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Scalpel Please: Cutting to the Heart of Medical Records Disputes in Employment Law Cases

Megan I. Brennan

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**SCALPEL PLEASE: CUTTING TO THE HEART
OF MEDICAL RECORDS DISPUTES IN
EMPLOYMENT LAW CASES**

Megan I. Brennan[†]

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I. INTRODUCTION

In employment law cases where a plaintiff pursues damages for emotional distress, defendants often seek unrestricted access to plaintiff's medical records on the basis that the records may potentially contain evidence regarding alternative stressors contributing to the plaintiff's emotional distress. The general point that any physical malady might cause emotional distress may be true, "but it scarcely gives defendants a license to rummage through all aspects of the plaintiff's life in search of a possible source of stress or distress, particularly with respect to information that the governing law treats as especially sensitive."¹ Even in situations where there is no applicable psychotherapist-patient or physician-patient privilege, or there has been a waiver of the privilege(s), the defendant is not entitled to *carte blanche* access to a lifetime of plaintiff's medical records. "Because of the recognized sensitivity of medical records, a party seeking their disclosure must make a strong and clear showing of such relevance, and mere generalizations that medical records of unspecified matters might relate in some unspecified way to a claim of emotional distress is obviously inadequate."²

There is no uniformity on how federal courts analyze the discovery of plaintiffs' medical records in employment law cases involving emotional distress.³ When it comes to these cases, courts frequently struggle with what Federal Rule of Civil Procedure applies to their production, the scope of the production, and privilege and waiver issues. Courts often "conflate privilege/waiver with relevancy, medical records with medical examinations, and generic medical records with mental-health-related medical records."⁴ This article urges a thorough, tailored, and legally sound approach to determining issues relating to the production of

1. *Evanko v. Elec. Sys. Assocs., Inc.*, No. 91 CIV. 2851, 1993 WL 14458, at *2 (S.D.N.Y. Jan. 8, 1993).

2. *Id.*

3. Although this Article references states' laws generally, the primary focus is on how federal courts handle this issue.

4. *John Doe I v. Mulcahy, Inc.*, No. 08-306, 2008 WL 4572515, at *4 (D. Minn. Oct. 14, 2008); *see also Carr v. Double T Diner*, No. WMN-10-CV-00230, 2010 WL 3522428, at *3 n.4 (D. Md. Sept. 8, 2010) (suggesting that the plaintiff did not appreciate the different analytical frameworks governing privilege waiver, Rule 35 independent mental examinations, and discovery of medical records).

medical records in employment cases involving emotional distress damages.⁵

This article will first provide an overview of emotional distress damages in employment law cases.⁶ Then it will discuss the application of the Federal Rules of Civil Procedure and the Federal Rules of Evidence to the production of medical records for claims involving emotional distress damages.⁷ Thereafter, the article will summarize the vastly different results that courts have reached on the issues of temporal and substantive scope of medical records.⁸ Next, the article will explore the psychotherapist-patient and physician-patient privileges.⁹ After that, the article will discuss privacy concerns relating to the production of medical records.¹⁰ Finally, the article will suggest an approach for parties, and an analytical framework for courts, to efficiently and effectively resolve disputes relating to medical records in employment law cases involving claims of emotional distress.¹¹

II. EMOTIONAL DISTRESS IN EMPLOYMENT LAW CASES

Plaintiffs may recover emotional distress damages for a variety of claims that typically arise in the employment context. Emotional distress damages are recoverable under various statutes, including Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act, 42 U.S.C. § 1981, and 42 U.S.C. § 1983, as well as under certain other federal and state statutes providing protection for employees.¹² They are also available in connection with tort causes of action such as intentional infliction of emotional distress, fraud, defamation, or wrongful discharge cases based on a tort theory.¹³

5. This Article does not specifically address the discoverability of medical records in cases involving disability claims under the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101–12213 (2012), the Rehabilitation Act of 1973, 29 U.S.C. §§ 701–797, or state law. Nor is it intended to specifically relate to cases involving physical injuries suffered by plaintiffs.

6. *See infra* Part II.

7. *See infra* Part III.

8. *See infra* Part IV.

9. *See infra* Part V.

10. *See infra* Part VI.

11. *See infra* Part VII.

12. *See generally* 1 PAUL H. TOBIAS, LITIGATING WRONGFUL DISCHARGE CLAIMS § 8:5 (2014), available at Westlaw.

13. *Id.*

To recover damages for emotional distress, a plaintiff does not have to demonstrate that her mental distress is severe or accompanied by a physical injury, nor must she have proof of medical treatment.¹⁴ A plaintiff's own testimony is a sufficient basis for emotional distress or mental anguish, and such an award need not be supported by expert testimony.¹⁵ However, an award of emotional distress damages must still be supported by "competent evidence of 'genuine injury.'"¹⁶ As noted in the Equal Opportunity Employment Commission (EEOC) Policy Guide:

Emotional harm will not be presumed simply because the complaining party is a victim of discrimination. The existence, nature, and severity of emotional harm must be proved. Emotional harm may manifest itself, for example, as sleeplessness, anxiety, stress, depression, marital strain, humiliation, emotional distress, loss of self esteem, excessive fatigue, or a nervous breakdown. Physical manifestations of emotional harm may consist of ulcers, gastrointestinal disorders, hair loss, or headaches.¹⁷

As with other categories of damages, a plaintiff must show that the emotional distress was proximately caused by the defendant's illegal conduct.¹⁸ Moreover, a plaintiff seeking emotional distress

14. See, e.g., *Williams v. Trans World Airlines, Inc.*, 660 F.2d 1267, 1272 (8th Cir. 1981) ("[S]pecific proof of out-of-pocket losses or medical testimony . . . is not necessary." (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974))); *Gillson v. State Dep't of Natural Res.*, 492 N.W.2d 835, 842 (Minn. Ct. App. 1992) ("Recoverable pain and suffering does not have to 'be severe or accompanied by physical injury.'" (quoting *Bradley v. Hubbard Broadcasting, Inc.*, 471 N.W.2d 670, 677 (Minn. Ct. App. 1991))).

15. See *Kim v. Nash Finch Co.*, 123 F.3d 1046, 1065 (8th Cir. 1997) ("Medical or other expert evidence is not required to prove emotional distress." (citing *Turic v. Holland Hospitality, Inc.*, 85 F.3d 1211, 1215 (6th Cir. 1996))); *Moody v. Pepsi-Cola Metro. Bottling Co.*, 915 F.2d 201, 210 (6th Cir. 1990); *Williams*, 660 F.2d at 1273 (citing *Smith v. Anchor Bldg. Corp.*, 536 F.2d 231, 236 (8th Cir. 1976)); *Gillson*, 492 N.W.2d at 842 ("A trial court can award damages based on subjective testimony." (citing *Bradley*, 471 N.W.2d at 677)).

16. *Forshee v. Waterloo Indus., Inc.*, 178 F.3d 527, 531 (8th Cir. 1999) (citing *Carey v. Piphus*, 435 U.S. 247, 264 n.20 (1978)); *Turic*, 85 F.3d at 1215 (quoting *Carey*, 435 U.S. at 264 n.20); *Rodgers v. Fisher Body Div., Gen. Motors Corp.*, 739 F.2d 1102, 1108 (6th Cir. 1984) (quoting *Carey*, 435 U.S. at 263-64 & n.20).

17. EEOC Decision No. 915.002, 1992 WL 189089, at *5 (July 14, 1992) (citation omitted).

18. As the Fifth Circuit noted, "It was plaintiff's burden to prove that the harassment proximately caused the ultimate condition," and the "law recognizes

has to prove that the defendant's unlawful conduct was a substantial cause of her psychological or emotional distress.¹⁹ The plaintiff does not need to prove that the defendant's conduct was the *sole* cause of her emotional distress damages.²⁰ Moreover, it is well established that a defendant may be held liable for aggravating a plaintiff's preexisting condition.²¹ Accordingly, expert testimony (where offered) may not be excluded simply because the plaintiff had multiple psychological stressors that could have contributed to her emotional distress,²² except in extreme cases where the expert's disregard of alternative causes is so extreme as to justify exclusion of his testimony as unreliable.²³

In turn, the defendant is entitled to demonstrate that it should not be held liable for the entire amount of plaintiff's emotional distress damages because of the plaintiff's preexisting mental

no 'could have been a factor' standard of causation." *Hamilton v. Rodgers*, 791 F.2d 439, 444 & n.3 (5th Cir. 1986), *abrogated on other grounds by* *Harvey v. Blake*, 913 F.2d 226 (5th Cir. 1990); *see also* *Doe v. City of Chula Vista*, 196 F.R.D. 562, 568-69 (S.D. Cal. 1999) (citing *Hamilton*, 791 F.2d at 444 & n.3).

