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# DISCOVERY OF THE PLAINTIFF'S MENTAL HEALTH HISTORY IN AN EMPLOYMENT DISCRIMINATION CASE

DAVID A. ROBINSON\*

## INTRODUCTION

Psychotherapy has an unpleasant side effect for patients who happen to be victims of employment discrimination. If they sue their employers for discrimination and claim emotional distress damages, their employers will demand to see their therapy records.<sup>1</sup>

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1. See, e.g., *Lowe v. Philadelphia Newspapers, Inc.*, 101 F.R.D. 296, 298 (E.D. Pa. 1983) (allowing defendant to inspect plaintiff's "entire life's history of both medical and psychological problems" in racial discrimination case); *Mitchell v. Hutchings*, 116 F.R.D. 481, 485 (D. Utah 1987) (employer demanded employee undergo medical and psychological examination in sexual harassment suit); *Vinson v. Superior Court*, 740 P.2d 404, 409-10 (Cal. 1987) (employer demanded employee undergo medical and psychological examination in sexual harassment suit); EEOC Issues Policy Guidance on Availability of Damages Under 1991 Act, 2 Empl. Prac. Guide (CCH) ¶ 5360, at 6225 n.14 (July 14, 1992) [hereinafter EEOC Guidance] (Text of Enforcement Guidance No. 915.002, Compensatory and Punitive Damages Available Under Section 102 of the Civil Rights Act of 1991, U.S. Equal Opportunity Commission) (employer "may be able to obtain records of medical and/or psychiatric treatments for conditions relevant to the complained of symptoms"). *Contra Sabree v. United Bhd. of Carpenters, Local 33*, 126 F.R.D. 422, 426 (D. Mass. 1989) (prohibiting defendant from inspecting therapy records in race discrimination case).

Lawyers for plaintiffs warn their clients:

If compensatory damages are sought, then plaintiffs must be forewarned and prepared to give in-depth testimony about their emotional pain and suffering. Once the claim of emotional pain and suffering is introduced, then plaintiff probably must be prepared to lay bare her entire psychiatric and medical history, although counsel should make every attempt, where possible, to limit the intrusion into areas of privacy. Defendant's counsel will attempt to prove that any present mental anguish was caused not by the discriminatory acts, but by other personal problems such as marital difficulties, family deaths, etc. Plaintiff and her attorney must be fully prepared for this type of inquiry, which will undoubtedly be quite painful to the plaintiff.

1 JANICE GOODMAN, ED., *EMPLOYEE RIGHTS LITIGATION: PLEADING AND PRACTICE* § 2.07[4][a] (1993). For specific examples of the questions defense counsel might ask, see DOUGLAS DANNER, *PATTERN DISCOVERY: EMPLOYMENT DISCRIMINATION* PI 6:366, at 412-13 (Supp. 1992).

For these employees, the Civil Rights Act of 1991<sup>2</sup> ("CRA 91") is like a rainbow. They can reach their "pot of gold" only after braving a fierce storm which washes away their privacy and lays bare their most intimate secrets.

The "pot of gold," of course, is an award of compensatory damages for emotional distress under CRA 91.<sup>3</sup> Prior to the enactment of CRA 91, such damages (often the largest part of the total damages awarded)<sup>4</sup> were not recoverable under the leading federal anti-discrimination statute—Title VII of the Civil Rights Act of 1964.<sup>5</sup> The "storm" is the humiliating torrent of discovery requests

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2. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended in scattered sections of 42 U.S.C.).

3. *Id.* § 102 (codified as amended at 42 U.S.C. §§ 1981a(a)(1), (b)(3) (Supp. III 1991)). Compensatory damages include damages for "future pecuniary losses, *emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life*, and other nonpecuniary losses." 42 U.S.C. § 1981(b)(3) (Supp. III 1991) (emphasis added).

4. *See, e.g.*, *Kientzy v. McDonnell Douglas Corp.*, 990 F.2d 1051, 1055-56 (8th Cir. 1993) (awarding \$125,000 in actual damages and front pay, and \$150,000 for emotional distress); *Dias v. Sky Chefs, Inc.*, 919 F.2d 1370, 1376 (9th Cir. 1990), *vacated on other grounds*, 111 S. Ct. 2791 (1991) (awarding \$125,000 in general damages, \$500,000 in punitive damages); *Patrickson v. Westvaco, Envelope Div.*, 15 Mass. Discrimination L. Rep. (New Eng. Legal Pub.) 1642, 1664 (Sept. 23, 1993) (Parks, Commr.) (awarding no back pay and \$100,000 for emotional distress); *Norman v. Andover Country Club*, 15 Mass. Discrimination L. Rep. (New Eng. Legal Pub.) 1394, 1421-23 (July 29, 1993) (Lee, Hearing Officer) (awarding \$6,541.68 in back pay and \$75,000 in emotional distress).

5. Civil Rights Act of 1964, Pub. L. No. 88-352, §§ 701-716, 78 Stat. 241, 253-66 (codified as amended at 42 U.S.C. §§ 2000e to 2000e-17 (1988 & Supp. III 1991)). The statute prohibits employers from discriminating on the basis of race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2(a) (1988 & Supp. III 1991). Emotional distress damages were (and are) recoverable under the Civil Rights Act of 1866, 42 U.S.C. § 1981 (1988), but this statute applies only to racial discrimination. *Foster v. MCI Telecommunications Corp.*, 773 F.2d 1116 (10th Cir. 1985) (holding that emotional distress damages recoverable under U.S.C. § 1981 (1988)); *see also infra* notes 12-13 and accompanying text (emotional distress damages for sexual harassment were available under tort theory or under state anti-discrimination statute in some states prior to CRA 91).

CRA 91 also provides punitive damages in Title VII cases. 42 U.S.C. § 1981a(b)(1) (Supp. III 1991). Although punitive damages theoretically serve a different purpose than emotional distress damages, they are often interchangeable in the minds of judges and jurors. There have been some large punitive damage awards which easily could have been classified as emotional distress damages. *See, e.g.*, *Johnson v. Armored Transp. of Cal., Inc.*, 813 F.2d 1041, 1042 (9th Cir. 1987) (en banc) (allowing in a race discrimination case \$45,000 in compensatory damages and \$150,000 in punitive damages); *Contardo v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 753 F. Supp. 406, 412 (D. Mass. 1990) (allowing in a sex discrimination case \$1 in actual damages and \$250,000 in punitive damages); *Ford v. Revlon, Inc.*, 734 P.2d 580, 584 (Ariz. 1987) (en banc) (finding that a sexual harassment victim was fondled, her career threatened and that she suffered severe emotional distress; the jury awarded \$10,000 in compensatory damages and \$100,000 in punitive damages).

CRA 91 places a cap ranging from \$50,000 to \$300,000 (depending on the size of the employer's workforce) on compensatory and punitive damages recoverable under

which the discrimination victim must answer in order to prove that the discrimination, and not some other difficulty in the victim's life, was the proximate cause of the alleged emotional distress.<sup>6</sup>

This article argues that such intrusive discovery is, in most em-

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Title VII. 42 U.S.C. § 1981a(b)(3) (Supp. III 1991). This cap also applies to damages under the Americans With Disabilities Act, 42 U.S.C. §§ 12101-12213 (Supp. III 1991) ("ADA"), but does not apply to racial discrimination cases brought pursuant to 42 U.S.C. § 1981 (Supp. III 1991), nor does it preempt the higher awards available under state law in many jurisdictions. 42 U.S.C. §§ 1981(a)(1)-(2) (Supp. III 1991). Under the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634 (1988 & Supp. IV 1992) ("ADEA"), liquidated damages are recoverable for "willful" violations, § 626(b), but "compensatory" damages are not recoverable. See *Johnson v. Al Tech Specialties Steel Corp.*, 731 F.2d 143, 147 (2d Cir. 1984) (holding that scope of ADEA includes authority to grant "legal or equitable relief as may be appropriate to effectuate the purposes of [ADEA]"). But see *Franklin v. Gwinnett County Pub. Schs.*, 112 S. Ct. 1028, 1037-38 (1992) (holding that compensatory damages are available in Title IX (educational institutions) sexual harassment cases, because Congress expressed no intent to negate presumption of such damages).

