

UNITED STATES DISTRICT COURT  
DISTRICT OF MAINE

STEPHANIE BERRY,  
Plaintiff

v.

Civil No. 99-283-P-C

WILLIAM HENDERSON, Postmaster  
General,  
Defendant

Gene Carter, District Judge

**MEMORANDUM OF DECISION AND ORDER**

Plaintiff Stephanie Berry has appealed, pursuant to Rule 72, from an Order of Discovery Dispute (Docket No. 15) issued by Magistrate Judge Kravchuk granting Defendant's request to produce the medical and personnel files of former Postal Service employee Daniel Perry and to depose Daniel Perry on the issue of whether his medical and psychological conditions may have contributed to Plaintiff's stress. *See Fed. R. Civ. P. 72.*

This is a Title VII case in which Plaintiff seeks, among other relief, emotional distress damages for a period of time leading up to her leaving the employ of the Postal Service in June of 1996. In support of her claim that the Postal Service was the cause of her stress, Plaintiff relies on treating physician Dr. Leigh Baker, whom Plaintiff has named as an expert. In 1996, Plaintiff apparently told Dr. Baker that the Postal Service was the cause of her stress. Dr. Baker relies on that information in support of her expert opinion that the Postal Service was the sole

cause of Plaintiff's stress. Defendant alleges that Plaintiff gave different information to another treating physician. In the spring of 1996, Plaintiff apparently told Dr. Moses Ijaz that her boyfriend, Daniel Perry, was one of the three most significant stressors in her life. Defendant also asserts that Plaintiff intends to call Mr. Perry as a witness at trial.

Defendant requested that the Magistrate Judge issue an order (1) requiring production of the medical and personnel files of Mr. Perry, (2) permitting the taking of Mr. Perry's deposition on the issue of whether his medical and psychological conditions may have contributed to Plaintiff's stress, and (3) allowing Defendant's expert to incorporate Mr. Perry's materials into his expert opinion. Defendant's Response to Plaintiff's Objections to the Magistrate Judge's Order (Docket No. 19) at 1. Magistrate Judge Kravchuk ordered disclosure of the records, ruling that the disclosure did not violate the psychotherapist-patient privilege and that the records were discoverable under Rule 26(b), permitting Mr. Perry to be questioned on the issue of whether his medical and psychological conditions may have contributed to Plaintiff's stress and allowing Defendant's expert to supplement his expert opinion. Plaintiff objects to the Order on the basis that Defendant violated the Privacy Act when it obtained the records and that the information is protected by the psychotherapist-patient privilege. The Court does not reach the privilege issue, finding that Defendant violated the Privacy Act by examining Mr. Perry's medical disability and personnel records without satisfying the statutory conditions for disclosure. The Court finds Magistrate Judge Kravchuk's Order to be factually erroneous and, thus, will vacate the order.

With respect to the personnel records at issue here, the Privacy Act provides, in relevant part, for the conditions of disclosure as follows:

No agency shall disclose any record which is contained in a system of

records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains, unless disclosure of the record would be--

(1) to those officers and employees of the agency which maintains the record who have a need for the record in the performance of their duties;

...

(3) for a routine use as defined in subsection (a)(7) of this section and described under subsection (e)(4)(D) of this section; [or]

...

(11) pursuant to the order of a court of competent jurisdiction;

....

5 U.S.C. § 552a(b). This provision clearly establishes that neither the Postal Service nor its employees have automatic access to personnel records of its former employees. Mr. Perry did not consent to Defendant's examination of the records. Moreover, the Court does not find that any of the potentially relevant exceptions apply here.

Defendant contends that Mr. Perry's records were produced pursuant to the Consent Protective Order and, therefore, that it has not violated the Privacy Act. *See* 5 U.S.C. § 552a(b). Defendant's Brief in Support of Production of the Postal Service Medical and Personnel Files of Daniel Perry (Docket No. 9) at 5. Early in the discovery process of this case, the Court entered a Consent Protective Order Restricting Disclosure of Confidential Information (Docket No. 6) which allows, on a specifically circumscribed basis, disclosure of Privacy Act information to limited persons and provides in relevant part,

The *plaintiff seeks* to discover information which may be encompassed by the Privacy Act of 1974, 5 U.S.C. § 552a. In order to permit the parties to discover all information relevant to the subject matter of this case without making this information public and thus undermining the purpose of the Privacy Act, the Court hereby enters this Consent Protective Order . . . .

1. As used in this Consent Protective Order, the term “confidential information” includes any and all documents and records in possession of the United States Postal Service (Postal Service) pertaining to any Postal Service employee or former employee that is protected by the Privacy Act, and *which is to be produced in response to plaintiff’s discovery requests . . . .*

. . .

3. The confidential information *shall be used by plaintiff and her counsel only* for the purposes of this action and shall not be published to the general public in any form, nor used for any business or commercial use.

. . .

5. *Plaintiff and her counsel and their agents shall not* disclose material subject to this Order to any unauthorized person without further order of the Court or stipulation by the parties.