19. *Bottomly v. Leucadia Nat'l*, 163 F.R.D. 617, 620 (D. Utah 1995); *see also* *Rettiger v. IBP, Inc.*, No. 96-4015-SAC, 1999 WL 318153, at *3 (D. Kan. Jan. 6, 1999) (citing *Bottomly*, 163 F.R.D. at 620).

20. *Bottomly*, 163 F.R.D. at 620.

21. *Shea v. Icelandair*, 925 F. Supp. 1014, 1025-27 (S.D.N.Y. 1996); *see, e.g.*, *Alston v. Blue Cross & Blue Shield of Greater N.Y.*, No. 83 C 2780, 1985 WL 2469, at *7 (E.D.N.Y. May 23, 1985) (noting that, although plaintiff previously had some physical problems, "defendant must take plaintiff as it finds her, and plainly her physical condition was adversely affected by the discriminatory actions taken by defendant against her").

22. *See Bell v. Gonzales*, No. Civ. A. 03-163, 2005 WL 3555490, at *17 (D.D.C. Dec. 23, 2005) ("[R]eversing lower court exclusion of expert testimony addressing emotional injuries where lower court justified exclusion based on experts' failure to distinguish between causal effect of 'multiple psychological stresses.'" (citing *Jenson v. Eveleth Taconite Co.*, 130 F.3d 1287, 1297-99 (8th Cir. 1997)); *Webb v. Hyman*, 861 F. Supp. 1094, 1114 (D.D.C. 1994) (admitting expert testimony on psychological injury, even though other factors in plaintiff's life could have contributed to her psychological injuries, because testimony would assist the trier of fact in assessing the injury issue and a "substantial" cause standard had no basis in law).

23. *Bell*, 2005 WL 3555490, at *17 ("[E]xcluding expert testimony where witness 'utterly failed to investigate or even inquire as to how [other] factors may have contributed to his depression,' including divorce, other failed relationships, murder of parents, and familial history of chemical imbalance." (alteration in original) (quoting *Munafa v. Metro. Transp. Auth.*, Nos. 98 CV-4572 (ERK), 00-CV-0134 (ERK), 2003 WL 21799913, at *19 (E.D.N.Y. Jan. 22, 2003))).

health issues or other sources of emotional distress.²⁴ A defendant can undermine a plaintiff's claim of emotional distress if it can demonstrate that "the onset of symptoms of emotional harm preceded the [alleged] discrimination."²⁵ A plaintiff's vulnerability or unusual sensitivity is relevant in determining damages.²⁶ The

24. *Doe v. City of Chula Vista*, 196 F.R.D. 562, 568 (S.D. Cal. 1999) (reducing jury's monetary award for emotional harm caused by racial discrimination because "there were many other unpleasant factors in her life which almost certainly contributed to her emotional distress" (citing *Vance v. S. Bell Tel. & Tel. Co.*, 863 F.2d 1503, 1516 (11th Cir. 1989), *abrogated on other grounds by Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993))); *see also Hamilton v. Rodgers*, 791 F.2d 439, 444–45 & n.3 (5th Cir. 1986) (allowing compensatory damages when plaintiff endured emotional injury from his work environment but reversing award attributed to plaintiff's physical decline because "insufficient certainty as to causation exists" as his health had been failing due to his smoking, diet, and family history of hypertension), *abrogated on other grounds by Harvey v. Blake*, 913 F.2d 226 (5th Cir. 1990); *EEOC v. Cal. Psychiatric Transitions*, 258 F.R.D. 391, 400 (E.D. Cal. 2009) ("[E]motional distress [which plaintiff] allegedly suffered as a result of the sexual harassment could have been effected by her depression and vice versa. Defendant should be able to determine whether Plaintiff's emotional state may have been effected by something other than Defendant's alleged actions."); *Hawkins v. Anheuser-Busch, Inc.*, No. 2:05-CV-688, 2006 WL 2422596, at *2 (S.D. Ohio Aug. 22, 2006) ("Because a defendant is typically liable in damages only for any exacerbation of a pre-existing condition, be it physical or psychological, it is important for the defendant to learn about and explore the impact of other factors that may have either created such a condition or caused a 'baseline' level of emotional distress to be present at the time of the alleged workplace injury.").

25. *Desyatnik v. Atl. Casting & Eng'g Corp.*, No. CIV. 03-5441, 2008 WL 4724003, at *6 (D.N.J. Oct. 24, 2008) (quoting EEOC Decision No. 915.002, 1992 WL 189089, at *5 (July 14, 1992)).

26. *Turic v. Holland Hospitality, Inc.*, 85 F.3d 1211, 1215 (6th Cir. 1996) ("[A]s a young, unwed mother who was walking an 'economic tightrope' and who had just discovered she was pregnant for a second time, [plaintiff] was in a particularly vulnerable position and was highly dependent upon her job. Vulnerability is relevant to determining damages." (citing *Pratt v. Brown Mach. Co.*, 855 F.2d 1225, 1240 (6th Cir. 1988))); *see Jenson v. Eveleth Taconite Co.*, 130 F.3d 1287, 1294–95 (8th Cir. 1997) (providing that a "[t]ortfeasor is liable for all of [the] natural and proximate consequences" of his actions, which "include[d] damages assessed . . . for harm caused to a plaintiff who happens to have a fragile psyche"); *Williamson v. Handy Button Mach. Co.*, 817 F.2d 1290, 1294 (7th Cir. 1987) ("Perhaps [plaintiff] was unusually sensitive, but a tortfeasor takes its victims as it finds them. . . . In some cases unusual sensitivity will enhance the loss; in others unusual hardiness will reduce it; payment of the actual damage in each case will both compensate the victim and lead the injurer to take account of the full consequences of its acts."); EEOC Decision No. 915.002, 1992 WL 189089, at *5 ("The fact that the complaining party may be unusually emotionally sensitive and

fact-finder may also consider other factors that are relevant to whether and to what extent the employer caused the employee's emotional distress.²⁷ "Awards for pain and suffering are highly subjective and the assessment of damages is within the sound discretion of the jury, especially when the jury must determine how to compensate an individual for an injury not easily calculable in economic terms."²⁸

Where a plaintiff seeks emotional distress damages in connection with an employment law case, the parties often dispute which of the plaintiff's medical records, if any, are discoverable by the defendant.

III. APPLICABLE RULES OF CIVIL PROCEDURE AND EVIDENCE

A. *Rule 26 of the Federal Rules of Civil Procedure*

Rule 26(b)(1) of the Federal Rules of Civil Procedure provides that

[p]arties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense—including . . . the identity and location of persons who know of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.²⁹

Relevance has been "construed broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case."³⁰ "On

incur great emotional harm from discriminatory conduct will not absolve the respondent from responsibility for the greater emotional harm." (citing *Williamson*, 817 F.2d at 1294)).

27. *See, e.g., Cowan v. Prudential Ins. Co. of Am.*, 852 F.2d 688, 690–91 (2d Cir. 1988) (awarding \$15,000 to the plaintiff in a failure-to-promote case instead of the \$50,000 to \$150,000 he had requested because plaintiff was not subjected to overt racism or public humiliation, had been offered other positions, caused some of his own humiliation, and had not sought counseling).

28. *Jenkins v. McLean Hotels, Inc.*, 859 F.2d 598, 600 (8th Cir. 1988) (citations omitted) (internal quotation marks omitted).

29. FED. R. CIV. P. 26(b)(1).

30. *Marsico v. Sears Holding Corp.*, 370 F. App'x 658, 664 (6th Cir. 2010)

the other hand, the relevance standard is ‘not so liberal as to allow a party to roam in shadow zones of relevancy and to explore matter which does not presently appear germane on the theory that it might conceivably become so.’”³¹

[W]hen the discovery sought appears relevant[,] . . . the party resisting the discovery has the burden to establish the lack of relevance by demonstrating that the requested discovery (1) does not come within the broad scope of relevance as defined under . . . [Federal Rule of Civil Procedure] 26(b)(1), or (2) is of such marginal relevance that the potential harm occasioned by discovery would outweigh the ordinary presumption in favor of broad disclosure.³²

Furthermore, if “good cause” exists to believe that the discovery would result in unwarranted “annoyance, embarrassment, oppression, or undue burden or expense” the court may take various approaches to protect the party, including limiting or prohibiting discovery into certain matters.³³ Generally, where emotional distress damages are sought by the plaintiff, a defendant’s effort to obtain medical records does not, without

(quoting *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978)).

