

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE SUBPOENA OF
FELESHIA PORTER

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Case No.: 3:16-mc-00067

DR. RACHEL TUDOR'S
MOTION TO QUASH SUBOENA OR, IN THE ALTERNATIVE,
TO TRANSFER TO THE
WESTERN DISTRICT OF OKLAHOMA
WITH INCORPORATED BRIEF

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INTRODUCTION

Dr. Rachel Tudor is currently engaged in active litigation in the Western District of Oklahoma against her former employers, Southeastern Oklahoma State University and the Regional University System of Oklahoma (“Defendants”). *United States et al. v. Southeastern Oklahoma State University et al.*, 5:15-cv-00324-C (W.D. Okla. filed Mar. 30, 2014). The United States filed the underlying Title VII enforcement action to redress sex discrimination and retaliation that Dr. Tudor, a transgender woman, was subjected to by Defendants. Dr. Tudor intervened in the underlying case, added an additional claim alleging she was subjected to a hostile work environment, and is thus a party in that matter.

Without waiting for the court in the underlying action to resolve a pending motion regarding Dr. Tudor’s psychotherapist-patient privilege, Defendants have served the subpoena at issue to Ms. Feleshia Porter, Dr. Tudor’s former therapist (“Porter Subpoena”). Dr. Tudor now moves this Court to quash the subpoena on the grounds of psychotherapist-patient privilege, or, in the alternative, to transfer this Motion to Quash to the Western District of Oklahoma (the “Issuing Court”) so that the Issuing Court can resolve the Motion to Quash in accordance with its ruling on the pending motion related to that privilege.

Ms. Porter lives and works in Dallas, so the Northern District of Texas is the “Compliance Court” for the Porter Subpoena pursuant to Fed. R. Civ. P. 45. Ms. Porter is not a party to the underlying action and is currently unrepresented; she is in agreement with the relief sought and consents to transfer to the Western District of Oklahoma.

Dr. Tudor further requests that this Court enter a protective order and stay of the noticed July 26, 2016 deposition of Ms. Porter to allow time for this Court (or, if transferred, the Western District of Oklahoma) to consider Dr. Tudor's request.

CERTIFICATE OF CONFERENCE

Pursuant to Fed. R. Civ. P. 26(c) and Local Rule 7.1, counsel for Dr. Tudor has in good faith conferred with counsel for Defendants in a sincere attempt to resolve differences without court action. Dr. Tudor's counsel's office is located in Tuxedo Park, New York, and Defendants' counsel's office is located in Oklahoma City, Oklahoma. The distances between these offices rendered an in person conference infeasible. A telephonic conference was held on the evening of July 11, 2016. Jillian Weiss, one of Dr. Tudor's personal counsel in the underlying matter, and Dixie Coffey, counsel for Defendants in the underlying matter, conferred but could not reconcile the parties' disagreement over the Porter Subpoena. Specifically, Dr. Tudor's and Defendants' counsel disagree as to whether Dr. Tudor has waived psychotherapist-patient privilege in the underlying case and whether and to what extent waiver precludes the deposition of Ms. Porter and production of documents by Ms. Porter to Defendants.

Dr. Tudor's counsel also conferred with the United States. Dr. Tudor's counsel's office is located in Tuxedo Park, New York and the United States' office is located in Washington, D.C. The distance between these offices also made an in person conference infeasible. A telephonic conference was held on July 13, 2016. Shayna Bloom, one of the United States' counsel for the underlying matter, conferred with Jillian Weiss and Ezra

Young. During the conference, Bloom advised that the United States does not oppose the relief sought by Dr. Tudor.

Dr. Tudor's counsel also conferred with Ms. Porter (who is unrepresented). Dr. Tudor's counsel's office is located in Tuxedo Park, New York and Ms. Porter lives and works in Dallas, Texas. The distance between Dr. Tudor's counsel's office and Ms. Porter also made an in person conference infeasible. A telephonic conference was held with Ms. Porter and Jillian Weiss on July 11, 2016 as well as via email on July 12 and 13, 2016. Ms. Porter is in agreement with the relief sought by Dr. Tudor.

