

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

BEATRICE WAGGAMAN, Ph.D.  
Plaintiff,

Civil Action No. 04-4447

v.

VILLANOVA UNIVERSITY IN THE  
STATE OF PENNSYLVANIA, et al.  
Defendants.

**MEMORANDUM / ORDER**

July 14, 2006

Pursuant to FED. R. CIV. P. 72(a), plaintiff Beatrice Waggaman ("Waggaman" or "plaintiff") has filed objections to Magistrate Judge Angell's February 7, 2006 order (Docket # 36), in which Judge Angell found that Waggaman's production of a summary report of her psychiatric treatment did not satisfy the court's previous order that Waggaman produce "all [] remaining medical/treatment records to Defendants." *See* January 13, 2006 order (Docket # 35). For the reasons that follow, Waggaman's objections will be overruled.

This is an employment case in which Waggaman's extant claims<sup>1</sup> against defendants include a breach of contract claim as well as claims of retaliation in violation of the Americans with Disabilities Act, the Rehabilitation Act of 1973, and the Pennsylvania Human Relations Act ("PHRA"). By way of relief, Waggaman's amended complaint requests, *inter alia*, "[a]n award of compensatory damages for damaged reputation."

At times relevant to the instant suit, Waggaman participated in family therapy, and defendants have requested that Waggaman produce her therapist's treatment notes. Waggaman initially refused to produce any document related to her therapy, asserting therapist-patient privilege. Defendants responded with a motion to compel production, which was granted on December 21, 2005 (Docket # 32). In that order, Judge Angell ordered that "[p]laintiff must produce all requested medical information and documentation for the period from January 1, 2001 to the present." Defendants were evidently displeased with the amount of time Waggaman was taking to produce the requested documents, so they again applied for court intervention, which resulted in an order dated January 13, 2006 (Docket # 35) that stated "[n]o later than 5:00 p.m. on January 17, 2006, Plaintiff must produce copies of all of remaining medical/treatment records to Defendants." Waggaman responded to this order by providing a report prepared by her therapist that summarized the treatment Waggaman had received. By

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<sup>1</sup> A substantial portion of Waggaman's amended complaint was dismissed by order of this court dated September 28, 2005 (Docket # 24).

order dated February 7, 2006 (Docket # 36), Judge Angell found this summary report insufficient to comply with Waggaman's discovery obligations and ordered Waggaman to submit her therapist's treatment notes for *in camera* review. Waggaman objects to the February 7, 2006 order.

As an initial matter, defendants contend that Waggaman's objections are untimely. FED. R. CIV. P. 72(a) requires a party wishing to object to a magistrate judge's decision of a non-dispositive matter to file objections with the district court no later than 10 days after being served with the magistrate judge's order. Defendants contend that the clock began to run on December 21, 2005 – the date Judge Angell granted defendants' motion to compel. Defendants characterize the February 7, 2006 order as nothing more than a third repetition of the directive that Waggaman produce her treatment records. I disagree. The February 7, 2006 order made clear for the first time that production of a summary of Waggaman's treatment was inadequate to satisfy her discovery obligations. It was not simply a third repetition of the court's previous orders that Waggaman produce her treatment records; rather, it clarified those orders. Waggaman objects to those orders as clarified by the February 7, 2006 order, and I therefore consider her filing of objections to the orders within 10 days of the February 7, 2006 order to be timely.

I will proceed to the merits of Waggaman's objections. Waggaman correctly contends that her communications with her therapist are privileged. *See Jaffee v. Redmond*, 518 U.S. 1 (1996). However, defendants respond that Waggaman, by

requesting damages for emotional distress<sup>2</sup>, has placed her mental state at issue in this action, thereby waiving the privilege. Waggaman, in turn, contends that her prayer for “garden variety” emotional distress damages does not place her mental state at issue.

It is clear that, when a party places her mental status at issue in litigation, she waives the therapist-patient privilege. *Sarko v. Penn-Del Directory Co.*, 170 F.R.D. 127, 130 (E.D. Pa. 1997); *McAllister v. Royal Caribbean Cruises, Ltd.*, 2005 WL 151925, \*1 (E.D. Pa. Jan. 20, 2005); 25 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE & PROCEDURE § 5543. It is less clear that a plaintiff places her mental status at issue simply by including in her complaint a prayer for “garden variety” emotional distress damages (as opposed to asserting a claim an element of which is emotional distress or calling the therapist as a witness). Some courts have concluded that a plaintiff waives the privilege simply by alleging emotional distress, whereas others have held that more is necessary to trigger the waiver. *See* 25 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE & PROCEDURE § 5543, n. 94.1 and 94.2.