31. *St. John v. Napolitano*, 274 F.R.D. 12, 16 (D.D.C. 2011) (quoting *Food Lion, Inc. v. United Food & Commercial Workers Int’l Union*, 103 F.3d 1007, 1012 (D.C. Cir. 1997)).

32. *EEOC v. Sheffield Fin., LLC*, No. 1:06CV00889, 2007 WL 1726560, at *3 (M.D.N.C. June 13, 2007) (quoting *Garrett v. Sprint PCS*, No. 00-2583-KHV, 2002 WL 181364, at *2 (D. Kan. Jan. 31, 2002)); see *St. John*, 274 F.R.D. at 15–17 (concluding that the burden of producing records for many years prior to the event and the harm to the plaintiff’s privacy interests from the disclosure significantly outweighed “any marginal relevance for the majority of the time period for which the defendant seeks records”); *Barnett v. Pa. Consulting Grp., Inc.*, No. 04-1245 (RWR), 2007 WL 845886, at *5 (D.D.C. Mar. 19, 2007) (reversing magistrate’s refusal to order production of plaintiff’s pure medical records and non-privileged mental health information where plaintiff failed to explain why production of such information was irrelevant or that the “harm from disclosure would outweigh its marginal relevance”); *Merrill v. Waffle House, Inc.*, 227 F.R.D. 467, 473–74 (N.D. Tex. 2005) (overruling relevancy objections where plaintiffs failed to provide “disputed medical records for in camera review or otherwise provide a description of the medical records sufficient to allow the Court to independently determine relevance or weigh potential harm of disclosure”).

33. FED. R. CIV. P. 26(c)(1).

more, demonstrate such good cause.³⁴ Likewise, even when a defendant seeks to obtain medical records from more than one source, this does not necessarily show that the discovery was intended for an improper purpose³⁵ or that it was cumulative or duplicative.³⁶

Courts typically find that “the identities of health providers, the dates of treatment and the nature of the treatment are relevant to claims for emotional distress.”³⁷ This type of information provides preliminary information which can be used to further evaluate the appropriate scope of discovery regarding the plaintiff’s medical records.³⁸ Beyond this starting point, courts have vastly different views on the relevancy of medical records.

When a plaintiff seeks emotional distress damages, courts often find that the plaintiff’s medical records are relevant both to causation and to damages because they could reveal other sources

34. See, e.g., *Merrill*, 227 F.R.D. at 471 (“[C]ourts have routinely ordered discovery of this information in cases where emotional distress damages are sought. Plaintiffs have not shown that the request for this information was made in order to harass them.”).

35. *EEOC v. Dolgencorp, LLC*, No. 1:09CV700, 2011 WL 1260241, at *15 (M.D.N.C. Mar. 31, 2011) (refusing to find that discovery requests directed toward EEOC were propounded for an improper purpose, even though defendant had previously served charging parties with subpoenas seeking the same information).

36. *EEOC v. Premier Well Servs., LLC*, No. 4:10CV1419 SWW, 2011 WL 2198285, at *1 (E.D. Ark. June 3, 2011) (“In many cases, it is important to obtain what should be the same documents from two different sources because tell-tale differences may appear between them; and in many cases when a party obtains what should be the same set of documents from two different sources a critical fact in the litigation turns out to be that one set omitted a document that was in the other set.” (quoting *Cofeyville Res. Refining & Mktg., LLC v. Liberty Surplus Ins. Corp.*, No. 4:08mc00017 J LH, 2008 WL 4853620, at *1 (E.D. Ark. Nov. 6, 2008))); see also *EEOC v. Smith Bros. Truck Garage, Inc.*, 7:09-CV-00150-H, 2011 WL 102724, at *3 (E.D.N.C. Jan. 11, 2011) (finding subpoena not cumulative or duplicative where EEOC had previously only agreed to produce a portion of charging party’s medical records).

37. *Merrill*, 227 F.R.D. at 471 (emphasis omitted) (listing cases); cf. *Simpson v. Univ. of Colo.*, 220 F.R.D. 354, 365 (D. Colo. 2004) (compelling plaintiff to disclose names of physicians who prepared records during relevant time frame referencing plaintiff’s emotional or psychological condition, but not those who treated her for physical injuries or conditions unrelated to allegations in the case).

38. For example, in *EEOC v. Consolidated Realty, Inc.*, No. 2:06-CV-00681, 2007 WL 1452967, at *2 (D. Nev. May 17, 2007), the court directed the EEOC to provide defendant the identities of the charging party’s healthcare providers, dates of treatment, and nature of the treatment with sufficient specificity to determine whether additional discovery was warranted.

of stress that may be impacting the plaintiff's emotional distress.³⁹ On the other hand, certain courts do not permit defendants to obtain discovery on plaintiffs' psychological or medical histories where the court finds the plaintiffs' harms were indivisible, thus rendering such information irrelevant.⁴⁰ Some courts allow defendants to obtain medical records in order to see whether the plaintiff reported her employment-related emotional distress to her medical provider.⁴¹ This is often premised, at least in part, on the

39. *EEOC v. Sheffield Fin., LLC*, No. 1:06CV00889, 2007 WL 1726560, at *4 (M.D.N.C. June 13, 2007) (citing, inter alia, *Garrett v. Sprint PCS*, No. 00-2583-KHV, 2002 WL 181364, at *2 (D. Kan. Jan. 31, 2002)); see, e.g., *Owens v. Sprint/United Mgmt. Co.*, 221 F.R.D. 657, 660 (D. Kan. 2004) (finding that records relating to plaintiff's medical care, treatment, and counseling were relevant to claim for "garden-variety" emotional damages under Title VII as well as to defenses against emotional distress damages claims because the records could reveal unrelated stressors that could have affected her emotional well-being); *Posey v. Calvert Cnty. Bd. of Educ.*, No. CIV.A. WMN-02-2130, 2003 WL 21516194, at *1 (D. Md. Mar. 27, 2003) (denying plaintiff's motion for a protective order of her medical records where plaintiff testified to prior use of antidepressants, "a history of an abusive relationship with her alcoholic ex-husband and counseling involving her son and daughters"); *LeFave v. Symbios, Inc.*, No. CIV.A. 99-Z-1217, 2000 WL 1644154, at *2 (D. Colo. Apr. 14, 2000) (finding that medical records were relevant to claim for emotional distress damages and to defenses against emotional distress damages claims because they could reveal unrelated stressors); *Ziemann v. Burlington Cnty. Bridge Comm'n*, 155 F.R.D. 497, 506-07 (D.N.J. 1994) (requiring disclosure of plaintiff's marriage counseling records where plaintiff's expert indicated that "current mental condition is due, in part, to the experiences of" that marriage); *Bridges v. Eastman Kodak Co.*, 850 F. Supp. 216, 223 (S.D.N.Y. 1994) (holding that, where sexual harassment plaintiffs claimed emotional distress damages, the employer is entitled "to inquire into plaintiffs' pasts for the purpose of showing that their emotional distress was caused at least in part by events and circumstances that were not job related").

40. In *Jenson v. Eveleth Taconite Co.*, 130 F.3d 1287 (8th Cir. 1997), the plaintiffs in a class action sexual harassment case sought emotional distress damages under the Minnesota Human Rights Act; in turn, defendants sought "detailed medical histories, childhood experiences, domestic abuse, abortions, and sexual relationships, etc." of each of the plaintiffs. *Id.* at 1292. The Eighth Circuit stated that the special master should not have permitted broad discovery of the plaintiffs' personal backgrounds, including domestic abuse, earlier illnesses, and personal relationships, because he previously concluded that the plaintiffs' emotional harm was indivisible; thus defendants should have been foreclosed from seeking apportionment, rendering the plaintiffs' prior psychological and medical histories irrelevant. *Id.* at 1292-94.