STATEMENT OF FACTS

Dr. Tudor is a transgender woman who was diagnosed with a condition now known as gender dysphoria by Ms. Feleshia Porter in April 2007. Ms. Porter is a licensed psychotherapist (Exhibit A). Shortly after her diagnosis, Dr. Tudor ended her treatment with Ms. Porter. Dr. Tudor's therapy sessions with Ms. Porter were limited in scope—these sessions were narrowly focused on diagnosing of Dr. Tudor's gender dysphoria and assisting Dr. Tudor with a referral for hormone treatment and surgical care to treat Dr. Tudor's gender dysphoria (Exhibit B, Declaration of Rachel Tudor ("Tudor Dec.") ¶ 5). Dr. Tudor's treatment by Porter ended prior to Tudor encountering the hostilities, discrimination, and retaliation at issue in the underlying case. (Exhibit B, Tudor Dec. ¶ 6).

The underlying case is a Title VII enforcement action filed by the United States against Defendants in the Western District of Oklahoma in March 2015. The United States alleges that Defendants engaged in unlawful sex discrimination and retaliation against Dr.

Rachel Tudor. Dr. Tudor intervened in the underlying case in early April 2015. As Plaintiff/Intervenor, Dr. Tudor brought claims alleging that she was subjected to sex discrimination, retaliation, and a hostile work environment that started in June 2007 and continued unabated through her termination by Defendants in May 2011. Neither the United States nor Dr. Tudor seek emotional distress damages in the underlying case.

No party in the underlying case contests in good faith that Dr. Tudor was diagnosed by Ms. Porter with gender dysphoria in April 2007. No party in the underlying case contests in good faith that Dr. Tudor's gender presentation changed to female at work starting in Fall 2007.

In November 2015, Dr. Tudor provided Defendants with discovery responses to Defendants' requests which sought, *inter alia*, all of Tudor's psychotherapist records and information regarding all psychotherapy Dr. Tudor has ever undergone. In her responses to Defendants' requests, Dr. Tudor raised several objections, including objections on the grounds of psychotherapist-patient privilege. (*See generally* Exhibit C.) Without waiving these objections, Dr. Tudor produced documents to Defendants that were sufficient to evidence that Dr. Tudor in fact sought treatment from Dr. Porter for gender dysphoria in mid-2007 and that the purpose of that treatment was limited in scope to diagnosis and referral out to other health providers. Defendants did not challenge Tudor's responses or the objections contained therein at the time.

On June 7, 2016, Defendants filed a copy of the Porter Subpoena with the Issuing Court (Exhibit D). The Porter Subpoena seeks to both depose Ms. Porter about Porter's

treatment of Dr. Tudor and demands production of all of Ms. Porter's records pertaining to Dr. Tudor's treatment.

On June 9, 2016, Dr. Tudor's counsel sent a letter (Exhibit E) via email (Exhibit F) and certified mail (Exhibit G) to Defendants' counsel requesting an opportunity to meet and confer regarding the Porter Subpoena. The letter from Dr. Tudor's counsel detailed Dr. Tudor's concerns regarding the privileged nature of the information and documents sought by the Porter Subpoena. Specifically, the letter noted that Dr. Tudor did not waive psychotherapist-patient privilege and requested that Defendants' meet and confer on June 13, 14, or 15 about the Porter Subpoena. Defendants' counsel did not respond to this letter.

On June 23, 2016 Defendants filed a Motion to Compel the United States to, *inter alia*, produce all of Dr. Tudor's therapy records including those of Ms. Porter (Exhibit H). In Defendants' Motion to Compel, Defendants claim that Dr. Tudor has waived psychotherapist-patient privilege. (Exhibit H at 14–15).

On July 6, 2016, the Issuing Court granted a Joint Motion to Extend Time to File Response/Reply for the Motion to Compel (Exhibit I). Thus, the Issuing Court is currently awaiting further briefing on the same psychotherapist-patient privilege dispute that is at the heart of Dr. Tudor's present Motion to Quash.