6. A defendant's strategy for discovery of the plaintiff's psychological history is typically as follows:

Now, because [CRA 91] allows for compensatory damages and plaintiffs can be expected to seek such relief in virtually every case, inquiry at the plaintiff's deposition will concern all related matters, for example, symptoms, psychological and medical treatment, medication, therapists' and physicians' records, family and personal relationships, traumatic experiences, job-related stress, and other possible sources of harassment, tension, or stress.

Once the plaintiff puts his or her mental or physical condition in controversy, the court, upon a showing of good cause, may order the plaintiff to submit to a physical examination by a physician or a mental examination by a psychologist or physician.

. . . [T]he defendant should request the plaintiff to identify any experts [psychiatrists, psychologists, or therapists] early in the litigation process. If the plaintiff delays producing this information, the employer should aggressively pursue obtaining it as quickly as possible by appropriate means.

. . . [T]he defendant should obtain, through discovery, each expert's report and any underlying documents.

Marian C. Haney, *Litigation of a Sexual Harassment Case After the Civil Rights Act of 1991*, 68 NOTRE DAME L. REV. 1037, 1051-52 (1993) (footnotes omitted). See generally Steven B. Bisbing, *Challenging Psychological Damages Claims in Civil Litigation*, 59 DEF. COUNS. J. 358 (1992); Paul R. Lees-Haley & Marlas Werkow, *Confronting Employment-Related Claims for Emotional Distress*, 56 DEF. COUNS. J. 454, 457 (1989).

Defense counsel will likely probe the plaintiff's emotional history even if the plaintiff does not specifically allege emotional distress in her complaint. See Lees-Haley & Werkow, *supra*, at 455 (citing *Cancellier v. Federated Dep't Stores*, 672 F.2d 1312, 1319 (9th Cir.), *cert. denied*, 459 U.S. 859 (1982) which discusses Federal Rule of Civil Procedure 54(c)). A jury can award such damages regardless of whether the plaintiff explicitly asks for them in her pleadings. Thus, the only way a plaintiff can avoid such discovery is to explicitly waive her right to emotional distress damages. But see *Acosta v. Tenneco Oil Co.*, 913 F.2d 205, 208-09 (5th Cir. 1990) (refusing, in a decision prior to the Civil Rights Act of 1991, to compel a Federal Rules of Civil Procedure 35 mental examination of an age discrimination plaintiff who did not seek or allege emotional distress).

ployment discrimination cases, unfair to plaintiffs and contrary to the legislative purpose of the civil rights laws. The article suggests solutions which attempt to reconcile the employee's right to privacy with the employer's need to defend itself against false or exaggerated claims.

## I. THE PROBLEM

### A. *Three Distraught Plaintiffs*

Consider three hypothetical plaintiffs—Betty, Sue, and Joe. Betty's male co-workers are constantly leering at her, commenting about her body, swearing, telling dirty jokes, and asking her for dates. Betty always refuses. When Betty complains to management, she is demoted.

Although she periodically suffered headaches before the harassment began, since then her headaches have worsened. She consults a psychiatrist, who diagnoses Betty's condition as mild depression. During therapy sessions Betty reveals much about her past, including the fact that at age seventeen she had an abortion. She feels guilty about this, having been raised in a strict Catholic home. Her parents still do not know about the abortion. Meanwhile, Betty sues her employer for sexual harassment.<sup>7</sup>

Sue learns that she is pregnant and tells her boss. A few weeks later Sue and another employee—who is not pregnant—are told that they are terminated because their jobs have been eliminated due to "downsizing." A week later Sue learns that her job was not really eliminated. In fact, someone was hired to replace her. Sue suffers a miscarriage and blames it on the stress caused by the termination. She sues for pregnancy discrimination.<sup>8</sup> Sue was in therapy last year due to marital problems.

Joe is an African-American whose new boss uses racial epithets at work. He also frequently tells Joe that blacks are intellectually inferior to whites. Joe finds this very upsetting and gets a stomach ache every morning as he drives to work, dreading what the boss might say that day. Joe also has been seeing a therapist. Among the issues they have discussed is Joe's uncertainty about his

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7. Sexual harassment is a form of sex discrimination. See, e.g., *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 65 (1986); see also Equal Employment Opportunity Commission Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11 (1993) (EEOC's sexual harassment regulations).

8. Pregnancy discrimination is a form of sex discrimination. 42 U.S.C. § 2000e(k) (1988).

sexual orientation. Joe is fired for being two minutes late to work one morning and sues for racial discrimination.

### B. *Defense Strategy*

The forecast for Betty, Sue, and Joe is stormy indeed. Because they claim emotional distress due to discrimination, they will be asked, either at depositions or through interrogatories, whether they have undergone psychotherapy within the past few years. They will answer yes. Defense counsel in each case will then seek to depose the psychotherapist and obtain copies of the therapy records.

Defense counsel's purpose in seeking such information is, at least facially, legitimate. Defense counsel needs to know whether the plaintiff's claim of emotional distress is truthful or fabricated, and whether the distress is related to the discrimination or is caused by other personal problems in the plaintiff's life.<sup>9</sup>

All three plaintiffs are aghast at the thought of their employers (and defense counsel) learning about their personal problems. They cringe at the thought of their former bosses, who have hurt them deeply, having access to this private and personal information. Each plaintiff moves for a protective order barring such discovery.<sup>10</sup> What should the court do?

### C. *Judicial Precedent*

This is a very perplexing problem. There is little statutory guidance<sup>11</sup> or judicial precedent dealing with discovery of psychological records in employee discrimination cases. Nevertheless, it is possible to draw upon the few pre-CRA 91 cases which dealt with this issue and some cases involving emotional distress outside the

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9. See, e.g., *Kennedy v. Fritsch*, 58 Empl. Prac. Dec. (CCH) ¶ 41,493, at 70,966 (N.D. Ill. 1991) ("The existence of difficulties in the personal lives of plaintiffs contemporaneous with the alleged emotional distress they suffered would effect a determination as to whether the alleged conduct of defendants caused this distress."); *Franklin Pub. Co. v. Massachusetts Comm'n Against Discrimination*, 519 N.E.2d 798, 800 (Mass. App. Ct. 1988) (employee in pregnancy discrimination case suffered emotional distress both from discrimination and from her worries about carrying the pregnancy to term).

10. The plaintiffs draw little comfort from the availability of confidentiality orders, which merely prevent the defendant and the court from disseminating the discovery materials to the general public. The plaintiffs want the materials shielded from the defendant as well.

11. A few states have statutes pertaining to discovery in sexual harassment cases. See, e.g., CALIF. GOV'T CODE § 11507.6 (West 1992).

civil rights context to ascertain a jurisprudence to govern these situations.

Although emotional distress damages were not available in Title VII cases prior to November 1991 (when CRA 91 took effect), such damages were available in some states, pursuant to either a state fair employment practices act<sup>12</sup> or the common law of intentional (or negligent) infliction of emotional distress.<sup>13</sup> The conventional wisdom has been that the plaintiff has voluntarily opened herself<sup>14</sup> up to a probe of her emotional history by contending that the alleged discrimination caused her emotional distress.<sup>15</sup> By filing suit, she has virtually invited the defendant to explore her psychological records.<sup>16</sup>

In deciding whether to compel production of these records, courts have considered the patient/psychotherapist privilege<sup>17</sup> (and the exceptions thereto), privacy laws,<sup>18</sup> and the general relevance of the information sought.<sup>19</sup> The patient/psychotherapist privilege is waived, and the defendant can depose the plaintiff's therapist and compel production of the therapy records, if the plaintiff "introduces his mental or emotional condition as an element of his claim . . . and the judge . . . finds that it is more important to the interests of justice that the communication be disclosed than that

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12. See, e.g., *College-Town, Div. of Interco v. Massachusetts Comm'n Against Discrimination*, 508 N.E.2d 587, 594-95 (Mass. 1987) (construing MASS. GEN. L. ch. 151B, § 5 (1992)).