41. *Hannah v. Wal-Mart Stores, Inc.*, Civ. No. 3:12CV1361 (JCH), 2014 WL 2515221, at *6 n.9 (D. Conn. June 4, 2014) ("[D]efendants are entitled to these records to see whether plaintiffs ever complained of mental anguish to a medical

assumption that medical records may be relevant for impeachment purposes.⁴²

B. Rule 35 of the Federal Rules of Civil Procedure

Rule 35 of the Federal Rules of Civil Procedure, entitled “Physical and Mental Examinations,” states:

The court where the action is pending may order a party whose mental or physical condition . . . is in controversy to submit to a physical or mental examination by a suitably licensed or certified examiner. . . . The order . . . may be made only on motion for good cause and on notice to all parties and the person to be examined.⁴³

The United States Supreme Court has explained that Rule 35 requires more than mere relevance.⁴⁴ “The general consensus is that ‘garden-variety’⁴⁵ emotional distress allegations that are part and parcel of the plaintiff’s underlying claim are insufficient to place the plaintiff’s mental condition ‘in controversy’ for purposes of Rule 35(a).”⁴⁶ Instead, most federal courts find that a mental

provider in relation to their terminations, and whether any other matters contributed to or caused plaintiffs’ alleged mental anguish.”).

42. *Michelman v. Ricoh Ams. Corp.*, No. 11-CV-3633 (MKB), 2013 WL 664893, at *3 (E.D.N.Y. Feb. 22, 2013) (affirming magistrate’s ruling that medical records from plaintiff’s cardiologist were relevant for impeachment purposes where plaintiff testified at her deposition that she had received treatment for chest pains from her cardiologist).

43. FED. R. CIV. P. 35.

44. *Schlagenhauf v. Holder*, 379 U.S. 104, 116–18 (1964).

45. As explained in *Ruhlmann v. Ulster County Department of Social Services*, 194 F.R.D. 445, 449 n.6 (N.D.N.Y. 2000):

“Garden-variety” means ordinary or commonplace. Webster’s New World Dictionary 656 (3d College ed. 1988). Garden-variety emotional distress, therefore, is ordinary or commonplace emotional distress. Garden-variety emotional distress is that which [is] simple or usual. In contrast, emotional distress that is not garden-variety may be complex, such as that resulting in a specific psychiatric disorder, or may be unusual, such as to disable one from working.

See also *John Doe I v. Mulcahy, Inc.*, Civil No. 08-306 (DWF/SRN), 2008 WL 4572515, at *1 n.2 (D. Minn. Oct. 14, 2008) (recognizing popularity of this phrase with parties and courts, but noting the Court’s “distaste for the phrase” “[t]o the extent that use of the ‘garden variety’ phrase diminishes or belittles the very real emotional distress a plaintiff can experience when an employer violates civil rights laws”).

46. *Kuminka v. Atl. Cnty.*, 551 F. App’x 27, 29 (3d Cir. 2014) (citing *Bowen v.*

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examination is warranted where, in addition to a claim of emotional distress, the case involves one or more of the following factors set forth in *Turner v. Imperial Stores*:

- 1) a cause of action for intentional or negligent infliction of emotional distress; 2) an allegation of a specific mental or psychiatric injury or disorder; 3) a claim of unusually severe emotional distress; 4) plaintiff's offer of expert testimony to support a claim of emotional distress; and/or 5) plaintiff's concession that his or her mental condition is 'in controversy' within the meaning of Rule 35(a).⁴⁷

C. *Whether the "In Controversy" and "Good Cause" Requirements of Rule 35 or the Relevancy Standard of Rule 26 Applies*

There is disagreement among federal courts regarding whether defendants must prove the relevancy standard of Rule 26 of the Federal Rules of Civil Procedure or the "in controversy" and "good cause" requirements of Rule 35 of the Federal Rules of Civil Procedure in order to obtain a plaintiff's medical records.⁴⁸

Most courts apply the Rule 26 relevancy standard to the production of medical records.⁴⁹ These courts take the position that "a party's medical condition can be relevant [under Rule 26], yet not be 'in controversy' within the meaning of Rule 35."⁵⁰ Under

Parking Auth. of Camden, 214 F.R.D. 188, 193 (D.N.J. 2003)).

47. 161 F.R.D. 89, 95 (S.D. Cal. 1995); *see also* EEOC v. Consol. Resorts, Inc., No. 2:06-CV-LDG-GWF, 2008 WL 942289, at *6 (D. Nev. Apr. 7, 2008) (listing cases applying these factors).

48. *See* Sandoval v. Am. Bldg. Maint. Indus., Inc., 267 F.R.D. 257, 268–69 (D. Minn. 2007) (recognizing inconsistent decisions within the district court of Minnesota on this issue); *see also infra* notes 49–54 and accompanying text.

49. *See, e.g.*, Schoffstall v. Henderson, 223 F.3d 818, 823 (8th Cir. 2000) ("[Plaintiff's] claims [of extreme emotional distress] against [defendant] placed her medical condition at issue, making the [medical records] sought by [defendant] relevant, and absent a showing of bad faith, discoverable."); *St. John v. Napolitano*, 274 F.R.D. 12, 15 (D.D.C. 2011); *Mulcahy, Inc.*, 2008 WL 4572515, at *4 (citing EEOC v. Sheffield Fin., LLC, No. 1:06CV00889, 2007 WL 1726560, at *5 (M.D.N.C. June 13, 2007)); *Burrell v. Crown Cent. Petroleum, Inc.*, 177 F.R.D. 376, 381 (E.D. Tex. 1997).

50. *Ricks v. Abbott Labs.*, 198 F.R.D. 647, 650 (D. Md. 2001); *see also* *Combe v. Cinemark USA, Inc.*, No. 1:08-cv-142 TS, 2009 WL 3584883, at *2 (D. Utah Oct. 26, 2009) (concluding that Rule 26, not Rule 35, applied to discovery of medical records of plaintiffs who sought "'garden variety' emotional distress"); *Owens v. Sprint/United Mgmt. Co.*, 221 F.R.D. 657, 659–60 (D. Kan. 2004) (noting that,

this approach, a court could deny a Rule 35 mental examination on the grounds that an employee's mental health is not in controversy, but still potentially find that the employee's medical records are discoverable because they are relevant.⁵¹

There are some courts, however, that assert that Rule 35 not only applies to physical and mental examinations, but also applies to the production of a plaintiff's medical records.⁵² One district court judge stated that in making the "threshold showing of relevance," the "analysis necessarily implicates Rule 35(a), . . . given the clear parallels between the analysis of whether a mental condition is 'in controversy,' for purposes of a mental health examination, and whether the issue of mental health is 'in controversy' for purposes of compelling a party to turn over her medical records."⁵³ Other courts applying the Rule 35 standard to address the discoverability of a plaintiff's medical records assert that the standard for whether a plaintiff has waived the psychotherapist-patient or physician-patient privilege, and/or her right to privacy in her medical records, is the same as the standard required for a Rule 35 physical or mental examination.⁵⁴

although some courts have found that a "garden-variety" emotional distress claim may not place the plaintiff's mental condition "in controversy for purposes of justifying a mental examination under Rule 35," this does not automatically exempt them from discovery under Rule 26).

51. *See, e.g., Bowen v. Parking Auth. of Camden*, 214 F.R.D. 188, 195 (D.N.J. 2003) ("The finding that the defendants are not entitled to a Rule 35 mental examination does not, however, preclude the defendants from obtaining discovery concerning the plaintiff's psychiatric history. To the contrary, the psychological history of the plaintiff is governed by Rule 26(b), not Rule 35(a)."); *Ricks*, 198 F.R.D. at 650 (holding that the employee's mental condition was not in controversy for the purpose of a Rule 35 mental examination and stating that its holding did not conflict with its previous denial of plaintiff's motion to quash the defendant's subpoena seeking plaintiff's medical records).

52. *See, e.g., Blake v. U.S. Bank Nat'l Ass'n*, No. CIV 03-6084 PAM/RLE, 2004 WL 5254174, at *7 (D. Minn. May 19, 2004) (holding that, "absent some specific, particularized showing, the production of medical records are governed by the 'in controversy' requirement of Rule 35"); *see also Balcom v. Univ. of Indianapolis*, No.1:09-CV-0057-LJM-DML, 2010 WL 2346768, at *2 (S.D. Ind. June 9, 2010) (citations omitted) (analyzing a motion to compel plaintiff's medical records and noting that "[a] claim for emotional distress damages, without more, is not sufficient to put mental condition 'in controversy' within the meaning of Rule 35").

53. *Blake*, 2004 WL 5254174, at *5.