On the same day, Dr. Tudor served additional discovery responses to Defendants' requests which also sought, *inter alia*, all of Tudor's psychotherapist records and information regarding all psychotherapy Dr. Tudor had ever undergone (Exhibit K). Once again, in her responses to Defendants' requests, Dr. Tudor raised several objections, including objections on the grounds of psychotherapist-patient privilege (*See generally* Exhibit K).

Without waiving these objections, Dr. Tudor pointed to previously produced documents that were sufficient to evidence that Dr. Tudor in fact sought treatment from Dr. Porter for gender dysphoria in mid-2007 and that the purpose of that treatment was limited in scope to diagnosis and referral out to other health providers. (*See generally* Exhibit K).

On July 11, 2016—without ever giving Dr. Tudor’s counsel the opportunity to meet and confer—Defendants served Ms. Porter with the Porter Subpoena, noticing the deposition and demanding production of all psychotherapist records held by Porter pertaining to treatment of Dr. Tudor for July 26, 2016.

Dr. Tudor’s counsel has acted with all deliberate speed to file this Motion. Between learning that the Porter Subpoena was served on Ms. Porter, and present Dr. Tudor’s counsel has: conferred with Ms. Porter; conferred with the United States; conferred with Defendants; registered for ECF access in the Northern District of Texas; retained local counsel so that a member of Dr. Tudor’s personal litigation team in the underlying matter could move to be admitted to practice in this Court; filed for admission *pro hac vice* with this Court; and filed this Motion.

SUMMARY OF ARGUMENT

Dr. Tudor respectfully requests that this Court quash the Porter Subpoena on the grounds that it seeks information and documents protected by psychotherapist-patient privilege. In the alternative, Dr. Tudor requests that this Court transfer this Motion to Quash to the Western District of Oklahoma (the Issuing Court and court in the underlying action). Transfer is proper because Ms. Porter—the non-party witness subject to the subpoena—

consents to transfer and there are exceptional circumstances that weigh heavily in favor of transfer.

Dr. Tudor also requests that this Court issue a protective order or stay of the Porter Subpoena to allow either this Court or the Issuing Court to decide Dr. Tudor's Motion to Quash and protect Dr. Tudor's psychotherapist-patient privilege. Without such a stay, Ms. Porter will be required to produce all records and give a deposition on July 26, 2016, regarding Dr. Tudor's therapeutic treatment, permanently destroying Dr. Tudor's unwaived privilege.

ARGUMENT

I. THE PORTER SUBPOENA SHOULD BE QUASHED BECAUSE ITS SUBJECT MATTER IS PROTECTED BY PSYCHOTHERAPIST-PATIENT PRIVILEGE.

Dr. Tudor respectfully requests that this Court quash the Porter Subpoena to preserve Dr. Tudor's unwaived psychotherapist-patient privilege. Dr. Tudor has an interest in ensuring that the privilege she holds in the subject matter of the Porter Subpoena is protected, which is sufficient good cause under Federal Rule of Civil Procedure 26(c)(1) for an order to quash.

Psychotherapist-patient privilege exists. The Porter Subpoena requires Ms. Porter to appear for a deposition and also directs Ms. Porter to bring to that deposition “[a]ll records, including but not limited to physician notes, office notes, reports, session notes, intake information, diagnostic information, patient charts, prescriptions, correspondence, etc. . . .” (Exhibit D at 3.) Based upon the contents of the Porter Subpoena, and the telephone

conversations between Defendants' counsel and Dr. Tudor's counsel on this matter, it appears that Defendants are seeking to depose Ms. Porter regarding statements and records of statements made by Dr. Tudor to Dr. Porter in the course of psychotherapy sessions conducted in 2007.

