

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, )

Plaintiff, )

and )

DR. RACHEL TUDOR, )

Plaintiff/Intervenor, )

v. )

CASE NO. 5:15-CV-00324-C

SOUTHEASTERN OKLAHOMA )  
STATE UNIVERSITY, )

and )

THE REGIONAL UNIVERSITY )  
SYSTEM OF OKLAHOMA, )

Defendants. )

**REPLY IN SUPPORT OF DR. RACHEL TUDOR'S  
MOTION TO QUASH SUBPOENA OF MS. FELESHIA PORTER AND  
FOR SANCTIONS**

## I. INTRODUCTION

Dr. Tudor respectfully moved the Eastern District of Oklahoma to quash the Subpoena of Ms. Feleshia Porter (ECF Doc. 77 [hereinafter “Second Porter Subpoena”]) and to impose sanctions upon Defendants and/or Defendants Counsel for multiplying proceedings, forum-shopping the psychotherapist-patient privilege issue, and failing to take reasonable steps to avoid imposing an undue burden upon non-party witness Ms. Porter. Dr. Tudor’s Motion was transferred to this Court on August 4, 2016. ECF Doc. 87-1. Defendants’ response (ECF Doc. 111) to Dr. Tudor’s Motion offers new and inaccurate statements of fact and law, none of which overcome Dr. Tudor’s arguments.

## II. ARGUMENT

### A. **Defendants Have Not Satisfied their Burden to Demonstrate that Tudor Waived the Psychotherapist-Patient Privilege.**

Defendants assert that if the psychotherapist-privilege exists, that Dr. Tudor’s privilege “must yield” because, *inter alia*, Dr. Tudor placed her mental condition into issue. Not so.

***Mental Condition Not An Element of Tudor’s Claims.*** As Dr. Tudor explained in her Motion, she did not put her mental condition into issue by filing her complaint in intervention or claiming entitlement to remedies. ECF Doc. 82-1 at 13–16. Indeed, Defendants cite no binding precedent that clearly supports their argument. For example, *Dixon v. City of Lawton, Okla.*, stands for the narrow proposition that the privilege does not apply in any proceeding in which any party relies upon the condition as an element of the claim or defense. 898 F.2d 1443, 1451 (10<sup>th</sup> Cir. 1990) (quotations and citations

omitted). Dr. Tudor's discrimination, retaliation, and hostile work environment claims are not predicated upon statements Tudor exchanged with Porter during the course of psychotherapy, and Defendants have not raised in good faith how statements exchanged during the course of treatment with Ms. Porter buttresses any defense to Tudor's claims, thus *Dixon* is inapposite.

Moreover, even if Tudor's mental condition were at issue, waiver has not occurred here since Dr. Tudor has not made a factual claim regarding her gender dysphoria diagnosis that can only be assessed by examination of a privileged communication. *Cf. Walsh v. Seaboard Surety Co.*, 184 F.R.D. 494, 496 (D.Conn.1999) (“[E]ven if a party does not attempt to make use of a privileged communication, he may waive the privilege if he asserts a factual claim the truth of which can only be assessed by examination of a privileged communication.”).

**B. Defendants Have Failed to Demonstrate that the Psychotherapist-Patient Privilege Must Yield to the Needs of this Case.**

*Documents Sought Do Not Shed Light on Damages Claimed.* Defendants' argue that they are entitled to privileged therapist records because Tudor is seeking damages to redress her injuries also fails. First, the records Defendants seek relate to treatment Dr. Tudor received prior to the events complained of in this lawsuit. These records thus do not in any way shed light on the “humiliation, loss of enjoyment of life, and loss of professional reputation” (ECF Doc. 111 at 7) Tudor claims. *Jones v. Halliburton Energy Servs., Inc.*, 2016 WL 1179210, at \*2 (W.D. Okla. Mar. 24, 2016) (finding that proportionality fails where request seeks discovery beyond what is needed for specific

time period pertinent to claims and/or defenses); *Gatewood v. Stone Container Corp.*, 170 F.R.D. 455, 460 (S.D. Iowa 1996) (“[T]he Court recognizes that a person’s medical and mental health history involve private, personal information which ought not be disclosed on the basis of attenuated relevance. The fact that plaintiff has claimed general emotional distress damages does not give defendant carte blanche to peruse plaintiff’s medical history.”).

