

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

MARKIE L. FARNHAM,)
)
 Plaintiff)
)
 v.) 1:13-cv-00305-JDL
)
 WALMART STORES EAST LP,)
)
 Defendant)

ORDER ON PAYMENT OF EXPERT FEES

This matter is before the Court on Plaintiff’s request that Defendant pay for the “reasonable fees” charged by two medical witnesses to prepare for and attend their respective depositions. The witnesses treated Plaintiff for medical conditions that are relevant to Plaintiff’s claim that Defendant, Plaintiff’s former employer, failed to accommodate Plaintiff’s disability and wrongfully terminated her employment. The Court conducted a telephonic hearing on the issue on May 12, 2014.

Fed. R. Civ. P. 26(b)(4)(E) provides in pertinent part: “Unless manifest injustice would result, the court must require that the party seeking discovery (i) pay the expert a reasonable fee for time spent in responding to discovery ...” Defendant argues that the witnesses are not expert witnesses as contemplated by the Rule and, therefore, their compensation is governed by 28 U.S.C. § 1821(b), which provides that “[a] witness shall be paid an attendance fee of \$40 per day for each day’s attendance.” The issue in this case is thus whether the two witnesses are considered experts for whom reasonable compensation is required by Rule 26.

Courts are divided as to whether a treating physician is an expert under Rule 26. *See, e.g., McDermott v. FedEx Ground Sys., Inc.*, 247 F.R.D. 58, 59-60 (D. Mass. 2007) (Alexander, Mag. J., consent order, discussing the two “camps” of opinion and ruling that the only authorized fee is

the fee set by 28 U.S.C. § 1821); *Lamere v. New York State Office for the Aging*, 223 F.R.D. 85, 91-93 (N.D.N.Y. 2004) (Treece, Mag. J., order, collecting cases and allowing a reasonable fee), *aff'd over obj.*, 1:03-cv-00356-TJM-RFT, 2004 WL 1592669 (N.D.N.Y. July 14, 2004) (McAvoy, J.) (affirming, where the deposition transcript reflected that the party who noticed the deposition asked questions that could reasonably be interpreted as calling for opinion testimony).

While certain policy reasons (*e.g.*, increased compensation is appropriate because treating physicians are often called to testify in court proceedings) and professional courtesy might justify compensating treating physicians in accordance with Rule 26 rather than § 1821, by its own terms, Rule 26 applies to witnesses who are formally designated as expert witnesses. Accordingly, if a treating physician has not been designated as an expert witness, the physician's fee is dictated by § 1821.

The mere fact that a treating physician is designated as an expert, however, should not be dispositive on the issue. Otherwise, a party could increase the potential cost of litigation for an opposing party simply by designating all treating physicians as expert witnesses. From the Court's perspective, the issue is whether the witness is designated to offer opinions that are not necessarily limited to the witness's treatment of the party. In other words, if the witness's proposed testimony includes opinions in addition to the witness's treatment, the patient's prognosis and, in some situations, the cause of the patient's condition, the witness can fairly be characterized as an expert witness under Rule 26.

In this case, one of the treating physicians, Larry Newman, M.D., is not a Rule 26 expert witness. Plaintiff did not designate Dr. Newman as an expert, and Plaintiff has not suggested that Dr. Newman offered opinions other than those that were related directly to his treatment of Plaintiff.

Plaintiff, however, designated Stephen Kelly, M.D., as an expert witness who was expected to offer an opinion that was not limited to his treatment of Plaintiff. In particular, Plaintiff designated Dr. Kelly to testify “that [Plaintiff] is disabled within the meaning of the Maine Human Rights Act.” (October 24, 2013, letter to Defendant’s counsel.) Because Plaintiff identified Dr. Kelly as an expert witness to offer an opinion that is not ordinarily a necessary part of a patient’s treatment,¹ Dr. Kelly is an expert witness under Rule 26 and, therefore, is entitled to a “reasonable fee for time spent in responding to discovery.” Fed. R. Civ. P. 26(b)(4)(E).²

Based on the foregoing analysis, therefore, the Court orders (1) that Dr. Newman’s fee for his deposition is governed by 28 U.S.C. § 1821(b), and (2) that Dr. Kelly’s fee for his deposition is governed by Fed. R. Civ. P. 26(b)(4)(E).

CERTIFICATE

Any objections to this Order shall be filed in accordance with Federal Rule of Civil Procedure 72.

So Ordered.

May 15, 2014

/s/ John C. Nivison
U.S. Magistrate Judge

FARNHAM v. WALMART STORES EAST LP
Assigned to: JUDGE JON D. LEVY
Referred to: MAGISTRATE JUDGE JOHN C.
NIVISON
Case in other Washington County Superior Court,
court: CV-13-00019

Date Filed: 08/08/2013
Jury Demand: Plaintiff
Nature of Suit: 442 Civil Rights:
Jobs
Jurisdiction: Diversity

¹ The Court recognizes that Dr. Kelly’s testimony is at least in part based on his treatment of Plaintiff. Treating physicians, however, are not automatically precluded from serving as a Rule 26 expert witness. The proffered opinion (*i.e.*, that Plaintiff is disabled for purposes of the Maine Human Rights Act) goes beyond that which one could ascertain from a mere review of Dr. Kelly’s treatment of Plaintiff.

² Defendant contends that Dr. Kelly actually confirmed during his deposition that he did not wish to serve as an expert witness. Whether a witness is an expert under Rule 26 is not controlled by the results of the deposition or the witness’s ultimate willingness to appear in court to testify. The issue is whether the witness has been properly designated to testify regarding issues other than those issues that are apparent from the witness’s treatment of the party.

Cause: 28:1332 Diversity-Employment Discrimination

Plaintiff

MARKIE L FARNHAM

represented by **ARTHUR J. GREIF**
GILBERT & GREIF, P.A.
82 COLUMBIA STREET
P.O. BOX 2339
BANGOR, ME 04402-2339
947-2223
Email: ajg@yourlawpartner.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

ERIK M.P. BLACK
GILBERT & GREIF, P.A.
82 COLUMBIA STREET
P.O. BOX 2339
BANGOR, ME 04402-2339
(207) 947-2223
Email: empb@yourlawpartner.com
ATTORNEY TO BE NOTICED

V.

Defendant

WALMART STORES EAST LP

represented by **KATHRYN W. MCGINTEE**
BERNSTEIN SHUR SAWYER &
NELSON
100 MIDDLE STREET, WEST
TOWER
P.O. BOX 9729
PORTLAND, ME 04104-5029
207-774-1200
Email:
kmcgintee@bernsteinsur.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

MATTHEW TARASEVICH
BERNSTEIN SHUR SAWYER &
NELSON
100 MIDDLE STREET, WEST
TOWER
P.O. BOX 9729

PORTLAND, ME 04104-5029
774-1200
Email:
mtarasevich@bernsteinshur.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED