

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

WANDA D. MORRISETTE,)
)
 Plaintiff)
)
 v.)
)
 KENNEBEC COUNTY,)
)
 Defendant)

CIVIL No. 01-01-B-S

ORDER

The parties seek an order resolving an outstanding discovery dispute. In this action the plaintiff, Wanda Morrisette, is suing the defendant, Kennebec County, for an alleged violation of the federal employment laws. Part of her plea for damages seeks a recovery for emotional distress. Morrisette does not intend to call as a witness or otherwise rely on the testimony of a mental health care provider in support of her damages claim. Nor does Morrisette intend to present evidence of a particularized emotional or psychological disorder caused by the alleged violation nor does she intend to offer evidence that she has seen or is seeing a mental health care provider as a result of defendant’s conduct. Among its discovery requests, Kennebec County seeks copies of all medical records pertaining to Morrisette’s mental health over the past five years, all medical records pertaining to Morrisette’s claim for emotional injuries, and all mental health records created subsequent to “the incident giving rise to” the suit that are unrelated to any claimed injury. (Document Request Propounded to Plaintiff by Defendants at ¶¶ 9-11.)

Morrisette objects to the disclosure of records relating to any mental health counseling she may have received during these time periods.

Because discovery pertaining to Morrisette's communications with her mental health care providers is covered by a privilege that has not been waived by Morrisette, I **ORDER** that Morrisette may withhold the mental health records requested in Kennebec County's request for documents.

DISCUSSION

At my request the parties submitted short letter memoranda including citations to authority favoring their respective positions. The parties are in agreement that Morrisette's communications with a mental health care provider are privileged pursuant to Jaffee v. Redmond, 518 U.S. 1, 14 (1996). The area of disagreement concerns whether Morrisette's plea for emotional distress damages, standing alone, supports a finding that Morrisette has waived the privilege. The authorities cited by Kennebec County are Fox v. Gates Corp., 179 F.R.D. 303 (D. Colo. 1998); Vasconcellos v. Cybex Int'l, Inc., 962 F. Supp. 701 (D. Md. 1997); and Lanning v. Southeastern PA Trans. Authority, Nos. Civ. A.97-593, A.97-1161, 1997 WL 597905 (E.D. Pa. Sept. 17, 1997). These cases hold that the inclusion in a complaint of a claim for emotional damages constitutes a waiver by the plaintiff of the psychotherapist-patient privilege with respect to relevant mental health records. The authorities invoked by Morrisette are this Court's orders in Dinsmore v. University of Maine System, No. 93-0064-B (D. Me. Nov. 16, 1994) (Order of Judge Brody affirming discovery order of Magistrate Judge Beaulieu); Ruhlmann v. Ulster County Dept. of Soc. Servs., 194 F.R.D. 443 (N.D.N.Y. 2000); and Hucko v. City of Oak Forest, 185 F.R.D. 526 (N.D. Ill. 1999). These cases hold that the mere assertion of a damages

claim for “garden variety” or “incidental” emotional distress is not sufficient to constitute waiver of the psychotherapist-patient privilege. In my view, Dinsmore, Ruhlman, and Hucko achieve a more appropriate balancing of the competing interests of full and fair disclosure and the societal values promoted by the psychotherapist-patient privilege. Ruhlmann and Hucko also contain the better-reasoned approach to the issue:

1. Claims for incidental emotional distress damages merely seek recompense for those emotional injuries that are likely to arise as a fair consequence of an underlying tort. In this way, they do not make recourse to the substance of a privileged communication;

2. Those cases treating claims for incidental emotional damages as constituting waivers focus on relevancy and on the fact that emotional health is “in issue.” This disregards the fact that privileges operate notwithstanding relevancy and that the proper subject for the waiver analysis is whether the substance of a particular *communication* has been placed in issue, not whether the topic of communication is relevant to the factual issues of the case;

3. Treating claims for incidental emotional damages as waivers of the privilege unfairly disadvantages those litigants who seek mental health counseling services as compared to otherwise identical litigants who refrain from seeking professional counseling. This runs counter to the basis of the Supreme Court’s recognition of the psychotherapist-patient privilege, that “communications between a psychotherapist and her patient ‘promote[] sufficiently important interests to outweigh the need for probative evidence.’” Jaffe, 518 U.S. at 9-10 (quoting Trammel v. United States, 445 U.S. 40, 51 (1980)).

CONCLUSION

For the foregoing reasons I am persuaded that a plaintiff does not waive the psychotherapist-patient privilege simply as a consequence of seeking “garden variety” emotional damages.

So Ordered.

Dated: August 21, 2001

Margaret J. Kravchuk
U.S. Magistrate Judge

CERTIFICATE

- A. The Clerk shall submit forthwith copies of this Order to all parties in this case.
- B. The parties shall submit any objections to this Order to the clerk in accordance with Fed. R. Civ. P. 72.

STNDRD

U.S. District Court

District of Maine (Bangor)

CIVIL DOCKET FOR CASE #: 01-CV-1

MORISSETTE v. KENNEBEC COUNTY, et al

Filed: 01/03/01

Assigned to: Judge GEORGE Z. SINGAL Jury demand: Plaintiff

Demand: \$0,000

Nature of Suit: 442

Lead Docket: None

Jurisdiction: Federal Question

Dkt# in other court: None

Cause: 42:1983 Civil Rights Act

WANDA D MORISSETTE

DAVID G. WEBBERT, ESQ.

plaintiff

[COR LD NTC]

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v.

KENNEBEC COUNTY

PETER T. MARCHESI, ESQ.

defendant

[COR LD NTC]

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873-7771

PATRICK PARADIS, individually PETER T. MARCHESI, ESQ.

and in his official capacity (See above)

as Treasurer of Kennebec [COR LD NTC]

County

defendant

WESLEY G KIELTYKA

PETER T. MARCHESI, ESQ.

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