13. See, e.g., *Ferrell v. Brick*, 678 F. Supp. 111, 112-13 (E.D. Pa. 1987); *Mitchell v. Hutchings*, 116 F.R.D. 481, 483 (D. Utah 1987); *Cody v. Marriott Corp.*, 103 F.R.D. 421, 422-23 (D. Mass. 1984); *Lowe v. Philadelphia Newspapers, Inc.*, 101 F.R.D. 296, 298-99 (E.D. Pa. 1983); *Vinson v. Superior Court*, 740 P.2d 404, 407 (Cal. 1987).

14. The author chooses to use the female pronoun because most employment discrimination victims are women. Gender neutral language would imply that men are generally as likely to be victims of employment discrimination as women are, which is not true.

15. *Zabkowicz v. West Bend Co.*, 585 F. Supp. 635 (E.D. Wis. 1984); *Lowe*, 101 F.R.D. at 298; see also *Montana ex rel. Mapes v. District Court*, 822 P.2d 91, 94-95 (Mont. 1991) (therapy records discoverable in worker's compensation case where employee alleges damage to lungs and central nervous system). Discovery is also permitted in serious emotional distress cases not involving employment. See, e.g., *Evans v. Club Mediteranee, S.A.*, 585 N.Y.S.2d 33 (N.Y. App. Div. 1992).

16. *K.P. v. Packer*, 826 S.W.2d 664, 667 (Tex. Ct. App. 1992); see *infra* text accompanying note 22.

17. See, e.g., *Mapes*, 822 P.2d at 94-95 (construing MONT. CODE ANN. § 26-1-807 (1991)); *K.P.*, 826 S.W.2d at 665-67 (construing TEX. R. CIV. EVID. 510(d)(5)).

18. See, e.g., *Vinson v. Superior Court*, 740 P.2d 404, 410 (Cal. 1987) (construing CAL. CONST. art. I, § 1); see also *John C. v. Martha A.*, 592 N.Y.S.2d 229, 232 (City Ct. 1992) (construing U.S. CONST. amend. IX in housing case).

19. See *Davis v. Superior Court*, 9 Cal. Rptr.2d 331, 337 (Ct. App. 1992).

the relationship between patient and [therapist] be protected.”<sup>20</sup> As one court has explained:

[P]laintiff haled defendants into court and accused them of causing her various mental and emotional ailments. Defendants deny her charges. As a result, the existence and extent of her mental injuries is indubitably in dispute. In addition, by asserting a causal link between her mental distress and defendants' conduct, plaintiff implicitly claims it was not caused by a preexisting mental condition, thereby raising the question of alternative sources for the distress. We thus conclude that her mental state is in controversy.<sup>21</sup>

Another court has opined, “[w]hen a [plaintiff] seeks affirmative relief that places his mental condition in issue, his actions have already compromised the privacy interest behind the privilege.”<sup>22</sup>

However, even the courts quoted above read the exceptions to the patient/psychotherapist privilege narrowly,<sup>23</sup> or gave the plaintiff sanctuary under the state's privacy statutes.<sup>24</sup> The courts have refused to compel the plaintiff to “discard entirely her mantle of privacy.”<sup>25</sup>

Another consideration is the distinction between emotional *distress* and emotional *condition*.<sup>26</sup> Emotional *distress* has been de-

20. MASS. GEN. L. ch. 233, § 20B(c) (1992); *see also* MASS. GEN. L. ch. 112, § 135B(c) (1992) (patient/social worker privilege; same wording as patient/psychotherapist privilege).

21. *Vinson*, 740 P.2d at 409.

22. *K.P. v. Packer*, 826 S.W.2d 664, 667 (Tex. Ct. App. 1992).

23. *Id.* at 666. Importantly, in those cases where the court did permit either a mental examination of the plaintiff or a deposition of the plaintiff's therapist, the plaintiff had alleged *severe* emotional distress, not just emotional distress. *See, e.g.*, *Zabkowitz v. West Bend Co.*, 585 F. Supp. 635, 636 (E.D. Wis. 1984); *Lowe v. Philadelphia Newspapers, Inc.*, 101 F.R.D. 296, 298 (E.D. Pa. 1983); *Vinson*, 740 P.2d at 407.

24. *Montana ex rel. Mapes v. District Court*, 822 P.2d 91, 94 (Mont. 1991) (construing MONT. CONST. art. II, § 10).

25. *Vinson*, 740 P.2d at 410 (restricting scope of questioning in mental examination for sexual harassment plaintiff); *see also* *Robinson v. Jacksonville Shipyards, Inc.*, 118 F.R.D. 525, 528-29 (M.D. Fla. 1988) (refusing to order mental examination in sexual harassment case); *Cody v. Marriott Corp.*, 103 F.R.D. 421 (D. Mass. 1984) (refusing to order mental examination in employment discrimination case). The same holds true in the non-employment context. *See, e.g.*, *Midkiff v. Shaver*, 788 S.W.2d 399, 403 (Tex. Ct. App. 1990) (limiting scope of discovery to medical and hospital records related to mental anguish claims); *Davis v. Superior Court*, 9 Cal. Rptr.2d 331, 336 (Ct. App. 1992) (filing of “garden-variety” motor vehicle personal injury claim alleging emotional distress does not entitle defendant to inspect therapy records).

26. “Title VII comes into play before the harassing conduct leads to a nervous breakdown.” *Harris v. Forklift Systems, Inc.*, 114 S. Ct. 367, 370 (1993). The Court held, in the sexual harassment context, that Title VII is violated when a “reasonable



defined as the anguish a normal person would feel under given circumstances,<sup>27</sup> while emotional *condition* is something deeper. Injury to a plaintiff's emotional *condition* is akin to a permanent psychological scar,<sup>28</sup> and is alleged by few plaintiffs in employment discrimination cases. Thus, if the plaintiff's emotional reaction to the discrimination is within the normal range of what might be expected, it is no business of the defendant's if the plaintiff also happens to have other problems which contemporaneously cause emotional distress or even affect her emotional condition. On the other hand, a plaintiff alleging damage to her emotional condition may be subject to more intrusive discovery.

Given this distinction between emotional distress and emotional condition, some courts have resolved the discovery problem

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person" would find the working conditions hostile or abusive. *Id.* at 371. *Harris* is relevant to, but not dispositive of, the discovery issue. *Harris* addresses the question of liability, i.e., how much emotional distress must the sexual harassment cause the victim in order to constitute a Title VII violation. This article addresses the question of damages, i.e., whether and when a plaintiff who seeks emotional distress damages for a Title VII violation should be required to disclose her mental health history to the defendant.

There is no indication whether the defendant in *Harris* sought to discover the plaintiff's mental health records, or whether the plaintiff objected to such discovery request. Nonetheless, *Harris* says that "[a] discriminatorily abusive work environment, even one that does not seriously affect employees' psychological well-being, can and often will detract from employees' job performance, discourage employees from remaining on the job, or keep them from advancing in their careers." *Id.* at 370-71. By logical extension, if the employee's psychological well-being is *not* seriously affected, then the employee's "mental condition" is not in issue. See *supra* note 20 and accompanying text. If "mental condition" is not in issue, the patient-psychotherapist privilege is not waived, and the plaintiff should not be required to disclose her mental health history in order to collect emotional distress damages. If, however, the employee's psychological well-being is "seriously" affected, then a stronger argument can be made to compel disclosure of the therapy records, unless, of course, the discriminatory acts are so vile that they would be expected to "seriously" affect the psychological well-being of the "reasonable person." An example of such vile behavior would be the racial harassment and discharge of our hypothetical Joe. See *supra* text accompanying notes 7-8 for the section describing the hypotheticals. If Joe claims that the discrimination caused "serious" psychological harm, should he be compelled to produce his therapy records? *Harris* does not answer this question.

For other cases distinguishing between "emotional distress" and "emotional condition" in employment discrimination claims, see *Cody v. Marriott Corp.*, 103 F.R.D. 421, 422-23 (D. Mass. 1984) and *Robinson v. Jacksonville Shipyards, Inc.*, 118 F.R.D. 525, 531 (M.D. Fla. 1988). As a psychiatrist recently noted, "[s]evere distress is not equivalent to and does not necessarily result in a psychiatric diagnosis. Otherwise, practically everyone would be subject to a psychiatric diagnosis, since severe distress at one time or another is simply a consequence of being alive." Eric H. Marcus, *Sexual Harassment Claims: Who is a Reasonable Woman?*, 44 LAB. L.J. 646, 648 (1993).