The statements exchanged between Ms. Porter and Dr. Tudor during the course of psychotherapy and the records of these statements that Ms. Porter possesses are plainly protected by federal common law psychotherapist-patient privilege. *Jaffee v. Redmond*, 518 U.S. 1, 15 (1996) (recognizing psychotherapist-patient privilege). Dr. Tudor and Ms. Porter made oral and written statements in the course of the psychotherapy in an atmosphere of trust and with the reasonable expectation of confidentiality. The effectiveness of psychotherapy treatment depends upon robust protections of confidentiality. Indeed, this is why the Supreme Court recognized federal common law psychotherapist-patient privilege in *Jaffee*. *Jaffee*, 518 U.S. at 10; *cf. United States v. Auster*, 517 F.3d 312, 315 (5th Cir. 2008) (recognizing privilege).

Dr. Tudor has standing. Dr. Tudor has standing for this Motion because she has a personal privilege and interest in the Porter Subpoena, which seeks to depose and demand production of documents pertaining statements and documents containing privileged statements made during the course of Dr. Tudor's psychotherapy with Ms. Porter. *Atlantic Inv. Mgmt., LLC v. Millennium Fund I, Ltd.*, 212 F.R.D. 395, 398 (N.D. Ill. 2002) (recognizing that party has standing to object to subpoena issued to non-party where party claims some personal right or privilege with regard to information or documents sought).

No waiver has occurred. Dr. Tudor’s privilege stands unless Dr. Tudor, as holder of the privilege, either expressly waives the privilege or places her mental condition into issue by seeking relief for extraordinary emotional distress. *See, e.g., Huck v. City of Oak Forest*, 185 F.R.D. 526, 529 (N.D. Ill. 1999) (analogizing to waiver of attorney-client privilege, and reasoning that psychotherapist privilege waived when plaintiff has taken affirmative step in litigation to place her diagnosis or treatment in issue, but recognizing mere assertion that defendant’s alleged misconduct caused emotional harm is insufficient to waive privilege); *Ruhlmann v. Ulster Cnty. Dep’t of Social Servs.*, 194 F.R.D. 445, 450–51 (N.D.N.Y. 2000) (recognizing that request for remedy seeking something beyond garden variety emotional distress would place Title VII plaintiff’s mental condition at issue and might trigger waiver of psychotherapist-patient privilege; holding that seeking “garden variety” emotional distress damages does not trigger waiver). Neither situation has occurred.

At no point during the course of the underlying case has Dr. Tudor expressly waived psychotherapist-patient privilege. Indeed, throughout the litigation Dr. Tudor has repeatedly, clearly, and consistently invoked psychotherapist-patient privilege to shield statements and records of statements related to her psychotherapy treatment with Ms. Porter. For example, Dr. Tudor has gone to great lengths to exactly clarify in her discovery responses that she believes, *inter alia*, statements made to and records of such statements made to Ms. Porter are protected. (*See* Exhibit C [Discovery Responses dated Oct. 28, 2015], at Response Nos. 63 (“Plaintiff/Intervenor objects to this Request for Production on the ground that it seeks records protected by psychotherapist-patient privilege.”); Exhibit

K [Discovery Responses dated July 6, 2016], at Response Nos. 64 (“Plaintiff/Intervenor also objects to this Request because it seeks information protected by the psychotherapist-patient and/or physician-patient privilege and interferes with the Plaintiff/Intervenor’s recognized privacy interest in one’s medical care and medical records.”), 65 (similar), 66 (similar).) Dr. Tudor’s counsel has also repeatedly clarified Dr. Tudor’s position to Defendants’ counsel. (*See, e.g.*, Exhibit E [Ltr. from Ezra Young to Dixie Coffey dated June 9, 2016]).

