

VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:	)	
	)	
DAVID TOWLE	)	DOCKET NO. 92-3

MEMORANDUM AND ORDER

At issue is a Motion to Compel filed on March 26, 1993, on behalf of David Towle ("Grievant") with respect to this grievance over his dismissal from employment as a Field Supervision Officer with the State of Vermont, Department of Corrections, Probation and Parole ("Employer"). In support of his contention that his dismissal was without just cause, Grievant asserts, among other things, that the Employer: 1) inappropriately bypassed progressive discipline in dismissing Grievant for engaging in sexual activities with co-worker J.P., and 2) failed to apply discipline in a uniform and consistent manner by dismissing Grievant and taking no disciplinary action against J.P. In his Motion to Compel, Grievant requests that the Labor Relations Board issue an order compelling witnesses Dr. James Bailey, and therapists Michael Watson and Tonya Howard to appear and testify at depositions noticed by Grievant pursuant to V.R.C.P. 30.

On April 6, 1993, J.P. filed a response in opposition to the Motion to Compel. Therein, J.P. claimed a privilege to prevent the deposition of these individuals who provided her medical and counseling services. Subsequently, Grievant and J.P. stipulated to the facts necessary to decide this motion, and filed Memoranda of Law in support of their respective positions.

The stipulated facts necessary to rule on this motion are as follows:

- 1) On August 27, 1991, J.P. alleged Grievant had coerced her into performing fellatio while the two were driving down Interstate 91.
- 2) After receiving J.P.'s complaint, Department of Corrections personnel confronted Grievant.
- 3) Grievant told the Department investigators that he and J.P. had engaged in fellatio while driving down Interstate 91 but denied he coerced her to do so.
- 4) Further, Grievant told the Department investigators that he and J.P. had engaged in consensual sexual contact on a half-dozen occasions.
- 5) The investigators then spoke with J.P. again.
- 6) J.P. told the investigators that she and Grievant had engaged in various sexual acts over a period of time.
- 7) J.P. also told the investigators she was unable to refuse requests to engage in sexual acts as a result of her childhood history of sex abuse.
- 8) On August 29, 1991 J.P. invited the Department investigators in writing to contact her therapists, Michael Watson and Tonya Howard, so that they could be informed of her mental health status.
- 9) Additionally, J.P., together with Mr. Watson, were interviewed by Department investigators on two occasions and discussed J.P.'s mental health history, diagnosis and prognosis.
- 10) J.P. made the above referenced disclosures voluntarily.
- 11) At the time she allowed agents of her employer to speak with Mr. Watson, J.P. had neither been subjected to formal disciplinary proceedings nor told that there would be no such proceedings.

We first discuss whether, absent consideration of J.P.'s physician/patient privilege, Grievant would have the right to depose persons who treated J.P. with respect to her mental health condition, and provided information on such condition to the Employer in connection with the Employer's investigation of the sexual contact between Grievant and J.P. The discovery provisions

of the Vermont Rules of Civil Procedure, which apply to grievances before the Board pursuant to Section 12.1 of the Board Rules of Practice, permit a party to "take the testimony of any person by deposition" to "obtain discovery regarding any matter ... which is relevant to the subject matter involved in the pending action". V.R.C.P. 26(b)(1); V.R.C.P. 30 . It is not ground for objection that the information sought will be inadmissible at a hearing if it "appears reasonably calculated to lead to the discovery of admissible evidence." V.R.C.P. 26(b)(1).

The deposition of the individuals who treated J.P. with respect to her mental health condition, and provided information to the Employer on such condition, is relevant to Grievant's claim that he was subject to disparate treatment since he was dismissed, but no disciplinary action was imposed on J.P. on the basis of her mental health condition. In order to determine whether J.P.'s mental health condition provides a reasonable basis for the difference in treatment accorded J.P. and Grievant, the Board must have information on the nature of the condition. In order to demonstrate that the mental health condition of J.P. does not provide such a reasonable basis, Grievant must be able to discover information on the mental health condition. The deposition of the individuals who treated J.P. on her mental health condition, and provided information to the Employer on such condition, appears reasonably calculated to lead to the discovery of admissible evidence in this regard. Thus, absent consideration of J.P.'s physician/patient privilege, Grievant would have the right to depose persons who treated J.P. with respect to her mental health condition, and provided information

on such condition to the Employer in connection with the Employer's investigation of the sexual contact between Grievant and J.P.

However, J.P. asserts that she has the right to prevent the depositions of such individuals for such a purpose due to her patient privilege, and that she has not waived such privilege. Grievant contends that J.P. has waived any privilege she may have had by making voluntary disclosures of her mental health history, diagnosis, and prognosis to Department of Corrections personnel investigating her sexual conduct complaints against Grievant.

Although the Vermont Rules of Evidence do not apply to grievance proceedings before the Board, 3 V.S.A. §928(b)(3), we believe it is appropriate to look to such Rules for guidance in deciding whether J.P. has waived her patient's privilege.

Under the Rules of Evidence, a patient has a privilege to refuse to disclose, and to prevent any other person from disclosing, confidential communications made for the purpose of diagnosis or treatment of a physical or mental condition between the patient and a physician and/or mental health professional. V.R.E. 503(b). A patient waives the privilege by voluntarily disclosing or consenting to disclosure of any significant part of the privileged matter. V.R.E. 510.