54. *See, e.g., Dochniak v. Dominion Mgmt. Servs., Inc.*, 240 F.R.D. 451, 452 (D. Minn. 2006) (affirming magistrate's report and recommendation applying

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Frequently, parties and the court will analyze whether a plaintiff is claiming “garden-variety” emotional distress damages; however, courts have different definitions of the terms and may reach opposite results.⁵⁵ One major reason for the different opinions is that some courts view the issue through the lens of Rule 26,⁵⁶ while others analyze it under Rule 35.⁵⁷

Rule 35 in denying defendant’s motion to compel discovery of plaintiff’s medical records); *EEOC v. Serramonte*, 237 F.R.D. 220, 224 (N.D. Cal. 2006) (concluding that plaintiff had not waived her right to privacy under state or federal constitutions, and reasoning that “if anything, delving into a plaintiff’s medical or psychiatric records is even more invasive than conducting a medical or psychological examination, and that the standard for waiver should be at least as rigorous” as in cases addressing whether a plaintiff has to submit to a Rule 35 medical examination); *see infra* Part V.D (regarding waiver of privilege).

55. Simply labeling a claim as “garden-variety” is not always helpful:

The term “garden variety” was bandied about repeatedly in the parties’ pleadings and in their arguments at the hearing. As demonstrated by the cases cited by the parties, however, the definition of the term is, at best, nebulous. Courts have attached the label to various sorts of claims, often with polar results. *Compare Combe v. Cinemark USA, Inc.*, 2009 WL 3584883, *2 (D. Utah 2009) (holding that “[m]edical records relating to treatment and counseling are relevant even when [a] plaintiff seeks ‘garden variety’ emotional damages”), *with Wright v. Marshall Mize Ford*, No. 1:09-cv-139, [Doc. 16] (E.D. Tenn. Dec. 2, 2009) (holding that a plaintiff’s mental health records for reasons unrelated to his termination were “undiscoverable as irrelevant” to “garden variety” emotional distress claims). The case law has been ambivalent even within single opinions. *See Kennedy v. Cingular Wireless*, 2007 WL 2407044 (S.D. Ohio 2007) (recognizing as a “general principle” that medical records “which might tend to show other stressors . . . at or about the same time [as the alleged wrong] and which could account for some or all of the emotional suffering . . . are discoverable” even for “garden variety” claims, but also indicating that if a plaintiff seeks damages only for “the emotional distress that normally accompanies a wrongful discharge,” then “other stressors . . . , whether revealed in records of medical treatment or elsewhere,” might be “completely irrelevant”).

Based on a review of the cases, the Court concludes that simply labeling a claim as “garden variety” is unhelpful to the analysis. The Court therefore declines to limit discovery merely because a plaintiff characterizes her claim that way.

Butler v. Rue 21, Inc., No. 1:11-CV-9, 2011 WL 1484151, at *2 (E.D. Tenn. Apr. 19, 2011).

56. *See, e.g., Hannah v. Wal-Mart Stores, Inc.*, No. 3:12CV1361 (JCH), 2014 WL 2515221, at *2, *6 n.9 (D. Conn. June 4, 2014) (using Rule 26(b) as the legal standard and finding that, despite plaintiffs waiving damages for physical injuries,

the court agreed with defendants that “production of the medical records are warranted so that defendants may test plaintiffs’ claims of mental anguish”); *Carpenter v. Res-Care Health Servs., Inc.*, No. 3:12-CV-08047, 2013 WL 1750464, at *3 (S.D. W. Va. Apr. 23, 2013) (“Notwithstanding Plaintiff’s representation in this case that she does not intend to offer medical records to corroborate her claims, she alleges that Defendant has caused her to suffer emotional distress and she seeks compensation for that injury. As a result, discovery of her medical records is *reasonably calculated* to lead to the discovery of admissible evidence.”); *St. John v. Napolitano*, 274 F.R.D. 12, 15–17 (D.D.C. 2011) (rejecting plaintiff’s argument that his medical records were irrelevant even though he represented that he has not sought treatment from any medical provider for any injury resulting from the defendant’s conduct and indicated he would not offer any expert testimony or medical records as evidence); *Moore v. Chertoff*, No. 00-953 (RWR) (DAR), 2006 WL 1442447, at *3 (D.D.C. May 22, 2006) (“Whether plaintiffs intend to prove their damages claims with expert testimony has no bearing on the relevance of plaintiffs’ medical records, or their ability to establish potential alternative causes for plaintiffs’ symptoms.”); *Owens v. Sprint/United Mgt. Co.*, 221 F.R.D. 657, 660 (D. Kan. 2004) (finding that “records relating to [Plaintiff’s] medical care, treatment, and counseling are relevant to the claims she seeks to assert for her ‘garden variety’ emotional damages under Title VII” as well as to “Defendant’s defenses against Plaintiff’s emotional distress damages claim because her medical records may reveal stressors unrelated to Defendant that may have affected Plaintiff’s well being”); *Walker v. Nw. Airlines Corp.*, No. Civ. 00-2604 MJD/JGL, 2002 WL 32539635, at *4 (D. Minn. Oct. 28, 2002) (using Rule 26 and stating, “regardless of whether Plaintiff intends to introduce his medical records or offer medical testimony to prove his alleged emotional distress, [Defendant] is entitled to determine whether Plaintiff’s relevant medical history indicates that his alleged emotional distress was caused in part by events and circumstances independent of [Defendant’s] allegedly adverse employment action”); *Garrett v. Sprint PCS*, No. 00-2583-KHV, 2002 WL 181364, at *2 (D. Kan. Jan. 31, 2002) (finding that plaintiff’s intent not to present expert testimony in support of her emotional distress claim did not make medical records and information any less relevant); *LeFave v. Symbios, Inc.*, No. CIV.A. 99-Z-1217, 2000 WL 1644154, at *2, *5 (D. Colo. Apr. 14, 2000) (finding that plaintiff’s medical record information was relevant to her claim for emotional distress damages even though plaintiff had only asked for damages for pain and suffering, embarrassment, and humiliation, and had not asserted a separate cause of action for intentional or negligent infliction of emotional distress, or alleged a specific mental or psychiatric injury, or unusually severe emotional distress).

57. See, e.g., *Dochniak*, 240 F.R.D. at 452 (applying Rule 35 and denying defendant’s motion to compel plaintiff to produce authorization for release of her medical records from the counselor she “saw following her rape, from her neurologist, and from doctors who performed her two elective surgeries” where plaintiff asserted she would not call an expert witness (citing *Blake*, 2004 WL 5254174, at *6–7)).

D. Rules of Evidence

Rules 401, 402, 403, 404, and 412 of the Federal Rules of Evidence⁵⁸ apply to issues relating to the admissibility of medical records.⁵⁹ For example, “a full personality inventory of [a] plaintiff’s character . . . unrelated to her psychological or emotional condition” would not be relevant and may be confusing to a jury.⁶⁰ Likewise, evidence that is unrelated to causation or damages, but simply bears on a plaintiff’s character, is outside the proper limits of discovery.⁶¹ Some courts take a broad view of discovery under Rule 26 and wait until trial to further limit discovery of medical records.⁶²

58. FED. R. EVID. 401 (“Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action.”); *id.* R. 402 (“Relevant evidence is admissible unless . . . the United States Constitution; a federal statute; these rules; or other rules prescribed by the Supreme Court [provide otherwise]. Irrelevant evidence is not admissible.”); *id.* R. 403 (“The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.”); *id.* R. 404(a)(1) (“Evidence of a person’s character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait.”); *id.* R. 412(a), (b)(2) (providing that evidence offered to prove that a victim engaged in other sexual behavior or to prove a victim’s sexual predisposition is inadmissible in a civil or criminal case involving alleged sexual misconduct, but such evidence may be offered in a civil case “to prove a victim’s sexual behavior or sexual predisposition if its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party”). “The court may admit evidence of a victim’s reputation only if the victim has placed it in controversy.” *Id.* R. 412(b)(2).

59. See *Bottomly v. Leucadia Nat’l*, 163 F.R.D. 617, 619–20 (D. Utah 1995).

60. *Id.* (holding that in a sexual harassment action alleging damages for “severe psychological and emotional distress,” the employer was not entitled to full “personality inventory of [the employee’s] character,” unrelated to the condition at issue (citing FED. R. EVID. 403)).

61. *Id.* at 620 (citing FED. R. EVID. 404(a), 412; *Stair v. Lehigh Valley Carpenters Local Union*, 813 F. Supp. 1116 (E.D. Pa. 1993)).

