

**UNITED STATES DISTRICT COURT
DISTRICT OF MAINE**

DAVID A. BICKFORD,

Plaintiff

v.

ALAN D. MARRINER,

Defendant

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No. 2:12-cv-17-JAW

ORDER ON RESPONSES TO ORDER TO SHOW CAUSE

In this Jones Act case, for injuries allegedly suffered by the plaintiff while in the defendant’s employ, counsel for the parties have submitted a discovery dispute concerning the discoverability of the plaintiff’s mental health and drug or alcohol treatment records. Following a telephone conference on the matter, *see* ECF No. 17, I issued an order to show cause why I should not consider the matter moot, as the plaintiff represented post-conference that he had not undergone any mental health treatment or treatment for drug or alcohol abuse. ECF No. 19. In response to the order to show cause, the defendant continues to demand “an unlimited HIPPA release.” Defendant’s Response to Order to Show Cause (ECF No. 20) at 1. The plaintiff, on the other hand, has provided a supplementary discovery response in which he states that he has not undergone any mental health treatment, but he now recalls treatment for alcohol abuse in 2001. Plaintiff’s Response to Court’s Order to Show Cause (ECF No. 21) at 1. Treating the defendant’s response to the Order to Show Cause as a motion to compel, I deny the motion for the reasons that follow.

The plaintiff takes the position that any records of the alcohol treatment, which for several reasons he doubts continue to exist, are privileged and not discoverable in this case, where he has alleged no more than “garden variety” emotional distress. *Id.* at 2-4.

The plaintiff’s statement that he has undergone no mental health treatment, ECF No. 21-1, is sufficient to overcome the defendant’s demand for a release that would encompass records of such treatment. The defendant’s argument, for which he offers no citation to authority, is essentially that, once he asks for unlimited access to all of the plaintiff’s records of mental health treatment, he is entitled to it. That assertion is contrary to federal common law.

In *Jaffe v. Redmond*, 518 U.S. 1 (1996), the Supreme Court held that federal law recognizes a privilege protecting confidential communications between psychotherapists and their patients. *Id.* at 15. The privilege extends to statements made to psychologists and licensed clinical social workers in the course of therapy. *Id.* This court has held that the assertion of a claim for “garden variety” emotional distress damages is not sufficient to waive the privilege. *Morrisette v. Kennebec County*, No. Civ. 01-01-B-S, 2001 WL 969014, at *1 (D. Me. Aug. 21, 2001). The complaint in this case, which involves physical injuries sustained in 2010, makes no more than such a “garden variety” claim. Complaint (ECF No. 1) ¶¶ 17, 21, 29.

In *Vanderbilt v. Town of Chilmark*, 174 F.R.D. 225, 228 (D. Mass. 1997), the court held that a plaintiff only waives this privilege when she uses the privileged communication as evidence herself. While I need not reach this issue in this case, it seems clear that the plaintiff has not used and will not use any of his communications with his alcohol abuse counselor as evidence in this case.

In *Oleszko v. State Compensation Ins. Fund*, 243 F.3d 1154 (9th Cir. 2001), the Ninth Circuit Court of Appeals held that the privilege extends to communications with unlicensed

counselors employed by a plaintiff's employer's Employee Assistance Program. *Id.* at 1157 (and cases cited therein). Here, the plaintiff apparently received alcohol abuse counseling from a licensed alcohol and drug counselor. ECF No. 21-2. I see no reason why the privilege should not extend to communications with such professionals for the purpose of treatment. The plaintiff has met his burden to show that any allegedly privileged communications with this counselor were made confidentially to a licensed therapist in the course of treatment. *See In re Grand Jury Proceedings (Gregory P. Violette)*, 183 F.3d 71, 73 (1st Cir. 1999). Nothing further is required of the plaintiff.

The defendant has made no effort to show that the privilege should not apply in this case.

Treating the defendant's submissions as a motion to compel discovery, I **DENY** the motion for the reasons stated, and **TERMINATE** the Order to Show Cause.

NOTICE

In accordance with Federal Rule of Civil Procedure 72(a), a party may serve and file an objection to this order within fourteen (14) days after being served with a copy thereof.

Failure to file a timely objection shall constitute a waiver of the right to review by the district court and to any further appeal of this order.

Dated this 21st day of September, 2012.

/s/ John H. Rich III
John H. Rich III
United States Magistrate Judge

Plaintiff

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V.

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