27. *Midkiff v. Shaver*, 788 S.W.2d 399, 402 (Tex. Ct. App. 1990).

28. *Coates v. Whittington*, 758 S.W.2d 749, 752 (Tex. 1988), *superseded by statute as stated in Moore v. Wood*, 809 S.W.2d 621, 624 (Tex. Ct. App. 1991).

by determining 1) what is, and what is not, a normal emotional reaction to a particular form of discrimination,<sup>29</sup> and 2) whether the plaintiff in the particular case is alleging more distress than is normal.<sup>30</sup> The first determination is an objective one requiring no inquiry into the plaintiff's psychological history. The second determination is subjective and may, in some circumstances, require some probing of that history. The extent of that probe will depend on the type of distress, and the type of discrimination, alleged.<sup>31</sup>

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29. *Vinson v. Superior Court*, 740 P.2d 404, 409 (Cal. 1987) stated the following: A simple sexual harassment claim asking compensation for having to endure an oppressive work environment . . . would not normally create a controversy regarding the plaintiff's mental state. To hold otherwise would mean that every person who brings such a suit implicitly asserts he or she is mentally unstable, obviously an untenable proposition.

*Id.* Courts make a "common sense" determination of what is, and what is not, a "normal" emotional reaction. *See, e.g., Rowlett v. Anheuser-Busch, Inc.*, 832 F.2d 194, 204 (1st Cir. 1987) (jury is entitled to make "common sense judgment of the emotional complications that would accompany the intentional discrimination Rowlett suffered").

30. In *Vinson*, the court opined that Ms. Vinson's allegations of "diminished self-esteem, reduced motivation, sleeplessness, loss of appetite, fear, lessened ability to help others, loss of social contacts, anxiety, mental anguish, [and] loss of reputation" were "rather extreme." *Vinson*, 740 P.2d at 409-10; *see also Cody v. Marriott Corp.*, 103 F.R.D. 421, 423 (D. Mass. 1984).

31. *Rabidue v. Osceola Refining Co.*, 805 F.2d 611, 620 (6th Cir. 1986) (sexual harassment case), *cert. denied*, 481 U.S. 1041 (1987). The court stated the following:

[The court must consider] such objective and subjective factors as the nature of the alleged harassment, the background and experience of the plaintiff, her coworkers, and supervisors, the totality of the physical environment of the plaintiff's work area, the lexicon of obscenity that pervaded the environment of the workplace both before and after the plaintiff's introduction into its environs, coupled with the reasonable expectation of the plaintiff upon voluntarily entering that environment.

*Id.* The last clause of the sentence quoted from *Rabidue* ("coupled with the reasonable expectations") has been "roundly criticized and rejected." *Robinson v. Jacksonville Shipyards, Inc.*, 118 F.R.D. 525, 530 (M.D. Fla. 1988). According to *Robinson*, the subjectivity of the particular plaintiff's reaction must meet a minimum standard in order for the plaintiff to recover emotional distress damages. The plaintiff "must show that she is at least as affected as the reasonable person under like circumstances." *Id.*; *see also W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS* § 12, at 63 (5th ed. 1984). The EEOC disagrees, saying "[t]he fact that the [plaintiff] may be unusually emotionally sensitive and incur great emotional harm from discriminatory conduct will not absolve the [defendant] from responsibility for the greater emotional harm." EEOC Guidance, *supra* note 1, at 6225. The EEOC's standard does not conflict with the Supreme Court's "reasonable person" standard, as announced in *Harris v. Forklift Systems, Inc.*, 114 S. Ct. 367, 371 (1993). The EEOC is referring to the question of *damages* in discrimination cases generally, while *Harris* applies only to the question of *liability* in sexual harassment cases.

*Cf. Lowe v. Philadelphia Newspapers, Inc.*, 594 F. Supp. 123, 126 (E.D. Pa. 1984) (stating that "[t]estimony concerning [race discrimination] plaintiff's mental disorder which causes him or her to perceive criticism as harassment, and to perceive racial slurs

Courts have held that a plaintiff should not be forced to expose her therapy records in order to vindicate her civil rights unless the defense makes a strong showing that discovery is necessary to expose a false or exaggerated claim,<sup>32</sup> or the plaintiff claims emotional distress beyond what might be expected under the circumstances.<sup>33</sup>

The courts are guided by two public policies in this regard: the policy which encourages discrimination victims to exercise their civil rights,<sup>34</sup> and the policy which encourages people to seek therapy for their problems.<sup>35</sup> Considering the former policy, one court has opined that if a sexual harassment victim claiming emotional distress was compelled to submit to a mental examination, "[p]laintiffs in these cases would face sexual denigration in order to secure their statutory right to be free from sexual denigration."<sup>36</sup> As to the latter policy, another court observed, "it is highly probable that had [the employee] known the psychotherapist would be required to disclose his confidences, his trust in the psychotherapist would have been diminished and he may not have sought treatment

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where no racial motivation is present, is highly relevant to the question whether plaintiff's perception of racial harassment is correct.") *But see* Mitchell v. Hutchings, 116 F.R.D. 481, 485 (D. Utah 1987) which states that "[p]ast sexual conduct does not, as defendants would argue, create emotional calluses that lessen the impact of unwelcomed [sic] sexual harassment. The fact that the plaintiffs may welcome sexual advances from certain individuals has absolutely no bearing on the emotional trauma they may feel from sexual harassment that is unwelcome." *Id.*; *see also* Coates v. Whittington, 758 S.W.2d 749, 752 (Tex. 1988) ("tortfeasor takes a plaintiff as he finds him"), *superseded by statute as stated in* Moore v. Wood, 809 S.W.2d 621, 624 (Tex. Ct. App. 1991).

32. Schlagenhauf v. Holder, 379 U.S. 104, 121-22 (1964); *Coates*, 758 S.W.2d at 752 (defendant must show "connection or 'nexus' between [plaintiff's] pre-injury depression and her post-injury embarrassment").

33. *See, e.g.*, Vinson v. Superior Court, 740 P.2d 404 (Cal. 1987).

34. *See* Priest v. Rotary, 98 F.R.D. 755, 761 (N.D. Cal. 1983) (defendant in sexual harassment case claimed that plaintiff, a bar waitress, was the sexual aggressor and that plaintiff was fired for trying to "pick up" male customers; defendant sought names of all of plaintiff's sex partners over the past 10 years; court analogized case to rape cases prior to the enactment of shield laws). The court stated:

Discovery of intimate aspects of plaintiffs' lives . . . has the clear potential to discourage sexual harassment litigants from prosecuting lawsuits . . . .

The possibility that discovery tactics such as that used by defendant herein might intimidate, inhibit, or discourage Title VII plaintiffs . . . from pursuing their claims would clearly contravene the remedial effect intended by Congress in enacting Title VII, and should not be tolerated by the federal courts.

*Id.*; *see also* Robinson v. Jacksonville Shipyards, Inc., 118 F.R.D. 525, 531 (M.D. Fla. 1988) (refusing to compel mental examination of plaintiff in sexual harassment case).

35. *See, e.g.*, Sabree v. United Bhd. of Carpenters, Local 33, 126 F.R.D. 422 (D. Mass. 1989).

36. *Robinson*, 118 F.R.D. at 531.

at all.”<sup>37</sup> These policies deserve special attention in employment discrimination cases.

## II. THE “INFERENCE” OF EMOTIONAL DISTRESS IN DISCRIMINATION CASES

Much of what has been said thus far would apply to any case in which a plaintiff alleged emotional distress. But the public policy which encourages employment discrimination victims to come forward<sup>38</sup> should, as a corollary, grant these victims special protection against abusive discovery of their psychological histories. This protection is based on the “inference”<sup>39</sup> of emotional distress in em-

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37. *Sabree*, 126 F.R.D. at 426.

