damage claim sought under § 4-61dd; (2) the confidentiality privileges of §§ 52-146c, 52-146f and 52-146o apply to garden variety emotional distress damages sought in a whistleblower retaliation complaint brought under § 4-61dd; and (3) such communications and records are excepted from disclosure under § 4-177c.

C

In this case, the complainant represents that she is "seeking damages for garden variety emotional distress," "has not sought treatment for any emotional distress and is not seeking reimbursement for such treatment," "will not rely on any treater or treatment," and will not offer any expert testimony in support of her emotional distress damage claim. Memorandum in opposition, p. 1. Further, in her complaint she indicated that the primarily relief she is seeking is to avoid being involuntarily "moved out of my position, out of my division or out of CVH to another location." Section 11, Part C. I conclude, therefore, that the complainant's claim is for garden variety emotional distress damages, that her psychological or mental condition is not an element in her claim for "garden variety" emotional distress damages, and that her medical communications and records are exempted from disclosure.

D

Due to the "notice-only" informality of administrative pleadings and the inability of the respondents 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 respondents, in the event that the complainant's evidence reveals that her emotional distress claims are actually non-garden variety, the respondents may renew their motion to compel and seek a continuance of the public hearing.

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Hon. Jon P. FitzGerald
Presiding Human Rights Referee

C:
Jamie L. Mills, Esq.
Beth Z. Margulies, Esq.