Second, even if the documents sought did touch on damages claimed in this lawsuit, this alone is not a reason to pierce the privilege. As other courts have recognized, an aggrieved employee in an employment discrimination case can testify to her injuries during trial, obviating the need for producing privileged medical and/or therapy records. *See, e.g., Kim v. Nash Finch Co.*, 123 F.3d 1046, 1065 (8<sup>th</sup> Cir. 1997) (plaintiff’s testimony and testimony of plaintiff’s family member is sufficient to evidence damages); *Luu v. Seagate Tech., Inc.*, 2011 WL 920013, at \*8 (D. Minn. July 5, 2001) (similar).

Third, Defendants argue that Tudor’s privilege should yield because Defendants desire to delve into Tudor’s “mental and emotional state prior to the actions alleged in this lawsuit” (ECF Doc. 111 at 8). However, Defendants are not entitled to depose Ms. Porter and receive otherwise privileged documents from Ms. Porter for this purpose because Defendants have failed to demonstrate that Tudor’s mental condition prior to the events complained of in this litigation sheds light on the claims or defenses in this litigation. *See, e.g., Fox v. Gates Corp.*, 179 F.R.D. 303, 306–07 (D.Colo. 1998) (limiting discovery on privileged medical and therapy records to period during which employee claimed to suffer distress from defendant-employer’s conduct). As Tudor has repeatedly

made clear, the damages she seeks in this litigation are attributable to Defendants' conduct, which started *after* Tudor ceased treatment with Porter. *Compare* Doc. 71-3 ¶ 4 (“To my recollection I had two visits with Ms. Porter in 2007, both of which occurred *before* I started presenting my gender as female at Southeastern Oklahoma State University.”) *with* ECF Doc. 34 at 5 (“Here, it is clear that Defendants’ actions as alleged by Dr. Tudor occurred because she was female, yet Defendants regarded her as male. Thus, the actions Dr. Tudor alleges Defendants took against her were based upon their dislike of her presented gender.”).

***Defendants Are In Possession of Documents Substantiating Claims in Tudor’s Declaration.*** Defendants also argue that they require the privileged documents because they are purportedly unable to rely upon Tudor’s recollection of the timing of and scope of treatment with Ms. Porter and thus need to depose Ms. Porter delineated in her Declaration. *See* ECF Doc. 71-3 [hereinafter “Tudor Declaration”]. This argument also fails. Defendants are in possession of several documents that substantiate the assertions in the Tudor Declaration,<sup>1</sup> obviating any need to depose Ms. Porter on these issues.

***Plaintiff United States’ reliance upon expert Dr. Brown does not give rise to waiver of psychotherapist privilege by Tudor.*** Defendants also argue that because

---

<sup>1</sup> *Compare* ECF Doc. 71-3, Tudor Declaration ¶ 3 (“To my recollection, I received psychotherapy care from Ms. Porter in 2007 only”), *id.* ¶ 4 (“To my recollection I had two visits with Ms. Porter . . . .”) *with* Exhibit A (Porter invoices indicating dates of treatment as April 4, 2007 and May 11, 2007). *Compare* Tudor Declaration ¶ 4 (“To my recollection, my treatment with Ms. Porter was narrowly focused on diagnosing me with a condition that is now called gender dysphoria.”) *with* Exhibit B (Declaration of Ms. Feleshia Porter; authenticating ECF Doc. 111-2, and providing additional information supporting Tudor’s assertions).

Plaintiff United States has indicated that it is likely to present Dr. Brown, an expert on transgender persons, at trial that Defendants are entitled to depose Ms. Porter. Not so.

The United States use of Dr. Brown as an expert witness cannot give rise to a waiver of psychotherapist patient privilege by Tudor. As the United States has previously clarified, Dr. Tudor is the holder of this privilege (ECF Doc. 75 at 14); thus only Tudor can take steps to waive the privilege. Tudor has not waived the privilege expressly or triggered waiver, therefore the privilege still stands.