Moreover, at no point has Dr. Tudor or the United States done anything that put Dr. Tudor’s mental condition into issue such that waiver of the privilege was triggered. For example, neither Dr. Tudor nor the United States are seeking emotional distress damages in the underlying action. (*See* Exhibit L [United States’ Complaint], at 19–20 (emotional distress damages not sought); Exhibit M [Dr. Tudor’s Complaint in Intervention], at 33–35 (same).) (Even if remedies like emotional distress damages were sought in the underlying action, many federal courts are clear that a request for *garden variety* emotional distress damages does not trigger waiver of psychotherapist-patient privilege.¹) Moreover, contrary to the baseless assertions Defendants have made in filings before the Issuing Court (*see, e.g.*, Exhibit H at 14 (“Plaintiff and Intervenor have placed the medical and psychological

¹ *Ortiz-Carballo v. Ellspermann*, No. 08-165, 2009 WL 961131, at *2 (M.D. Fla. Apr. 7, 2009) (“The majority of federal courts that have addressed the issue have held that a party does not place his mental condition in controversy merely by requesting damages for mental anguish or ‘garden variety’ emotional distress.”); *Ruhlmann*, 194 F.R.D. at 450 (“a party does not put his or her emotional condition in issue by merely seeking incidental, ‘garden-variety’, emotional distress damages”); *Stevenson v. Stanley Bostitch, Inc.*, 201 F.R.D. 551, 553 (N.D. Ga. 2001) (similar); *Fitzgerald v. Casil*, 216 F.R.D. 632, 634-40 (N.D. Cal. 2003) (medical records irrelevant and psychotherapy records protected by psychotherapist-patient privilege).

condition of Dr. Tudor at issue in both the claims asserted in this action as well as the request for damages”), the mere fact that Dr. Tudor and the United States have filed Title VII claims and sought remedies does not itself trigger waiver of Dr. Tudor’s psychotherapist-patient privilege.²

An order to quash the Porter Subpoena is an appropriate means of protecting Dr. Tudor’s privilege. The relief Dr. Tudor seeks is appropriate because Dr. Tudor can demonstrate that she has good cause for the relief requested and specific need for the protection sought. Fed. R. Civ. P. 26(c)(1) (authorizing protective orders where good cause is shown); *Landry v. Air Line Pilots Ass’n*, 901 F.2d 404, 435 (5th Cir. 1990). In addition, Dr. Tudor respectfully requests an order to stay or protective order relieving Ms. Porter from compliance with the Porter Subpoena until this Court or the Issuing Court can rule on the underlying issue of Dr. Tudor’s psychotherapist-patient privilege.

Good cause exists because, if this Court does not quash the Porter Subpoena in advance of July 26, 2016, or issue a stay pending a decision on this Motion to Quash, it is clear that Defendants will orally question Ms. Porter about privileged statements Dr. Tudor made during psychotherapy sessions and seek production of records from Ms. Porter which contain privileged statements at the noticed July 26, 2016 deposition.

² Cf. *Shirazi v. Childtime Learning Center, Inc.*, No. 07-1289, 2008 WL 4792694, at *1 (W.D. Okla. Oct. 31, 2008) (Cauthron, J.) (recognizing that aggrieved employee in Title VII suit does not waive right to privacy by simply filing lawsuit); *Roberts v. Clark Cnty. Sch. Dist.*, 312 F.R.D. 594, 606 (D. Nev. 2016) (declining to find “legitimate interest” in employer obtaining privileged medical records of aggrieved transgender employee to, *inter alia*, establish the timeline of the employee’s medical transition and/or establish timeline of physiological changes).

Dr. Tudor's concern that the Porter Subpoena will result in revelation of privileged information and records is substantiated by specific facts that show that protection is necessary to preserve her psychotherapist-patient privilege. *See In re Terra Int'l*, 134 F.3d 302, 306 (5th Cir. 1998). For example, Dr. Tudor points to the Porter Subpoena itself, which expressly states that Defendants intend to use it to seek production of documents from Ms. Porter that contain privileged statements. (Exhibit D at 3 (directing Ms. Porter to produce "All records, including but not limited to **physician notes**, office notes, reports, **session notes**, intake information, diagnostic information, **patient charts**, prescriptions, **correspondence** etc., relating to T.R. Tudor a/k/a Robert Tudor a/k/a Rachel Tudor.") (emphasis added).) Defendants' absolute disregard for Dr. Tudor's claims of privilege is further evidence by Defendants' past filings in the Issuing Court, wherein Defendants have stated that they seek to uncover all details about Dr. Tudor's psychotherapy treatment from Ms. Porter and others because the defendants believe no privilege exists. (*See, e.g.*, Exhibit H at 15 ("Plaintiff should be compelled to disclose any medical or medical health records . . .").) Accordingly, intervention from this Court is necessary to maintain the *status quo* and preserve Dr. Tudor's psychotherapist-patient privilege pending fuller consideration of the merits of her claim of privilege, and an order to quash from either this Court or the Issuing Court is ultimately required to preserve that privilege.

