E-Filed: 8/31/04

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff,

MASUMEH ZANGANEH,

Plaintiff/Intervenor,

v.

ROWTOWN, INC. D/B/A THE FISH HOPPER RESTAURANT AND DOES 1-50

Defendants.

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Case No. C03-01522 RMW (HRL)

ORDER ON INTERVENOR'S MOTION FOR A PROTECTIVE ORDER

BACKGROUND

Plaintiff Equal Employment Opportunity Commission (EEOC) filed this action against defendant Rowtown, Inc. on April 10, 2004, alleging that defendant violated of Title VII of the Civil Rights Acts by subjecting female employees to sexual harassment. Judge Whyte granted Masumeh Zanganeh's (intervenor's) motion to intervene in part, allowing her to assert her sexual harassment claims under Title VII and the California Fair Employment & Housing Act. Intervenor's complaint included an emotional distress claim as well as a claim for front and back pay.

At intervenor's January 14, 2004 deposition, she identified several doctors and a therapist with whom she had spoken regarding her emotional distress. On July 6, 2004, defendant

subpoenaed intervenor's doctors and therapist, seeking all medical and psychological records relating to intervenor. Defendant also subpoenaed intervenor's employers for her employment records. Intervenor's counsel objected to the subpoenas on July 12, 2004, alleging that they were overbroad and impinged on private and privileged information. After the parties were unable to resolve the dispute, intervenor filed this motion for a protective order on July 27, 2004, over a week after the due date on the subpoena, but before the documents had been produced. Basically, she seeks to limit the scope of the subpoenas. EEOC filed a statement of non-opposition to intervenor's motion. Defendant opposes the motion.

ANALYSIS

I. Whether Intervenor's Motion is Untimely

Upon "timely motion," the court may modify a subpoena if it "requires disclosure of privileged or other protected material." Fed. R. Civ. P. 45(c)(3)(A). Protective orders are appropriate to limit or modify the scope of a subpoena. *In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation*, 669 F.2d 620, 621 (10th Cir. 1982). In considering the timeliness of a motion for a protective order, courts should "look to all of the circumstances in determining whether the motion is timely." 8 WRIGHT, MILLER, AND MARCUS, FEDERAL PRACTICE AND PROCEDURE § 2035 (2d ed. 2004).

Here, there appears to be good reason for intervenor's delay in bringing the motion. Intervenor's counsel contacted defense counsel on July 12 and July 16 to inform them of their objections to the subpoenas, and attempt to resolve the issue. It was only after the parties were unable to resolve the matter that intervenor brought the motion for a protective order. Given that the slight delay in bringing the motion was due to intervenor's attempt to meet and confer, as required by Civ. L. R. 37-1, intervenor's motion is timely.

II. Whether Intervenor has Demonstrated Good Cause to Warrant a Protective Order

Pursuant to Fed. R. Civ. P. 26(c) a party may move the court for an order "to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." Parties may also request modifications to existing protective orders. *Osband v. Woodford*, 290 F.3d 1036, 1039 (9th Cir. 2002). Courts retain great flexibility in fashioning protective orders, and may enter a

protective order based upon "the necessities of a particular case." *United States v. Columbia Broadcasting Systems, Inc.*, 666 F.2d 364, 369 (9th Cir. 1982). The party seeking the protective order bears the burden of showing good cause, demonstrating that "specific prejudice or harm will result if no protective order is granted." *Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1130 (9th Cir. 2003). "[B]road allegations of harm, unsubstantiated by specific examples or articulated reasoning, do not satisfy the Rule 26(c) test." *Id.* at 1130 (quoting *Cipollone v. Liggett Group, Inc.*, 785 F.2d 1108, 1121 (3d Cir. 1986)).

A. Subpoena Dr. Richards

Intervenor saw Dr. Richards for prenatal care. "Pure" medical records do not constitute relevant, discoverable information where a party makes no claim for physical injury in conjunction with a claim for emotional distress. *See Fitzgerald v. Cassil*, 216 F.R.D. 632, 634 (N.D. Cal 2003). Here, although intervenor has not stated a claim for physical injury with her emotional distress claim, the subpoena requests all of intervenor's records. Intervenor does state that she asked Dr. Richards to prescribe medication for depression, but she was not prescribed any and was not otherwise treated by Dr. Richards for her emotional distress. Mot. at 6:4-7. *See also Doe v. City of Chula Vista,* 196 F.R.D. 562, 570 (S.D. Cal. 1999) ("[D]efendants have no need to access records relating to the birth of Doe's child.").

B. Subpoenas to Drs. Burnham and Hopkins

The subpoenas to Drs. Burnham and Hopkins, however, are not overbroad, as intervenor testified that she only saw those doctors concerning the alleged emotional distress she suffered as a result of defendant's conduct. Ex. A to Decl. of C. Long at 40-41, 48-50.

C. Subpoena to Connie Rodgers, MFT

Where a party makes a claim for emotional distress, psychological records are relevant in determining the extent of the distress as well as other possible stressors. *See Fitzgerald,* 216 F.R.D. at 634. The subpoena to Rodgers is appropriate, as intervenor said she began seeing her after the alleged discrimination occurred, solely for distress related to the claimed harassment. Ex. A to Decl. of C. Long at 43-44. As such, the records are relevant to her claims.

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D. Subpoena of Employment Records

The court finds that Intervenor has not demonstrated good cause for a protective order limiting the subpoenas of her employment records to wage information only. "[N]either personnel records nor employment agreements are, without more, legitimate categories of confidential information," necessitating a protective order. *Pierson v. Indianapolis Power & Light Co.*, 205 F.R.D. 646, 647 (S.D. Ind. 2002). Intervenor has provided no specific facts that would demonstrate good cause for a protective order. *See id.* (noting that the parties' conclusory allegations failed to demonstrate good cause necessary for a protective order).

ORDER

Based on the forgoing, IT IS ORDERED THAT:

1) The subpoena for Dr. Richard's records is quashed.

2) The motion is denied as to the subpoenas to Dr. Burnham, Dr. Hopkins, and Connie Rodgers, M.F.T.

3) The motion is denied as to the subpoenas to Initiative Media Worldwide, Inc., Manpower Inc., and Applebee's Neighborhood Grill & Bar.

4) Intervenor may designate the above-produced material as confidential pursuant to the existing protective order in this case.

IT IS SO ORDERED.

Dated: 8/31/04

/s/ Howard R. Lloyd
HOWARD R. LLOYD
UNITED STATES MAGISTRATE JUDGE

THIS SHALL CERTIFY THAT A COPY OF THIS ORDER WILL BE SENT TO:

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* Counsel are responsible for providing copies of this order to co-counsel who have not registered under the Court's ECF system.

Dated: 8/31/04

/s/ KWN
Chambers of Magistrate Judge Lloyd