Here, we conclude that J.P. has waived her patient's privilege by making voluntary disclosures of her mental health condition to the Employer during the investigation of the sexual

contact between J.P. and Grievant, and by authorizing her therapists to discuss her mental health condition with the Employer.

The Vermont Supreme Court has concluded that a mother who sought to resist action by the state to terminate her parental rights over a child placed her mental health in issue, which justified the admission of testimony by treating physicians which might otherwise be barred by the physician-patient privilege. In re M.M., 153 Vt. 102 (1989). The fact that the mother did not initiate the action was not determinative. Id.

The Court also has concluded that once a patient waives a privilege by the commencement of an action, such waiver applies to the discovery of matters causally or historically related to the patient's health put in issue by the injuries and damages claimed in the action. Mattison v. Poulen, 134 Vt. 158, 163 (1976).

By analogy, here J.P. placed her mental health in issue in defending herself against potential disciplinary action, due to her sexual contact with Grievant, by contending that she was unable to refuse requests to engage in sexual acts as a result of her childhood history of sexual abuse. By disclosing this information to the Employer, and allowing her therapists to discuss her mental health condition with the Employer, she waived her patient's privilege with respect to this information. Once she waived the privilege, the waiver applied to discovery of matters causally related to J.P.'s health put in issue by the disclosure.

We recognize that there is a significant distinction between the M.M. and Mattison cases, and the case before us, in that there the patients were parties to the action, whereas here J.P. is not a party to the underlying grievance before us. We treat her intervention in this case as an appearance for special purposes. Nonetheless, we find her situation analogous to that of the mother in M.M., who did not initiate the action but was defending against an action brought against her. Here, J.P. made the disclosures concerning her mental health condition to defend against potential disciplinary actions. Once she made those disclosures to defend herself, she waived her patient's privilege with respect to those matters.

J.P. asserts that the disclosures which she made were merely selective disclosures, and did not constitute the general waiver of privilege entitling Grievant to depose her mental health therapists. A selective disclosure is "any disclosure of a privileged communication that is not used as evidence against the party seeking its discovery." Developments in the Law: Privileged Communications, 98 Harv.L.Rev. 1450, 1644-45 (1985). Whenever a person selectively discloses privileged information, the confidentiality of the privileged communication is necessarily compromised to some degree. Id. at 1645. However, the person has not manipulated the privilege for gain in a lawsuit. Id. Because the privilege-holder's adversary stands in no better or worse position than if the selective disclosure never occurred, selective disclosure, unlike partial disclosure, poses little threat of unfairness. Id.

The principles underlying selective disclosure do not support J.P.'s claim of lack of waiver in this case. The Employer

has an obligation under Article 14, Section 1(b) of the collective bargaining agreement to apply discipline with a view toward uniformity and consistency. The evidence which the Employer had concerning J.P.'s mental health condition was used against Grievant in this regard in the sense that he was dismissed and no disciplinary action was imposed on J.P. There is a substantial threat of unfairness if Grievant is not allowed to depose J.P.'s mental health providers since he would be unable to adequately prepare his case of disparate treatment without obtaining information from them on J.P.'s mental health condition.

Thus, we conclude that Grievant has the right to depose the therapists who treated J.P. with respect to her mental health condition, and provided information on such condition to the Employer in connection with the Employer's investigation of the sexual contact between Grievant and J.P. Also, while the parties have provided us with no facts with respect to Dr. James Bailey, a physician at Northeastern Medical Center, the record before us indicates that the Employer's investigators did speak with Dr. Bailey in the course of their investigation (Attachment C to Grievant's August 14, 1982, Memo Regarding J.P.'s Physician/Patient Privilege). Under such circumstances, Grievant should be able to depose him. In all depositions, with respect to the therapists and Dr. Bailey, the scope of Grievant's deposition should be limited to the information which was provided to the Employer with respect to J.P.'s mental health condition, and the circumstances under which such information was given. J.P. has waived her patient's privilege only to that extent.

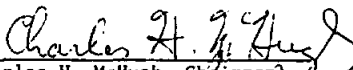
In closing, we believe it is appropriate to order the parties to maintain the confidentiality of the depositions of Dr. Bailey and the therapists. The disclosure of any information provided in the depositions is strictly limited to the parties and their legal representatives unless, and until, a subsequent order of the Board allows any such information to be admitted into evidence.


NOW THEREFORE, based on the foregoing findings of fact and for the foregoing reasons, it is hereby ORDERED:

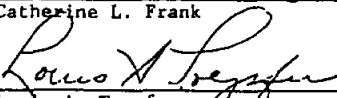
1. Grievant's motion to compel the depositions of Dr. James Bailey, Michael Watson and Tonya Howard is GRANTED, and they shall appear and testify at depositions noticed by Grievant pursuant to V.R.C.P. 30. The scope of Grievant's deposition shall be limited to the information which Dr. James Bailey, Michael Watson and Tonya Howard provided to the Employer with respect to J.P.'s mental health condition, and the circumstances under which such information was given; and
2. The parties shall maintain the confidentiality of these depositions; the disclosure of any information provided in the depositions is strictly limited to the parties and their representatives unless, and until, a subsequent order of the Labor Relations Board allows any such information to be admitted into evidence.

Dated this 6th day of May, 1993, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

  
Charles H. McHugh, Chairman

  
Catherine L. Frank

  
Louis A. Toepfer