The judges of this court have consistently espoused a broad view of waiver and held that a request for damages based on emotional distress, without more, places the

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<sup>2</sup> As quoted above, Waggaman’s amended complaint actually only requests “compensatory damages.” A request for compensatory damages can, of course, include damages for emotional distress, but it need not. However, Waggaman appears to agree with the defendants that the compensatory damages she seeks include a component of compensation for emotional distress. Were Waggaman to clarify her position and disclaim any request for damages for emotional distress (as distinct from other species of compensatory damages, such as injury to reputation), it would be clear that she has not placed her mental state at issue. *See Sanchez v. U.S. Airways, Inc.*, 202 F.R.D. 131, 136 (E.D. Pa. 2001).

plaintiff's mental state at issue and waives the privilege. *See Sanchez*, 202 F.R.D. at 135-36 (rejecting plaintiffs' argument that they had preserved the privilege because they asserted only garden variety emotional distress and did not intend to call their therapist as a witness); *McAllister*, 2005 WL 151925 at \*1 (“[W]hen a party places his or her mental status at issue, such as by claiming damages resulting from emotional distress, [the] privilege is waived.”); *Thorne v. Universal Properties, Inc.*, 1987 WL 7683, \*2 (E.D. Pa. March 10, 1987) (“If a plaintiff seeks damages for alleged emotional or psychological injuries, the defendant's case ought not be limited by the plaintiff's decision not to introduce available medical or psychological testimony that bears directly on the truth of the claim.”). Though other courts have adopted a narrower view of waiver, I am persuaded that the position taken by judges of this court (including me, *see Thorne, supra*) is sound. Plaintiff's attempts to distinguish the above-cited cases are unpersuasive – while some of our cases have involved claims of non-garden variety emotional distress or claims that contained emotional distress as an element, our cases do not suggest that anything more than a request for damages based on emotional distress is required to waive the privilege. I therefore agree with Judge Angell that Waggaman has waived the therapist-patient privilege for purposes of this lawsuit. Judge Angell's *in camera* review of the requested treatment notes will determine whether the privileged communications are relevant to the prosecution or defense of Waggaman's prayer for damages based on emotional distress.

One complication to which Waggaman points is that her therapy was *family* therapy, and her therapist's notes therefore reflect confidential communications made among the therapist and Waggaman's spouse and/or children. Waggaman's family members are not parties to this litigation and cannot be said to have waived the therapist-client privilege. Defendants offer no argument suggesting that these non-parties' communications fall within any exception to the privilege. It would therefore be inappropriate to require Waggaman to produce treatment notes that contain communications among the therapist and Waggaman's spouse and/or children. If the document containing the therapist's treatment notes with respect to Waggaman also contains notes that reflect confidential communications among the therapist and Waggaman's spouse and/or children, Waggaman is entitled to redact any portions of the document that disclose such confidential communications among the therapist and Waggaman's spouse and/or children. I do not read Judge Angell's February 7, 2006 order to require anything to the contrary.

Plaintiff also requests a protective order that would preclude defendants from seeking or introducing: 1) any information about Waggaman's family members who participated in family therapy, 2) raw treatment notes from the family therapist, and 3) any further deposition of Waggaman. The first two matters have been addressed above, and Waggaman is not entitled to her proposed protective order with respect to those matters at this time. With respect to additional deposition of Waggaman, I have found no

error in Judge Angell's handling of discovery issues to this point, and I discern no reason not to leave this matter to her discretion.

AND NOW, for the foregoing reasons, it is hereby ORDERED that "Plaintiff's Objections to Magistrate Judge's Order, Dated February 7, 2006, Compelling Discovery and Requesting a Protective Order" (Docket # 37) are OVERRULED. The challenged order (Docket # 36) is upheld.

BY THE COURT:

/s/ Louis H. Pollak

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Pollak, J.