62. See, e.g., *EEOC v. Cal. Psychiatric Transitions*, 258 F.R.D. 391, 400 (E.D. Cal. 2009) (“The court can be the gatekeeper of the ultimate admissibility of the evidence through a Rule 403 balancing analysis at trial.”); *Hawkins v. Anheuser-Busch, Inc.*, No. 2:05-CV-688, 2006 WL 2422596, at *3 (S.D. Ohio Aug. 22, 2006) (concluding that defendant met its burden of showing that certain medical records fell within the scope of Rule 26(b) but noting that it did not necessarily mean that defendant would ultimately be able to overcome other barriers to admissibility at trial, such as Federal Rule of Evidence 403); *Moore v. Metro. Water*

IV. SCOPE OF MEDICAL INFORMATION AND RECORDS

Even when medical records are relevant or “in controversy,” the court must still resolve the issue of which specific medical records the defendants are entitled to during discovery. “Certainly, some conditions, either by their nature or by their temporal relationship to the alleged injury, may be able to be ruled out categorically as simply irrelevant to a claim of emotional distress,” such as a broken bone ten years before the unlawful conduct.⁶³ Conversely, if a plaintiff

suffered a serious physical injury only a year or two before, and it had persisted up to the date of the alleged emotional injury, it would be much more reasonable to infer that her physical injury and the treatment regimen had some ongoing impact on the state of her emotional health, and to permit at least a limited inquiry into the details of that condition.⁶⁴

There is a lack of uniformity on how courts limit the discoverability of medical records in terms of time frame and substance.⁶⁵

Reclamation Dist., No. 02 C 4040, 2005 WL 2007291, at *7–8 (N.D. Ill. Aug. 12, 2005) (rejecting defendant’s motion for a new trial and concluding that the court properly granted the sexual harassment plaintiff’s motion in limine under Federal Rule of Evidence 403 to redact references to the terminated pregnancies from her medical records); *Posey v. Calvert Cnty. Bd. of Educ.*, No. CIV.A. WMN-02-2130, 2003 WL 21516194, at *1 (D. Md. Mar. 27, 2003) (noting that Federal Rule of Evidence 412 pertains to admissibility of evidence at trial: “Procedures set forth in subsection (c) do not apply to discovery of a victim’s past sexual conduct or predisposition in civil cases, which will continue to be governed by Fed. R. Civ. P. 26” (quoting FED. R. EVID. 412(c) advisory committee’s note)); *Kirchner v. Mitsui & Co.*, 184 F.R.D. 124, 130 (M.D. Tenn. 1998) (noting the fact that the court compelled plaintiff to produce certain documents does not mean that they will necessarily be admissible at trial (citing FED. R. EVID. 403)).

63. *Hawkins*, 2006 WL 2422596, at *2.

64. *Id.*

65. *Compare Sanchez v. U.S. Airways, Inc.*, 202 F.R.D. 131, 136 (E.D. Pa. 2001) (holding that because plaintiff placed mental state at issue, plaintiff could only prevent discovery by withdrawing claim), *with Vasconcellos v. Cybex Int’l, Inc.*, 962 F. Supp. 701, 708–09 (D. Md. 1997) (holding that even though plaintiff had placed mental state at issue, the possibility that discovery could end the psychotherapist privilege should still be considered).

A. *Temporal Scope of Medical Records*

Virtually all courts would agree that a plaintiff's "emotional distress claim does not, however, give [d]efendants an unfettered right to pursue discovery into [plaintiff's] entire medical history."⁶⁶ Accordingly, one important aspect regarding the scope of the medical records is what the appropriate temporal scope is.

Courts typically find that "contemporaneous medical records documenting the existence of emotional distress are relevant."⁶⁷ Moreover, most plaintiffs would want to disclose their medical records to defendants in order to demonstrate "the existence and severity of the claimed [emotional distress]."⁶⁸

A more difficult issue arises when assessing the relevance of medical records for treatment *before* the unlawful conduct, and for what time period these records remain relevant. Some courts find that medical records relating to medical treatment from a certain period of time before the unlawful conduct may be relevant.⁶⁹

66. *Manessis v. N.Y.C. Dep't of Transp.*, No. 02 CIV. 359SASDF, 2002 WL 31115032, at *2 (S.D.N.Y. Sept. 24, 2002).

67. *Hawkins*, 2006 WL 2422596, at *2.

68. *Id.*

69. *See, e.g.*, *Flores v. Tyson Foods, Inc.*, No. 4:12CV3089, 2013 WL 1091044, at *5 (D. Neb. Mar. 15, 2013) (concluding that defendant's request for over thirteen years of medical records was "not reasonably calculated to lead to discoverable evidence" and limiting the time frame of discoverable records to "five years preceding the date of the alleged injury"); *St. John v. Napolitano*, 274 F.R.D. 12, 16–17, 21 (D.D.C. 2011) (rejecting defendant's request for nine years of plaintiff's medical records in a denial of a promotion case and finding "that the relevant time period . . . should only extend from two years prior to the first date of the alleged discrimination through the present"); *EEOC v. Smith Bros. Truck Garage, Inc.*, No. 7:09-CV-00150-H, 2011 WL 102724, at *3 (E.D.N.C. Jan. 11, 2011) (granting "in part [in an ADA case] [p]laintiff's motion for a protective order to limit the documents produced by the medical providers to the relevant period" of two years prior to the incident at issue through the date of production); *EEOC v. Consol. Realty, Inc.*, No. 2:06-CV-00681-JCM-LRL, 2007 WL 1452967, at *2 (D. Nev. May 17, 2007) (ruling that defendant had "not shown good cause as to why the production" of medical "information should encompass the ten-year period before [plaintiff's] layoff" and limiting the relevant time period to five years prior to the plaintiff's layoff through the present); *Garrett v. Sprint PCS*, No. 00-2583-KHV, 2002 WL 181364, at *3 (D. Kan. 2002) (restricting discovery to "three years prior to the time the discriminatory conduct" allegedly occurred until the present); *LeFave v. Symbios, Inc.*, No. CIV.A. 99-Z-1217, 2000 WL 1644154, at *2 (D. Colo. Apr. 14, 2000) (finding defendants were entitled to discovery of plaintiff's medical records for any condition for a period of five years prior to the events giving rise to plaintiff's complaint and continuing to the present time). *But*

Other courts link the relevant temporal scope of medical records to the date the employee began working for the defendant.⁷⁰ Still other courts find that the date on which the plaintiff's mental health issues arose or when a particularly stressful event in the plaintiff's life occurred should coincide with the appropriate discovery period for medical records.⁷¹ Certain courts simply pick a number of years from the date of the order that they deem to be a reasonable amount of time or agree that the time frame sought by defendants is not unreasonable.⁷²

Courts may also find relevant some medical records that post-date the unlawful conduct.⁷³ As one court explained:

see Anderson v. Abercrombie & Fitch Stores, Inc., No. 06cv991-WQH, 2007 WL 1994059, at *4 (S.D. Cal. July 2, 2007) (concluding that requested records documenting plaintiff's medical treatment while employed by defendant were not relevant to the emotional distress plaintiff may have experienced after his termination).

70. *See, e.g.*, EEOC v. Nichols Gas & Oil, Inc., 256 F.R.D. 114, 123 (W.D.N.Y. 2009) (granting in part defendant employer's request in a sexual harassment case to compel discovery of plaintiffs' medical records for the purpose of examining emotional distress claims, with limitation to the period from one year prior to one year subsequent to each plaintiff's employment, instead of the ten-year period sought by defendants); Chiquelin v. Efunds Corp., No. 02Civ.5152LAPDFE, 2003 WL 21459581 at *2 (S.D.N.Y. June 24, 2003) (ordering plaintiff to produce all medical records since January 1, 1998, which was about one year before plaintiff began working for defendants, where plaintiff produced the file of the psychiatrist who began treating him after his May 2001 termination, but defense sought to admit all of plaintiff's medical records dating back to 1990).

71. *See, e.g.*, Tavares v. Lawrence & Mem'l Hosp., No. 3:11-CV-770, 2012 WL 4321961, at *11 (D. Conn. Sept. 20, 2012) (denying motion to quash subpoena of marital therapist or to narrow the time frame for discovery—over seven years, which pre-dated plaintiff's termination by over five years—because the court reasoned that discovery regarding plaintiff's therapy occurring about eight months after her husband's disability may be relevant to the stressful events and circumstances that preceded her termination); Doe v. Chula Vista, 196 F.R.D. 562, 570 (S.D. Cal. 1999) (concluding that the one-year time limit ordered by the magistrate was too restrictive and should be extended to include 1994, given the evidence that showed the plaintiff received counseling that year).

72. *See, e.g.*, IpoX v. EHC Fin. Servs., LLC, No. C07-5606RJB, 2008 WL 4534366, at *3 (W.D. Wash. Oct. 7, 2008) (permitting discovery of medical records for about the past ten years, which was what defendant requested).