38. This policy is evinced in 42 U.S.C. § 2000e-5e(k) (1988 & Supp. III 1991), which provides that the losing party may be required, at the court’s discretion, to pay attorneys fees to the prevailing party. Prevailing plaintiffs are almost always awarded attorneys fees; prevailing defendants are awarded attorneys fees only if the plaintiff’s claim was frivolous, unreasonable, or groundless. See *Christianburg Garment Co. v. EEOC*, 434 U.S. 412, 417-19 (1978); GOODMAN, *supra* note 1, § 2.10[4]. This statute encourages claims by giving the plaintiff’s lawyer an added incentive to take the case on a contingent fee.

The policy is also evinced by the simple, inexpensive administrative procedure by which a claimant can bring her claim at the EEOC or at the fair employment practices agency of the state. There are no filing fees and there are no strict rules of evidence. See, e.g., MASS. GEN. L. ch. 151B, § 5 (1992).

39. *Buckley Nursing Home, Inc. v. Massachusetts Comm’n Against Discrimination*, 478 N.E.2d 1292, 1299 (Mass. App. Ct.), *rev. denied*, 482 N.E.2d 328 (Mass. 1985). The court stated that “the deep hurt usually felt by the victim of discrimination is the same no matter what guise the disparate treatment takes. . . . ‘[T]he finding of [discrimination] alone permit[s] the *inference* of emotional distress as a normal adjunct of the [employer’s] actions.’” *Id.* (emphasis added) (quoting *Bournewood Hosp., Inc. v. Massachusetts Comm’n Against Discrimination*, 358 N.E.2d 235, 243 (Mass. 1976)).

An “inference” is a “process of reasoning by which a fact or proposition sought to be established is deduced as a logical consequence from other facts, or a state of facts, already proved or admitted.” BLACK’S LAW DICTIONARY 917 (4th ed. 1968). An inference differs from a presumption in that “a presumption [is] a deduction which the law requires a trier of fact to make, [while] an inference [is] a deduction which the trier may or may not make, according to his own conclusions; a presumption is mandatory, an inference, permissible.” *Id.* at 917-18. The inference of emotional distress in employment discrimination cases means that the factfinder may (but is not required to) assume that the plaintiff suffered emotional distress if the plaintiff alleges it. The burden is then on the defendant to prove that the plaintiff did not suffer distress.

*Bournewood Hospital* differentiated employment discrimination claims from common law tort actions involving emotional distress:

The standards applicable to an award of damages for emotional distress, pain, and suffering under [MASS. GEN.] L. ch. 151B as a means of enforcing the [Massachusetts] employment discrimination statutes are, for obvious reasons of statutory construction and policy, not as stringent as those applicable to actions of tort for intentional infliction of emotional distress.

*Bournewood Hosp. v. Massachusetts Comm’n Against Discrimination*, 358 N.E.2d 235,

ployment discrimination cases.

Unlike the common law tort of negligent infliction of emotional distress, which usually involves one moment of shock followed by lingering flashbacks and other evanescent indicia of distress,<sup>40</sup> discrimination is usually a continuous or frequent source of stress.<sup>41</sup> Each time Betty is sexually harassed or Joe is subjected to racial epithets, it is a new jolt to their emotions. In a "negligent infliction" action, the plaintiff must prove that her emotional distress "was accompanied by physical injury manifested by objective symptoms" in order to recover damages, because it is difficult to distinguish between those negligent acts which do cause emotional distress and those which do not.<sup>42</sup> In such cases, courts must strike a proper balance between the "fear of fraudulent claims and the danger of shutting the doors of the courthouse to worthy plaintiffs."<sup>43</sup> That balance is struck by requiring physical injury, which is more difficult to fabricate than "emotional distress."<sup>44</sup>

But the tort of *intentional* infliction of emotional distress requires no allegation or proof of physical injury.<sup>45</sup> Distress is inferred from the purposive nature of the defendant's conduct, if the conduct is sufficiently "outrageous."<sup>46</sup> CRA 91 likens employment discrimination to *intentional* infliction of emotional distress,

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243 n.11 (Mass. 1976). See generally Shawna H. Yen, *Redressing the Victim of Racist Speech After R.A.V. v. St. Paul: A Proposal to Permit Recovery in Tort*, 26 COLUM. J.L. & SOC. PROBS. 589, 601-02 (1993) ("Studies show that victims of racist speech and other acts of racism experience high blood pressure, stress disorders, low self-esteem, depression, and psychological problems."); Paul T. Hayden, *Religiously Motivated "Outrageous" Conduct: Intentional Infliction of Emotional Distress as a Weapon Against "Other People's Faiths,"* 34 WM. & MARY L. REV. 579 (1993); Daniel S. Alcorn, Case Note, 40 DRAKE L. REV. 415, 423 (1991) ("Indignity, humiliation, and frustration are expected as common reactions to discrimination.")

40. See, e.g., *Sullivan v. Boston Gas Co.*, 605 N.E.2d 805 (Mass. 1993). In *Sullivan*, the gas company negligently caused an explosion which burned a man's home while the man watched. The plaintiff alleged that he suffered emotional distress with symptoms including insomnia, gastrointestinal distress, nightmares, and difficulty driving and working, for months afterward. *Id.* at 806-07.

41. See KEETON ET AL., *supra* note 31, § 12, at 62. In an intentional infliction of emotional distress tort, "[i]t is seldom that any one such item of conduct is found alone in a case; and the liability usually has rested on a prolonged course of hounding." *Id.* Prosser and Keeton also note that the harm is magnified when the defendant has a position of power over the plaintiff. *Id.* § 12, at 61. That is apropos of an employment discrimination case, in which the boss has power over the employee's livelihood.

42. See *Sullivan*, 605 N.E.2d at 808-10; see also KEETON ET AL., *supra* note 31, § 54, at 359-62.

43. *Sullivan*, 605 N.E.2d at 808.

44. KEETON ET AL., *supra* note 31, § 54, at 362.

45. See, e.g., *Haddad v. Gonzalez*, 576 N.E.2d 658, 667 (Mass. 1991).

46. KEETON ET AL., *supra* note 31, § 12, at 64. "[I]f the enormity of the outrage

rather than *negligent* infliction of emotional distress.<sup>47</sup> Where the discrimination is intentional, “feelings of inferiority, personal humiliation, and the like are the rule rather than the exception.”<sup>48</sup> Once the factfinder determines that intentional discrimination did occur, emotional distress is inferred.<sup>49</sup>

Another reason to infer emotional distress in discrimination cases is found in the legislative purpose underlying the civil rights laws. These laws were enacted because no common law remedy existed to redress the discriminatory treatment of historically oppressed groups. But Title VII as it existed between 1964 and 1991 contained a gap. If our hypothetical Joe landed another job immediately after he was fired, and if the new job paid as much as or more than the former job, Joe was not entitled to damages under Title VII. Title VII formerly provided only back pay and reinstatement, not emotional distress damages. By making emotional distress damages recoverable under Title VII, and by omitting any requirement that the plaintiff allege or prove that the distress caused physical pain, Congress plainly declared that emotional distress should be inferred in a discrimination claim.

For these reasons, it is not accurate to say that a plaintiff in an employment discrimination case has “introduced” her mental “condition” into the litigation by alleging emotional distress. It is more accurate to say that the defendant introduced it by discriminating against the plaintiff.

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itself carries conviction that there has in fact been severe and serious mental distress, which is neither feigned nor trivial, bodily harm is not required.” *Id.*

47. While CRA 91 provides emotional distress damages in cases of *intentional* discrimination, such damages are not available in “disparate impact” cases, which are a form of negligent discrimination. 42 U.S.C. § 1981a(a)(1) (Supp. III 1991). In disparate impact situations, the employer did not intend to discriminate, but the employer’s actions nonetheless had a discriminatory impact against a protected class.

An example of “disparate impact” is a “no beard rule.” Prohibiting beards might exclude a disproportionate number of blacks from employment, as evidenced by studies indicating that blacks are far more likely to suffer from pseudofolliculitis barbae, a condition which makes shaving difficult, than whites are. *See Richardson v. Quik Trip Corp.*, 591 F. Supp. 1151 (S.D. Iowa 1984). Such a rule is discriminatory unless the employer can demonstrate that the rule is “job-related” and consistent with “business necessity.” 42 U.S.C. § 2000e-2(k)(1)(A)(i) (Supp. III 1991).