Moreover, Defendants' purported desire to glean additional "general" information from Ms. Porter—to the extent it sheds light on forthcoming testimony from Dr. Brown—as to diagnosis or treatment of Tudor's gender dysphoria is inapposite (Doc. 111 at 10). As this Court has previously held, Defendants do not honestly claim ignorance of Dr. Tudor's transgender status or her gender dysphoria diagnosis.<sup>2</sup> To the extent that Defendants desire additional information touching on issues raised in Dr. Brown's report, they are free to depose Dr. Brown.

### **C. Sanctions are Warranted**

Dr. Tudor believes that sanctions are appropriate because, *inter alia*, Defendants unreasonably multiplied proceedings, engaged in forum-shopping, and their conduct ran

---

<sup>2</sup> Order Denying Defendants' Motion to Compel, ECF Doc. 92 at 2–3 (“[D]efendant’s Answer to Plaintiff’s Complaint in this matter contains sufficient admissions regarding Intervenor’s transition status to overcome Defendant’s current suggestion that it is unaware of Intervenor’s transition from male to female. Further, Defendant has at no time raised or suggested as a defense to Plaintiff’s claims in this matter that Intervenor was not, in fact, undergoing a transition in her gender. Thus, there is no basis to find the documentation sought by Defendant has some tendency to either prove or disprove a fact in dispute. Nor is it likely to lead to information relevant to a matter in dispute. *See* Fed. R. Civ. P. 26(b)(1).”).

afoul of Rule 45(c)'s good faith requirement to take reasonable steps to avoid imposing an undue burden upon non-party witness Ms. Porter. ECF Doc. 82-1 at 19–20.

***Multiplied Proceedings Were Triggered by Defendants' Conduct.*** Defendants' averment that Dr. Tudor—not the Defendants—sought the involvement of three different courts fails on its face.

It is Defendants' conduct which multiplied proceedings on the psychotherapist-privilege issue at the heart of the Second Porter Subpoena. For example: It was Defendants who noticed the First Porter Subpoena for Dallas, Texas. ECF Doc. 64 (filed June 6, 2016). It was Defendants who refused to respond to a letter from Tudor's counsel seeking to limit the First Porter Subpoena. *See* ECF Doc. 71-7 (June 9, 2016 letter from Ezra Young to Defendants' Counsel). It was Defendants who filed a Motion to Compel with this Court, demanding that the United States produce all medical and therapy records pertaining to Tudor's transgender status on June 23, 2016, claiming, *inter alia*, that psychotherapist privilege had been waived. *See* ECF Doc. 67 at 14–15. And it was Defendants who proceeded to serve the First Porter Subpoena on July 11, 2016 while their Motion to Compel (ECF Doc. 67) was still pending before this Court. It was also Defendants who waited for Dr. Tudor to move the Northern District of Texas for relief (ECF Doc. 71-1), waited for the Northern District of Texas to issue an order setting a briefing schedule for Tudor's Motion (ECF Doc. 74-1), and then took steps to moot out the Texas motion (ECF Doc. 80-1 [email notifying Tudor's counsel that First Porter Subpoena was withdrawn, thus Tudor's pending Texas motion is mooted]). It was also Defendants whom, within minutes of receiving email notice from Tudor's counsel that

she had noticed the Texas Court that her First Porter Subpoena Motion was mooted (ECF Doc. 82-20 [email from Angela Ivy to all counsel time stamped July 28, 2016 11:13am [eastern time]], noticed the Second Porter Subpoena. ECF Doc. 77 [Second Porter Subpoena]; ECF Doc. 111 at 12 (admitting that Defendants filed the Second Porter Subpoena on July 28, 2016 at 10:19am [central time])).

***Defendants Willfully Misrepresent Their Conduct During the Meet and Confer Process to This Court.*** Defendants' Reply repeatedly misrepresents Defendants' counsel's conduct during the meet and confer process in an ill-fated attempt to pass blame to Dr. Tudor.