II. TRANSFER OF THIS MOTION TO THE WESTERN DISTRICT OF OKLAHOMA IS APPROPRIATE

Transfer of this Motion to the Issuing Court is appropriate for at least two reasons. Federal Rule of Civil Procedure 45(f) states that "[w]hen the court where compliance is

required did not issue the subpoena, it may transfer a motion under this rule to the issuing court if the person subject to the subpoena consents or if the court finds exceptional circumstances.” Furthermore, the Advisory Committee Notes on the most recent change to Rule 45 note that when considering a request for transfer, the court of compliance’s “prime concern should be avoiding burdens on local nonparties subject to subpoenas, and it should not assumed that the issuing court is in a superior position to resolve subpoena-related motions.” Both potential conditions of transfer under the rule (and both policy considerations outlined in the Advisory Committee Notes) apply here.

First, Ms. Porter—the non-party subject to the Porter Subpoena—has consented to transfer to the Court of Issuance (Exhibit J). Pursuant to the plain text of Rule 45(f), Ms. Porter’s consent to transfer alone is sufficient for transfer of the Porter Subpoena related motions to the Court of Issuance. Ms. Porter would not be burdened by transfer, thus satisfying the “prime concern” of this Court.

Second, there are also exceptional circumstances that justify transferring the Porter Subpoena related motions to the Western District of Oklahoma. The parties in the underlying case have heavily litigated this case in the Issuing Court, through a resolved Motion to Dismiss. *See United States et al. v. Southeastern Oklahoma State University et al.*, 2015 WL 4606079 (W.D. Okla. July 10, 2015). There are also currently several interconnected discovery disputes pending, including a Motion to Compel that is still in the process of being briefed which directly concerns the psychotherapist privilege issue at the heart of the Porter Subpoena and this Motion to Quash. (Exhibit H at 15 (Defendants’ argument for waiver in Motion to Compel in the Issuing Court.)) Thus, the Issuing Court already has

familiarity with the specific dispute and claim of privilege at issue, which strongly weighs in favor of permitting transfer back to the Court of Issuance. *See, e.g., In re Subpoena to Paul G. Cassell*, No. 15-7433, 2016 WL 3645166, at *2 (D. Utah June 30, 2016) (noting that court of issuance judge's familiarity with specific privilege being asserted is one exceptional ground for transferring matter to court of issuance). Given that the Issuing Court will rule on discovery requests made to the United States covering the precise documents requested in the Porter Subpoena, the Issuing Court is in a better position to rule on Dr. Tudor's Motion to Quash with a full understanding of the discovery requests made to Dr. Tudor and the United States, their compliance with those requests, and the appropriateness of those requests in the context of the overall underlying litigation.

CONCLUSION

For the foregoing reasons, Dr. Tudor respectfully requests that this Court quash the Porter Subpoena, or, in the alternative, transfer this Motion to Quash to the Western District of Oklahoma. Dr. Tudor additionally requests that Ms. Porter's noticed deposition for July 26, 2016, be stayed pending the resolution of this motion, and that Ms. Porter be instructed that she need not comply with provisions of the Porter Subpoena which demand that she produce her psychotherapist records pertaining to Dr. Tudor's care.

Respectfully submitted,

Dated: July 18, 2016

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CERTIFICATE OF SERVICE

I hereby certify that on July 18, 2016, I served a copy of the foregoing on all counsel of record in the underlying action and Ms. Feleshia Porter via email and U.S. Mail as follows:

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