48. Larry Heinrich, *The Mental Anguish and Humiliation Suffered by Victims of Housing Discrimination*, 26 J. MARSHALL L. REV. 39, 44 n.22 (1992).

49. *Buckley Nursing Home, Inc. v. Massachusetts Comm’n Against Discrimination*, 478 N.E.2d 1292, 1299 (Mass. App. Ct.), *rev. denied*, 482 N.E.2d 328 (Mass. 1985). *See supra* note 39 for a discussion of the *Buckley Nursing Home* case.

### III. THE PLAINTIFF'S NEED FOR SECRECY

It becomes necessary at this point to illustrate exactly why plaintiffs fear releasing their psychotherapy records. The reason can be summed up in one (hyphenated) word: "Catch-22." That term, of course, is the title of a famous book (and movie) about World War II flyers who wanted to be excused from further combat missions because they had been driven insane by the ravages of war. The "catch" was that if they were sane enough to realize that they should not fly, they were sane enough to fly.<sup>50</sup>

Several courts have adopted the "Catch-22" term in describing a plaintiff's right to privacy regarding mental health records in discrimination cases.<sup>51</sup> The "catch" is that on the one hand, if the plaintiff did *not* seek therapy during the time the discrimination was allegedly causing her emotional distress, or if she sought therapy for reasons having nothing to do with the job-related distress, the defendant will argue that the plaintiff must not have been bothered too much by the discrimination. On the other hand, if the plaintiff was already in therapy at the time the discrimination occurred, or even if she sought therapy as a result of the discrimination, she must have told her therapist about all kinds of other problems in her life, and the defendant will argue that these problems indicate pre-existing emotional instability. The defendant will argue that this instability, rather than the discrimination, is the true cause of her emotional distress.

Defense counsel therefore argues that if the plaintiff did not undergo therapy, the plaintiff is entitled to little or no damages. If the plaintiff did undergo therapy, defense counsel will argue that the plaintiff is still entitled to little or no damages because she was emotionally unstable even before the alleged discrimination.

This Title VII remake of "Catch-22" rests on two fallacies. The first is the belief that everyone who goes to a therapist is mentally ill<sup>52</sup> (hereinafter Proposition 1). The second is the belief that everyone who does not go to a therapist feels psychologically well (hereinafter Proposition 2).

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50. JOSEPH HELLER, CATCH-22 46-47 (1961).

51. *Priest v. Rotary*, 98 F.R.D. 755, 761 (N.D. Cal. 1983); *Vinson v. Superior Court*, 740 P.2d 404, 411 (Cal. 1987).

52. SARA D. GILBERT, WHAT HAPPENS IN THERAPY 18 (1982) ("Another common misconception is that only people who are mentally ill go to psychotherapists, so being in therapy—'having your head shrunk'—*proves* that you have serious mental problems.").

Proposition 1 ignores the fact that many people seek therapy for reasons other than mental illness.

Just as much of a physician's job is to keep people healthy, rather than simply to cure disease, much of psychotherapy is devoted to helping basically well people sort things out, resolve daily conflicts, and feel better about themselves. . . .

. . . .

. . . We *all* have thoughts, dreams, wishes, feelings or memories that we consider strange . . . .

Therapists, though, have seen this kind of "*normal craziness*" in many people . . . .<sup>53</sup>

As Freud said:

[T]he healthy man . . . possesses those factors in mental life which alone can bring about the formation . . . of a symptom, and we must conclude further that the healthy also have instituted repressions and have to expend a certain amount of energy to maintain them . . . . The healthy man too is therefore virtually a neurotic . . . .

The difference between nervous health and nervous illness (neurosis) is narrowed down therefore to a practical distinction, and is determined by the practical result—how far the person concerned remains capable of a sufficient degree of capacity for enjoyment and active achievement in life.<sup>54</sup>

Yet even for mild, ordinary emotional problems, therapy can be intense, exploring the plaintiff's deepest, darkest secrets. Psychotherapy frequently involves taking a detailed family and medical history from the patient, and then asking the patient to engage in free association,<sup>55</sup> whereby the patient may reveal highly embarrassing tidbits which span the patient's entire life, and which the therapist's notes and testimony could reveal in graphic detail.<sup>56</sup>

53. *Id.* at 19 (emphasis added).

54. SIGMUND FREUD, A GENERAL INTRODUCTION TO PSYCHOANALYSIS 397-98 (J. Riviere trans., authorized English rev. ed. 1943).

55. FRANK J. BRUNO, THE FAMILY MENTAL HEALTH ENCYCLOPEDIA 144 (1991).

56. See, for example, SILVANO ARIETI & JULES BEMPORAD, SEVERE AND MILD DEPRESSION: THE PSYCHOTHERAPEUTIC APPROACH 318-20 (1978), describing the case history of a male patient with *mild* depression. The therapist's notes are as follows:

[Patient] picture[d] himself having relations with beautiful women who threw themselves on him, with this type of fantasy frequently accompanied by masturbation. [His] attempts at self-stimulation were not always successful and were often accompanied by shame and guilt . . . .

. . . .

[Patient had sex with a prostitute. She liked patient and asked him to



Freud instructed patients to “freely associate” by imagining themselves looking out the window on a railroad journey, and to observe and relate to him anything that entered the patient’s mind. In modern terms, this might be described as videotaping the patient’s mental images. The patient might recall some previously repressed memory of childhood, or an embarrassing bodily dysfunction. Permitting discovery of the plaintiff’s therapy records can be compared to requiring the plaintiff to hand over the “mental videotape.” The horror and humiliation of doing so can be appreciated if the reader would put this article down for a few minutes, relax, and let her mind roam freely with the “camcorder” running. How would the reader feel about turning the tape over to an adversary?

Proposition 2 (“If they don’t seek therapy, they must feel fine”) ignores the fact that most people with emotional problems never undergo therapy. According to the American Psychiatric Association, 80% of depression sufferers “fail to recognize the illness and get the help they need.”<sup>57</sup> An estimated 8.3% of the population suffer anxiety disorders which, in most cases, are not known to anyone but the patient and perhaps the patient’s family, yet only 23% of these people seek help.<sup>58</sup> In many, if not most, cases, these disorders do not affect the person’s ability to work.

Thirty million Americans suffer the agony of recurring headaches.<sup>59</sup> The most common type of headache is the “tension” (or “muscle contraction”) headache, caused by emotional distress.<sup>60</sup> Many people undergo psychotherapy (which literally means “treating the mind”) for headache relief,<sup>61</sup> reasoning that aspirin relieves the symptoms but does not treat the cause.

Many great historical figures such as Lincoln and Churchill suffered from depression.<sup>62</sup> Senator Thomas Eagleton of Missouri was removed from the Democratic presidential ticket in 1972 because it was revealed that he had undergone electroshock therapy 12 years

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return] and she would offer her services gratis. After a great deal of deliberation, [patient] did return but was impotent.

*Id.*

57. DIANNE HALES, *DEPRESSION* 15 (1989).

58. JOHN H. GRIEST ET AL., *ANXIETY AND ITS TREATMENT* 18 (1986).

59. JOEL R. SAPER & KENNETH R. MAGEE, *FREEDOM FROM HEADACHES* 15 (1978).

60. *Id.* at 96.

61. *Id.* at 44-45.

62. Nancy Wartik, *Defeating Depression*, *AMERICAN HEALTH*, Dec. 1993, at 38, 39-40.

earlier for depression.<sup>63</sup> When former Senator Lawton Chiles of Florida ran for governor in 1990, Chiles was hurt by revelations that he had left the Senate in 1988 because he felt “burnt out” and that he was treated for depression with the popular antidepressant drug Prozac (Chiles managed to win anyway).<sup>64</sup>

In all likelihood, Lincoln, Churchill, Eagleton, and Chiles were no more ill than millions of Americans who do not seek therapy but who nonetheless have equally serious, or more serious, emotional problems. Yet if Eagleton or Chiles had ever filed a suit which alleged that the defendant had caused them emotional distress, defense counsel would have had a field day exploring their therapy records.