73. *See* McKinney v. Del. Cnty. Mem'l Hosp., Civil Action No. 08-1054, 2009 WL 750181, at *3 (E.D. Pa. Mar. 20, 2009) (noting it was unclear from plaintiff's complaint whether she was "asserting a claim for continuing emotional stress damages, or if the emotional distress damages she claims are attributable to [d]efendants are cut off at some past date certain," and rejecting plaintiff's

To allow Plaintiffs to make a claim for emotional distress, but shield information related to their claim, is similar to shielding other types of medical records. For instance, if the injury at issue were to the knee, and Plaintiff had sustained a subsequent knee injury requiring treatment, Plaintiffs would not be able to hide the details of the subsequent knee injury because of privilege or privacy considerations. In order to allege and recover for a harm, Plaintiffs need to show the existence and extent of the harm. The particular value of the harm is best left to the fact-finder, after a careful view of the facts. The only way to adequately review the facts is to bring to light relevant information.⁷⁴

Where the plaintiff claims ongoing emotional distress, courts typically find that medical records should be discoverable through the present.⁷⁵ However, where a plaintiff represents that the emotional distress has ceased and that she does not intend to seek emotional distress damages after a certain date, medical records after that point in time are usually not deemed relevant.⁷⁶

Because of the highly factual nature of each case, the types of claims, and the courts' own views of relevancy, courts reach different results about the number of years of medical records that should be permitted in discovery.⁷⁷

argument that her current medical records were not relevant).

74. *Sanchez v. U.S. Airways, Inc.*, 202 F.R.D. 131, 136 (E.D. Pa. 2001).

75. *See, e.g., St. John v. Napolitano*, 274 F.R.D. 12, 15–22, 16 n.2, 17 n.3 (D.D.C. 2011) (compelling plaintiff to produce medical records through the present where his interrogatory response relating to his damages stated that “[p]laintiff has been, and continues to be, injured as a result of mental and emotional distress . . . caused by [d]efendant’s illegal actions in an amount to be determined by a jury”).

76. *See, e.g., Fox v. Gates Corp.*, 179 F.R.D. 303, 306–07 (D. Colo. 1998) (concluding that, where plaintiff “only sought professional counseling one time in the past decade,” which was in connection with a family member’s death, and represented “that the emotional distress she suffered as a result of defendant’s actions had ceased as of the date she went to her first counseling session,” those counseling records were irrelevant; the court limited the range of discovery of medical records to prior to that time).

77. *See supra* notes 69–72 and accompanying text. For example, in cases under the ADA, in addition to seeking emotional distress, there may be other issues that affect a court’s determination of the relevant time period for the plaintiff’s records. *See Vannoy v. Fed. Reserve Bank of Richmond*, No. 3:13-CV-797, 2014 WL 2601765, at *4 (E.D. Va. June 10, 2014) (“In an action under the ADA, a

B. *Substantive Scope of Medical Records*

Courts take vastly different views on what should fall within the substantive scope of discoverable medical records. Some courts permit the defendant to obtain only the plaintiff's mental health records.⁷⁸ Other courts permit discovery relating to the treatment or diagnosis of a mental, emotional, or psychological condition, irrespective of whether the provider is a mental health professional.⁷⁹ An even more encompassing approach is to permit not only the discovery of medical information relating to the treatment or diagnosis of a mental, emotional, or psychological condition, but also medical records relating to any physical or mental manifestations of the issues that the plaintiff claims to have suffered at the hand of the defendant.⁸⁰ These courts sometimes

plaintiff's medical history is relevant in its entirety. It is impossible to answer the most basic questions, such as whether the plaintiff was generally foreclosed from similar employment by reason of a major life activity impairment, or otherwise qualified given a reasonable accommodation, or what a reasonable accommodation would have been [And it is relevant to whether] plaintiff's inability to work without accommodation is the result of something other than the claimed disability" (quoting *Butler v. Burroughs Wellcome, Inc.*, 920 F. Supp. 90, 92 (E.D.N.C. 1996))).

78. See, e.g., *Kirchner v. Mitsui & Co.*, 184 F.R.D. 124, 128–29 (M.D. Tenn. 1998) (requiring plaintiff to produce the psychiatrist, psychologist, and social worker documents during specified time frame).

79. See, e.g., *Hupp v. San Diego Cnty.*, No. 12cv0492 GPC(RBB), 2013 WL 5408644, at *8 (S.D. Cal. Sept. 25, 2013) (modifying subpoenas to limit records sought to those reflecting plaintiff's mental health issues); *Walker v. Nw. Airlines Corp.*, No. Civ.00–2604 MJD/JGL, 2002 WL 32539635, at *5 (D. Minn. Oct. 28, 2002) (“[Defendant] is directed to modify its authorization form such that it authorizes only the release of medical information pertaining to the treatment or diagnosis of a mental, emotional, or psychological condition.”); *Melaski v. Allco Enters., Inc.*, No. CIV. 95-1328-FR, 1996 WL 50974, at *2 (D. Or. Jan. 24, 1996) (ruling that the plaintiff need not disclose her general medical records but only the medical records relevant to the plaintiff's mental and/or emotional condition).

80. For example, in *Kersten v. Old Dominion Freight Line, Inc.*, No. 11-1036, 2011 WL 5373777, at *1 (D. Minn. Nov. 1, 2011), the plaintiff asserted in her initial disclosures that she “suffered emotional distress, including sleepless nights, anxiety and panic” due to the defendant's unlawful conduct. In that case, the court ordered plaintiff to provide defendant with “all records from any mental health provider (e.g. psychologist, psychiatrist, therapist, counsel[or] or social worker) pertaining to any diagnoses or treatment for mental, emotional and psychological issues” and “any records from any medical provider . . . that mention, discuss or reflect sleep loss, anxiety or panic (whether or not [the

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rule that certain types of records can be categorically excluded.⁸¹ Other courts allow the discoverability of medical records relating to physical maladies that the plaintiff sought treatment for during the relevant time period that admittedly resulted in emotional distress.⁸² Finally, in certain cases plaintiffs have been required to

plaintiff] sought treatment or received a diagnosis for these physical or mental manifestations)." *Id.* at *3; *see also* *Hannah v. Wal-Mart Stores, Inc.*, No. 3:12CV1361 (JCH), 2014 WL 2515221, at *6 (D. Conn. June 4, 2014) (holding that, where one plaintiff testified that he suffered "mental anguish, stress, weight loss, sleep disruption, and other consequences as a result of [defendant's] conduct," and it was anticipated that two of the other plaintiffs would testify similarly, defendant should be entitled to "examine their medical records that reflect 'any consultation with or treatment by a medical provider for complaints for mental anguish regardless of the cause, or reflect medical conditions the symptoms of or treatment for which could have resulted in the same type of physical symptoms the plaintiffs have described'" (quoting *EEOC v. Nichols Gas & Oil, Inc.*, 256 F.R.D. 114, 123 (W.D.N.Y. 2009))).

81. *See, e.g., Walker*, 2002 WL 32539635, at *5 (directing defendant to modify its authorization and specifying that "[t]he information to be disclosed may include: discharge summaries (if related to mental or emotional treatment), consultation reports (if related to mental or emotional treatment), psychiatric/psychological/mental health records, and chemical dependency treatment records. Laboratory reports, x-rays, pathology reports, physical therapy records, and information concerning physical examinations *are to be expressly excluded*" (emphasis added)).

82. In *Manassis v. New York City Department of Transportation*, No. 02 CIV. 359SASDF, 2002 WL 31115032, at *2 (S.D.N.Y. Sept. 24, 2002) (citation omitted), the court stated:

Defendants, however, are not entitled to pursue discovery into treatments [the Plaintiff] may have received for any physical ailments, unless [the Plaintiff] has first indicated through deposition testimony or other discovery responses that a particular physical ailment or ailments caused him emotional distress during the relevant period. If, for example, [the Plaintiff] has testified that a certain medical problem caused him to be upset, or to suffer anxiety or stress during the same period as the period of his alleged emotional injury, then Defendants may appropriately seek medical records concerning that underlying medical problem.