Defendant asserts that the statement “[i]n order to permit the parties to discover all information relevant to the subject matter of this case” allows it access to Mr. Perry’s records. The Court does not agree that this generic language in the Order which was otherwise clearly directed at Plaintiff’s ability to discover information is controlling. The Order, taken as a whole, demonstrates that it is directed at Plaintiff’s discovery requests. The Order is drawn from the perspective that the Postal Service has possession and control over the documents that are responsive to Plaintiff’s discovery requests. The express language of the Order confirms this interpretation. The confidential materials subject to the Order are those which are in the

“possession of the United States Postal Service (Postal Service) pertaining to any Postal Service employee or former employee that is protected by the Privacy Act *and* which [are] to be produced in response to plaintiff’s discovery requests.” Consent Protective Order Restricting Disclosure of Confidential Information at 1. The Court does not believe that the Magistrate Judge, with the language cited by Defendant, was contemplating the Postal Service’s unfettered access to all personnel files in its possession. If, based on this Order, the Postal Service was able to access and examine all personnel records under its control there are in fact no limits placed on its use of the information. In addition, the Order in no way assures that the Postal Service would gain access to information relevant to this case only. Because the Consent Protective Order does not contemplate Defendant desiring access to any information that is within its control and covered by the Privacy Act, the provision of the Privacy Act allowing an agency to disclose personnel records information by order of a court is not applicable here. *See* 5 U.S.C. § 552a(b)(11). Indeed, the Postal Service’s request, after it had already retrieved and examined the records, for a new, specific order of the Court permitting it to examine the records is evidence that the Postal Service knew that the Consent Protective Order did not permit it to examine the records.

The disclosure and examination of the records by the Assistant United States Attorney and, presumably, employees at the Postal Service involved in this case was done prior to obtaining a court order from Magistrate Judge Kravchuk. Defendant has made what the Court can only characterize as a request that borders on the fraudulent for the disclosure of Mr. Perry’s medical and personnel files. The request is disingenuous because the Assistant United States Attorney and, presumably, employees of the Postal Service involved in defending this suit had

already retrieved and examined Mr. Perry's records before they made a request to the Magistrate Judge for an order allowing disclosure of the records. *See* Defendant's Brief in Support of Production of the Postal Service Medical and Personnel Files of Daniel Perry at 1-2 ("The Postal Service's medical file supports the view that Dan Perry was a significant source of stress for Plaintiff during the relevant time period. That file includes a psychological evaluation of Dan Perry that states . . . .") The Magistrate Judge's Order allowing disclosure was based on this erroneous premise – that the Postal Service was asking for permission rather than for forgiveness – and, as such, must now be considered in light of this factual predicate.

In the absence of a court order allowing disclosure prior to examination, the statute provides two other potentially applicable provisions allowing disclosure. *See* 5 U.S.C. § 552a(b)(1), (b)(3). The Postal Service does not assert, and the Court does not find, that it satisfies either of the two remaining exceptions to the nondisclosure provision. First, there has been no assertion that this disclosure was pursuant to the "need to know" exception. 5 U.S.C. § 552a(b)(1). Second, the record establishes that the disclosure here was not for "a routine use"; that is, the disclosure is not for a use "which is compatible with the purpose for which it was collected." 5 U.S.C. § 552a(b)(3), (a)(7). Moreover, the Privacy Act provides that each agency must promulgate regulations with respect to the disclosure of records. 5 U.S.C. § 552a(e)(4)(E). The record does not indicate that the Postal Service complied with any regulations when accessing Mr. Perry's medical disability records. This failure, coupled with its failure to satisfy any of the relevant exceptions to nondisclosure, leads the Court to conclude that the Postal Service has violated the express provisions of the Privacy Act, 5 U.S.C. § 552a.

By its conduct in this matter, the Postal Service apparently believes that because the

Postal Service in Maine has a backlog of records to be sent to the National Records Center, its access to examine personnel records is not restricted in any way by the Privacy Act. The Court thinks otherwise. The Postal Service should not benefit from its failure to timely archive Mr. Perry's records. Moreover, in the absence of the use of the official archive system and its associated procedures for obtaining personnel records, the Postal Service does not acquire *carte blanche* access to examine all personnel and medical records of former employees.<sup>1</sup> In addition, the Postal Service seems to believe that even if the records had been archived at the National Records Center, its access would have been automatic. The Postal Service cavalierly states that "if the records had been sent [to the National Records Center] they could easily have been retrieved," Defendant's Response to Plaintiff's Objections to the Magistrate Judge's Order (Docket No. 19). Even if the Postal Service could "easily" retrieve a file from the archive system, this does not mean that once the file was retrieved, anyone at the Postal Service could read that file for any reason. The personnel records at issue here are still subject to the provisions of the Privacy Act. The Postal Service has failed to establish that it was entitled to disclosure of Mr. Perry's personnel records, prior to their examination, under any of the exceptions to the nondisclosure provision of the Privacy Act.

Accordingly, it is hereby **ORDERED** that Magistrate Judge Kravchuk's March 27, 2000, Order of Discovery Dispute be **VACATED**. It is further **ORDERED** that Defendant cannot

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<sup>1</sup>The Privacy Act protects employees and former employees of the Postal Service from having their personnel files disclosed without reason to other Postal Service employees in much the same way as it protects them from having such files disclosed to the public.

conduct any discovery or ask questions of Daniel Perry or any other individual which derive directly or indirectly from the illegal examination of Mr. Perry's personnel records.

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GENE CARTER  
District Judge

Dated at Portland, Maine this 8th day of May, 2000.

STEPHANIE BERRY  
plaintiff

JOSEPH J. HAHN  
774-1200  
[COR LD NTC]  
BERNSTEIN, SHUR, SAWYER, &  
NELSON  
100 MIDDLE STREET  
P.O. BOX 9729  
PORTLAND, ME 04104-5029  
207-774-1200

v.

UNITED STATES POSTMASTER  
GENERAL  
defendant

EVAN ROTH, ESQ.  
[COR LD NTC]  
OFFICE OF THE U.S. ATTORNEY  
P.O. BOX 9718  
PORTLAND, ME 04104-5018  
(207) 780-3257