Proposition 2 also ignores the fact that there is little a psychotherapist can do for someone who suffers discrimination-related emotional distress. Such distress has an *external* cause, not an internal one. To suggest that Joe should seek therapy to cope with racial slurs is like suggesting that someone who knows his boss is going to hit him over the head with a hammer should take a few aspirin before he gets to work. From a strictly technical standpoint, the pain one feels from a hammer blow comes from within the body,<sup>65</sup> but the hammer is external. There is little or nothing a doctor can do before the blow, or even after the blow, to ease the pain. The best advice the doctor can give the patient is to wear a helmet or quit the job. But there is no helmet Joe can wear that will afford him the protection he needs at work, and thus there is no reason to expect Joe to seek therapy for his discrimination-related stress.

Defense counsel will argue, of course, that if Joe is in therapy anyway, Joe is probably hypersensitive to insults. But that gets back to Proposition 1 (“Everyone who goes to a therapist is mentally ill”). Judges and juries should be competent to separate the stress caused by the discrimination from the stress caused by other factors in the plaintiff’s life without requiring the plaintiff to surrender therapy records in discovery.

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63. MICHAEL BARONE ET AL., *THE ALMANAC OF AMERICAN POLITICS* 1980 489 (1979). The Eagleton incident prompted a noted historian to observe, “American ignorance of mental health being what it is, even a mild history of depression disqualifies a politician from running for national office.” WILLIAM MANCHESTER, *THE GLORY AND THE DREAM: A NARRATIVE HISTORY OF AMERICA 1932-1972* 1286 (1974).

64. Holly Idelson, *Governors Find Re-Election a Trickier Proposition*, 48 CONG. Q. 3838, 3840 (1990).

65. “[A]ll pain is mental, and centers in the brain . . . .” *Hargis v. Knoxville Power Co.*, 94 S.E. 702, 703 (N.C. 1917), *quoted in* KEETON ET AL., *supra* note 31, § 12, at 55 n.5.

A well-adjusted black man of normal sensitivity will suffer emotional distress if he is subjected to racial slurs at work, as will a well-adjusted woman whose co-workers constantly leer at her. Should these victims be expected to seek psychotherapy? And if they are in therapy, should they be expected to dwell on this problem with the therapist? What would a psychotherapist tell these victims? They are suffering the way any normal person in their circumstances would. They are like the tenant whose apartment is full of rats—rats in the bathtub, rats in the kitchen, rats in her child's bed.<sup>66</sup> If the tenant sues her landlord and alleges that the infestation is causing her emotional distress, should the landlord be able to inspect the tenant's therapy records? Is there anything a therapist could do for her anyway? The therapist cannot get rid of the rats.

That is why discrimination-related emotional distress is actionable even in the absence of psychological or psychiatric consultation, expert testimony, or physical symptoms.<sup>67</sup> Physical symptoms are unnecessary because a discrimination victim can suffer considerable distress without necessarily feeling stomach pain, head pain, insomnia, or other indicia of distress.<sup>68</sup> And even if the plaintiff does suffer physical symptoms, is it really fair to expect him or her to take medication?<sup>69</sup> This is akin to asking the man who is about to be hit with a hammer to take aspirin. The medication might help a little, but it frequently has unpleasant side effects and it never solves the problem.

#### IV. THE SOLUTION

Two principles should provide guidance in deciding whether to permit discovery of an employment discrimination plaintiff's psychological history. First, discrimination is emotionally distressing to

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66. The rat analogy is a slight variation of the cockroach and rodent problem in *Haddad v. Gonzalez*, 576 N.E.2d 658, 660 n.3 (Mass. 1991) (holding that physical injury is not necessary to recover emotional distress damages).

67. See EEOC Guidance, *supra* note 1, ¶ 5360, at 6226 ("The 'plaintiff's own testimony may be solely sufficient to establish humiliation or mental distress.'") (quoting *Williams v. TransWorld Airlines, Inc.*, 660 F.2d 1267, 1273 (8th Cir. 1981)); *Hy-Vee Food Stores, Inc. v. Civil Rights Comm'n*, 453 N.W.2d 512, 526 (Iowa 1990); *Franklin Publishing Co. v. Massachusetts Comm'n Against Discrimination*, 519 N.E.2d 798, 800 (Mass. App. Ct. 1988); *Buckley Nursing Home, Inc. v. Massachusetts Comm'n Against Discrimination*, 478 N.E.2d 1292, 1299 (Mass. App. Ct. 1985).

68. KEETON ET AL., *supra* note 31, § 12, at 64.

69. "[T]he law does not tolerate employment discrimination and neither does the law require victims of discrimination to develop a tolerance for it." *Alcorn*, *supra* note 39, at 423 (quoting Appellee's Brief and Argument at 8, *Hy-Vee Food Stores v. Iowa Civil Rights Comm'n*, 453 N.W.2d 512 (Iowa 1990) (No. 88-934)).

a person of normal sensitivity.<sup>70</sup> Second, everyone should be entitled to seek psychotherapy without fear that the therapy sessions will be revealed to their adversaries if they become plaintiffs in employment discrimination cases.<sup>71</sup> With these principles in mind, courts should take the following steps to resolve the discovery problem.

The court should first focus on the offensiveness of the employer's alleged discriminatory conduct.<sup>72</sup> Betty's co-workers are uncouth and have created a hostile work environment. Her boss ignored the problem and, to make things worse, transferred Betty to a less rewarding job. This would certainly cause some emotional distress to any employee. Sue's case is not so clear. She is alleging that she was terminated because she was pregnant, but a non-pregnant employee was also dismissed, and the company was downsizing anyway. She did, of course, lose her job, which would be highly distressing for anyone. In Joe's case the conduct was despicable and would obviously cause distress to the most well-adjusted black employee.

The court should then look at the type of distress the plaintiff alleges she suffered as a result of the discrimination.<sup>73</sup> Rarely are the plaintiff's specific symptoms listed in the complaint, so the court should ask the plaintiff to list these symptoms in a sworn affidavit attached to a motion for a protective order. Of course, the defendant could also ascertain these symptoms by deposing the plaintiff or through interrogatories. The court can then make a common-sense determination of whether these symptoms are more severe than what might be expected if the plaintiff's allegations about the discriminatory acts are true.

For example, if Betty simply says, "I suffer headaches from the harassment," the defendant should be entitled to inquire whether Betty suffered headaches before the harassment began. If Betty admits that she did, but asserts that the harassment has made the headaches worse, that should be enough to halt any further intrusion into her privacy. As long as the jury knows that Betty was previously a headache sufferer and merely claims that harassment exacerbated the headaches, there is no need to tell the jury that Betty had an abortion. If, on the other hand, Betty claims in her

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70. *See supra* notes 38-49 and accompanying text.

71. *See supra* notes 50-69 and accompanying text.

72. *See supra* note 26.

73. *Davis v. Superior Court*, 9 Cal. Rptr.2d 331, 335-36 (Ct. App. 1992); *Midkiff v. Shaver*, 788 S.W.2d 399, 401 (Tex. Ct. App. 1990).

affidavit that her headaches are due *entirely* to the harassment, the court has a more difficult choice. Betty, of course, is lying. But the court and the defendant do not know that. Given the severity of Betty's alleged symptoms, the defendant should have the right to seek an *in camera*<sup>74</sup> inspection of the records by the judge, or to compel the therapist to submit an affidavit to be read by the judge only, not defense counsel. Alternatively, Betty's regular physician could be compelled to produce any records which would indicate whether Betty has complained about headaches in the recent past.<sup>75</sup> If the judge determines that Betty lied, then the case is probably over and Betty will be charged with contempt or perjury.

This procedure, of course, does not fully comport with the adversary process.<sup>76</sup> If the judge prohibits discovery, defense counsel

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74. *Sabree v. United Bhd. of Carpenters, Local 33*, 126 F.R.D. 422, 426 (D. Mass. 1989); *Commonwealth v. Bishop*, 617 N.E.2d 990, 998 (Mass. 1993) (finding that victim's therapy records in rape case should be reviewed by the judge "*in camera*, out of the presence of all other persons" (emphasis added)).