Contrary to Defendants' representations, Dr. Tudor's counsel repeatedly requested that Defendants narrow the scope of the First and Second Porter Subpoenas to prevent having to seek relief with the courts of compliance in both instances. *Contra* ECF Doc. 111 at 13. For example, Jillian Weiss conducted a meet and confer with Dixie Coffey on the evening of July 11, 2016. During this call, Coffey refused to narrow the scope of the First Porter Subpoena, claiming the privilege had been waived, and notified Weiss that their differences were irreconcilable, thus necessitating filing of the First Subpoena related motions with the Northern District of Texas.<sup>3</sup>

For example, Ezra Young conducted multiple meet and confer calls with Dixie

---

<sup>3</sup> Weiss and Coffey did not discuss filing the Subpoena motions with any particular court during the July 11, 2016 call. Weiss did attempt to call Coffey several times on July 15, 2016 to notify Coffey that, pursuant to Rule 45, Tudor's motions must be filed with the Northern District of Texas; Weiss recalls leaving at least one voicemail for Coffey notifying Coffey of the necessity of filing with the Northern District of Texas. Coffey did not respond to Weiss' voicemail until *after* Tudor filed her motion with the Northern District of Texas on July 18, 2016.



Coffey and Jeb Joseph on August 1, 2016. During these calls, as noted in Young’s memorializations of these calls (see generally Exhibits C and D), Defendants’ counsel repeatedly refused to narrow the scope of the Second Porter Subpoena. Indeed, Defendants’ counsel refused compromises proposed by Tudor’s counsel and stubbornly insisted that they were entitled to question Ms. Porter about issues that Tudor believes to be protected by the psychotherapist privilege and were further entitled to request of Porter all documents encompassed by the Second Porter Subpoena. Exhibit C (August 1, 2016 email time stamped 12:21pm [eastern time]; memorializing August 1 morning meet and confer call). Indeed—the only “compromise” offered by Defendants’ in the course of the August 1 calls that touched on the privilege issue was permitting Mr. Young to attend the Porter deposition and raise objections at that time. Exhibit D (August 1, 2016 email time stamped 7:11pm [eastern time]; memorializing August 1 evening meet and confer call). However, Mr. Young informed Defendants that this compromise did not resolve Tudor’s concerns since Defendants would not promise to refrain from seeking information and documents from Porter about the specific issues Young indicated were protected by the privilege.<sup>4</sup>

Dated: August 29, 2016

---

<sup>4</sup> See Exhibit D (Ezra Young to Dixie Coffey: “You did not say that you would take any line of questioning off the table. You did not say that you would not push forward on questions to which I raised objections based on privilege. Nor did you represent that you would amend the Second Porter Subpoena to ensure that the documents you currently seek production of are limited to only the items to which we can all agree the privilege does not apply.”).

Respectfully Submitted,

/s/ Ezra Young

Ezra Young (NY Bar No. 5283114)

Admitted *Pro Hac Vice*

Law Office of Jillian T. Weiss, P.C.

P.O. Box 642

Tuxedo Park, NY 10987

949-291-3185

Fax: 917-398-1849

[eyoung@jtweisslaw.com](mailto:eyoung@jtweisslaw.com)

Jillian T. Weiss (NY Bar No. 2125011)

Admitted *Pro Hac Vice*

Law Office of Jillian T. Weiss, P.C.

P.O. Box 642

Tuxedo Park, NY 10987

845-709-3237

Fax: 845-915-3283

[jtweiss@jtweisslaw.com](mailto:jtweiss@jtweisslaw.com)

Brittany M. Novotny (Okla. Bar No. 20796)

National Litigation Law Group, PLLC

42 Shepherd Center

2401 NW 23rd St.

Oklahoma City, OK 73107

405-429-7626

Fax: 405-421-9164

[bnovotny@nationlit.com](mailto:bnovotny@nationlit.com)

### **VERIFICATION OF COUNSEL**

The below-signed counsel certify that all statements regarding conversations with Defendants' counsel are true and correct as stated.

/s/ Ezra Young

Ezra Young

/s/ Jillian Weiss

Jillian Weiss

**ATTORNEYS FOR PLAINTIFF/INTERVENOR**

**CERTIFICATE OF SERVICE**

I hereby certify that on August 29, 2016, I electronically filed a copy of the foregoing with the Clerk of Court by using the CM/ECF system, which will automatically serve all counsel of record.

I further certify that on August 29, 2016 I emailed a copy of the foregoing and all exhibits to:

Ms. Feleshia Porter, MS, LPC

3530 Forest Lane, #55

Dallas, Texas 75234

[feleshia@aol.com](mailto:feleshia@aol.com)

*Pro Se*

/s/ Ezra Young \_\_\_\_\_

Ezra Young