75. In most cases, the physician's records are less embarrassing to the plaintiff than the psychotherapy records are. See *In re "B"*, 394 A.2d 419, 425 (Pa. 1978). The EEOC stated, "[s]ince medical evidence is important, a *medical release* should be obtained from the [plaintiff] whenever emotional or physical harm is alleged." EEOC Guidance, *supra* note 1, ¶ 5360, at 6227 (emphasis added). What this means, of course, is that the EEOC thinks that any plaintiff who alleges "emotional harm" should be compelled to sign a form which requests her physicians to send copies of her "medical" records to the defendant. "Medical" records should not be interpreted to mean "therapy" or "psychiatric" records, because the EEOC Guidance also differentiates between "medical" and "psychiatric" records. *Id.* Nonetheless, "medical" records are highly sensitive and can be extremely embarrassing. The EEOC's position that the medical records should be released whenever the plaintiff claims "emotional harm" is clearly at odds with many cases, such as *Vinson v. Superior Court*, 740 P.2d 404, 408-09, 411 (Cal. 1987), which held that a *routine* allegation of emotional *distress* does not make the plaintiff's emotional *condition* an issue. In the author's opinion, the EEOC Guidance is overbroad in this regard and will deter many discrimination victims from exercising their rights. This EEOC Guidance was promulgated on July 14, 1992, during the waning months of the Bush Administration. The author hopes that the EEOC under the Clinton Administration will take a more flexible approach on "medical releases."

76. According to the Massachusetts Supreme Judicial Court, "[t]he danger lurking in the practice of . . . *in camera* review [of privileged documents] by the trial judge is a confusion between the roles of trial judge and defense counsel. The judge is not necessarily in the best position to know what is necessary to the defense." *Commonwealth v. Stockhammer*, 570 N.E.2d 992, 1001 (Mass. 1991) (quoting *Commonwealth v. Clancy*, 554 N.E.2d 395, 398-99 (Mass. 1988)).

However, the United States Supreme Court has upheld *in camera* inspections of records over the objection that defendants and defense counsel are thereby barred from seeing the records which the plaintiff supplied to the court and which the court used to decide the discovery dispute. In *Pennsylvania v. Ritchie*, 480 U.S. 39, 59-61 (1987), the Court observed that

[a]lthough this rule denies Ritchie the benefits of an "advocate's eye," we note that the trial court's discretion is not unbounded. If a defendant is aware of

will never have the opportunity to inspect the records upon which the judge made the decision.<sup>77</sup> But this approach meets the defendant halfway, which is better than not at all, and certainly better than all the way, since unfettered discovery could devastate a plaintiff who had undergone therapy but who had not suffered headaches prior to the discrimination.

Sue is, in effect, alleging *severe* emotional distress. Although stress can cause a miscarriage,<sup>78</sup> the alleged discriminatory conduct in her case might, or might not, cause a "normal" employee to miscarry. Some discovery into Sue's personal life, including her marital problems of a year ago, should probably be permitted. On the other hand, Joe's allegation of emotional distress is quite normal under the circumstances. Therefore, discovery of psychological records is unwarranted in Joe's case.

Another approach would be to ask the plaintiff to place a dollar maximum on the monetary recovery she seeks for emotional distress. If the figure is modest in relation to the offensiveness of the harm alleged, there is no reason to intrude into the therapy records. On the other hand, if the figure is high in proportion to the harm, then perhaps the plaintiff has "invited" close scrutiny of her psychological records.

The court should also consider the remoteness of events noted in the plaintiff's psychological records. Although events of the distant past can affect a patient's current emotional status, it seems ridiculous to permit discovery which would reveal events which happened long ago.<sup>79</sup> Here again, a halfway approach is sensible.

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specific information contained in the file . . . , he is free to request it directly from the court, and argue in favor of its materiality.

*Id.* at 60.

This passage from *Ritchie* prompted the Massachusetts court to invoke the "Catch-22" term:

A threshold requirement, so framed, could place the defendant in a "Catch-22" situation. "To gain access to the privileged records defendant must specifically allege what useful information may be contained in the target records. However, defendant has no way of making these specific allegations until he has seen the contents of the records."

*Bishop*, 617 N.E.2d at 996 n.6 (quoting *People v. Foggy*, 521 N.E.2d 86, 96 (Ill.) (Simon, J., dissenting), *cert. denied*, 486 U.S. 1047 (1988)). The court in *Bishop* nevertheless endorsed the *in camera* procedure in rape cases, thus modifying its earlier holding in *Stockhammer*, 570 N.E.2d at 1002-03. *Bishop*, 617 N.E.2d at 997.

77. *Bishop*, 617 N.E.2d at 996-98.

78. KEETON ET AL., *supra* note 31, § 12, at 55-56, § 54, at 363.

79. *Mitchell v. Hutchings*, 116 F.R.D. 481, 484 (D. Utah 1987) ("[E]vidence of sexual conduct which is remote in time or place to plaintiffs' working environment is irrelevant.").

Privacy interests are not served merely by limiting discovery to records of *recent* therapy. Even recent records may include information about the plaintiff's childhood and adolescence that could be embarrassing. The court should, as best as possible, confine discovery to "the medical and hospital records and questions related to the medical attention sought for the symptoms of the . . . mental anguish claims."<sup>80</sup>

This is admittedly problematical. It is difficult to separate the records pertaining to the discrimination-related stress and the stress caused by other problems in the plaintiff's life. In many cases, it will be like trying to unscramble eggs. However, an effort should be made. The court might seek the opinion of an independent forensic expert on the causation question.<sup>81</sup> The more remote in time the other stressful incidents are from the discrimination, the heavier the burden should be on the defendant to establish a causal link.<sup>82</sup>

In close cases, the court might permit the plaintiff's therapist to be deposed but not permit the therapist's notes to be revealed. The notes will often be misleading and prejudicial,<sup>83</sup> if not incomprehensible. The live testimony of the therapist will be more probative of the plaintiff's circumstances. If appropriate, limitations can be placed on defense counsel's probing into certain remote events.

In taking these steps, the court should be wary of the possibility that the plaintiff has exaggerated the outrageousness of the defendant's discriminatory conduct. Joe, for example, was able to avoid discovery by alleging that his boss constantly uttered racial slurs. What if it turns out that the boss engaged in such misconduct only when Joe himself used racial slurs? In the end, the jury might find that Joe was indeed a victim of racial discrimination and might award Joe a significant sum in emotional distress damages. However, because Joe exaggerated the facts in his affidavit (he did not lie, he just omitted some of the facts), the court might be justified in ordering a remittitur, lowering the monetary award to Joe on the basis that the defendant should have been permitted to conduct some discovery into Joe's psychological history.

Finally, the court should hesitate to draw adverse inferences from the lack of physical symptoms. Just because Joe did not suffer headaches or insomnia or need to take medication does not mean

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80. *Midkiff v. Shaver*, 788 S.W.2d 399, 403 (Tex. Ct. App. 1990).

81. *Ferrell v. Brick*, 678 F. Supp. 111, 113 (E.D. Pa. 1987).

82. *Mitchell*, 116 F.R.D. at 484.

83. *Ferrell*, 678 F. Supp. at 112.

that Joe did not suffer emotional distress. The lack of physical symptoms should not provide an excuse to delve into the plaintiff's psychological past.<sup>84</sup>

#### CONCLUSION

Millions of American workers are effectively thwarted from exercising their civil rights merely because they have undergone psychotherapy. The possibility that they will be forced to turn over their therapy records to the defendant leaves them like turtles without shells, unprotected from the ravages of the litigation process. There is always, to be sure, a danger that plaintiffs will exaggerate their claims of emotional distress if defendants are not permitted to conduct comprehensive discovery. Hopefully this article and the authorities cited herein will be useful to courts and litigants as they strive to reconcile these competing interests.

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84. See *supra* notes 38-49 and accompanying text for a discussion of the "inference" of emotional distress in discrimination cases.