See also *St. John v. Napolitano*, 274 F.R.D. 12, 17 (D.D.C. 2011) ("[D]efendant is not entitled to production of all of the plaintiff's medical records, but only records that have a logical connection to the plaintiff's claims of injury. Such records include any non-privileged mental or emotional health records, records involving new medical issues for which the plaintiff first sought treatment during the Relevant Time Period, and records involving a medical condition that the defendant has established, through other discovery, may have caused the plaintiff emotional distress." (citation omitted)); *EEOC v. Dolgencorp, LLC*, No.

disclose all of their medical records for the specified time frame.⁸³ One such court reasoned:

Because of the broad range and generalized nature of the symptoms, and the difficulty of determining (at least by a layperson) the range of possible symptoms of various medical conditions and the possible side effects of medication, fairness requires that the medical records of [certain] claimants be disclosed for a relevant period of time.⁸⁴

V. PRIVILEGE

Even if medical records are relevant, it does not necessarily mean they are discoverable. Plaintiffs often move for protective orders, move to quash subpoenas, and oppose motions to compel the production of their medical records on the grounds that such records are privileged. Defendants, on the other hand, typically insist that by seeking emotional distress damages, the plaintiff has waived the privilege. Defendants often retort that plaintiffs cannot use the privilege “as both a shield and a sword.”⁸⁵ Thus, courts addressing the issue of medical records generally must analyze the applicable privileges and whether such privileges have been waived.

1:09CV700, 2011 WL 1260241, at *15 (M.D.N.C. Mar. 31, 2011) (finding that the EEOC failed to show that medical records—including records relating to two of the charging parties’ car accidents that resulted in significant medical treatment during the time frame that they alleged defendants conduct caused them medical expenses and emotional distress—lacked relevance).

83. *Wooten v. Certaineed Corp.*, Nos. 08-2508-CM, 08-2520-CM, 2009 WL 2407715, at *2 (D. Kan. Aug. 4, 2009) (granting defendant’s motion to compel medical records for a five-year period, despite plaintiff’s argument that the request was not relevant to the extent it sought information regarding every medical issue plaintiff experienced during that time period); *LeFave v. Symbios, Inc.*, No. CIV.A. 99-Z-1217, 2000 WL 1644154, at *2 (D. Colo. Apr. 14, 2000) (finding defendants were entitled to discovery of plaintiff’s medical records for any condition, not just her psychological counseling records).

84. *Nichols Gas & Oil, Inc.*, 256 F.R.D. at 123 (concluding such for claimants who consulted with their primary care physicians about work-related stress, as well as claimants who described during their EEOC interviews physical manifestations of the emotional distress they allegedly suffered, such as anxiety attacks, nausea, sweats, severe headaches, insomnia, and stomach aches and problems).

85. *Kronenberg v. Baker & McKenzie LLP*, 747 F. Supp. 2d 983, 989 (N.D. Ill. 2010).

A. *Psychotherapist-Patient Privilege*

In 1996, the United States Supreme Court held in *Jaffee v. Redmond* that “confidential communications between a licensed psychotherapist and her patients in the course of diagnosis or treatment are protected from compelled disclosure under Rule 501 of the Federal Rules of Evidence.”⁸⁶ In *Jaffee*, the Supreme Court explained that the psychotherapist-patient privilege applies to confidential communications with licensed psychiatrists and psychologists, as well as with licensed social workers in the course of psychotherapy.⁸⁷ The Court rejected a balancing test (i.e., weighing the patient’s interest in privacy against the evidentiary need for disclosure).⁸⁸ The Court reasoned that in order for a privilege to serve its purpose, an individual engaging in the confidential communication must be able to confidently determine whether his discussions will be protected.⁸⁹ It explained, “An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all.”⁹⁰

Likewise, the psychotherapist-patient privilege is recognized in state courts.⁹¹ Generally, the psychotherapist-patient privilege is statutory, but in a few cases it is based on common-law principles.⁹² The statutes mostly differ with respect to which types of specialists

86. 518 U.S. 1, 15 (1996). For case law regarding when federal courts are governed by state law of privilege under Rule 501, see Bruce I. McDaniel, Annotation, *Situations in Which Federal Courts Are Governed by State Law of Privilege Under Rule 501 of Federal Rules of Evidence*, 48 A.L.R. FED. 259 (1980). This rule provides that the common law governs claims of privilege unless the U.S. Constitution, a federal statute, or a rule prescribed by the Supreme Court provides otherwise. FED. R. EVID. 501. However, “in a civil case, state law governs privilege regarding a claim or defense for which state law supplies the rule of decision.” *Id.*

87. *Jaffee*, 518 U.S. at 15–16.

88. *Id.* at 17.

89. *Id.* at 17–18.

90. *Id.* at 18 (quoting *Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981)).

91. See Helen A. Anderson, *The Psychotherapist Privilege: Privacy and “Garden Variety” Emotional Distress*, 21 GEO. MASON L. REV. 117, 147–52 (2013) (“All of the states had recognized the privilege by the time of *Jaffee*, although the laws varied in scope.”).

92. B. W. Best, Annotation, *Privilege, in Judicial or Quasi-Judicial Proceedings, Arising from Relationship Between Psychiatrist or Psychologist and Patient*, 44 A.L.R.3d 24 § 3[a] (1972).

in mental diseases are covered by the privilege (e.g., psychiatrists or psychologists).⁹³

B. *Physician-Patient Privilege*

The United States Supreme Court, however, has not recognized the existence of a physician-patient privilege under Federal Rule of Evidence 501.⁹⁴ Because there was no physician-patient privilege at federal common law, courts “have been all but unanimous” in refusing to recognize a privilege under Federal Rule of Civil Procedure 501.⁹⁵

On the other hand, the vast majority of states have statutes codifying the physician-patient privilege.⁹⁶

C. *Not Privileged*

Even when there is a privilege available, most courts hold that the names of mental health care providers and dates of treatment are not subject to the privilege because the privilege only protects actual communications between the patient and the therapist.⁹⁷

93. *Id.* § 3[b].

94. *See Whalen v. Roe*, 429 U.S. 589, 602 n.28 (1977) (“[P]hysician-patient evidentiary privilege is unknown to the common law.”); *see also Jaffee*, 518 U.S. at 9–11 (discussing the need for a psychotherapist-patient privilege and noting that unlike the physician-patient relationship, the psychotherapist-patient relationship is dependent upon an atmosphere of confidence and trust).

95. 25 KENNETH W. GRAHAM JR., *FEDERAL PRACTICE AND PROCEDURE* § 5522 n.500 (1st ed. 2014); *see also United States v. Bek*, 493 F.3d 790, 801–02 (7th Cir.) (“[W]e can find no circuit authority in support of a physician-patient privilege.”), *cert. denied*, 552 U.S. 1010 (2007); 1 KENNETH S. BROUN, *MCCORMICK ON EVIDENCE* § 98 (7th ed. 2013). *But see, e.g., EEOC v. Serramonte*, 237 F.R.D. 220, 224 (N.D. Cal. 2006) (finding medical records privilege under the rights of privacy in state and federal law).

96. EDWARD J. IMWINKELRIED, *THE NEW WIGMORE: A TREATISE ON EVIDENCE: EVIDENTIARY PRIVILEGES* § 6.2.6 (2014).

97. *Merrill v. Waffle House, Inc.*, 227 F.R.D. 467, 471 (N.D. Tex. 2005) (citing, *inter alia*, *Jackson v. Chubb Corp.*, 193 F.R.D. 216, 219 n.4 (D.N.J. 2000)); *Vinson v. Humana, Inc.*, 190 F.R.D. 624, 627 (M.D. Fla. 1999); *Kiermeier v. Woodfield Nissan, Inc.*, No. 98 C 3260, 1999 WL 759485, *1 (N.D. Ill. Sept. 7, 1999); *Santelli v. Electro-Motive*, 188 F.R.D. 306, 310 (N.D. Ill. 1999). *But see Thomas-Young v. Sutter Cent. Valley Hosps.*, No. 1:12-CV-01410-AWI, 2013 WL 3481693, at *8–9 (E.D. Cal. July 10, 2013) (denying defendant’s motion to compel identity of all of plaintiff’s medical providers and noting California district courts have held that such information is protected by the plaintiff’s right to privacy; but permitting defendant to question plaintiff regarding dates of treatment, stressors,

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Accordingly, objecting to the production of such information on the basis of privilege will generally be unsuccessful. There is a split of case law about whether privilege encompasses diagnoses and the nature of treatment.⁹⁸ On a related note, “information gleaned and recorded by non-psychotherapists that happens to implicate [a plaintiff’s] mental health” is not subject to the psychotherapist-patient privilege.⁹⁹

D. *Waiver*

When there is an applicable privilege, it is not enough for the defendant to merely assert that it is entitled to the records because they may have relevant information that would assist the defendant with the presentation of its case.¹⁰⁰ This holds true even if the defendant could plausibly assert that the records could reveal significant evidence contradicting the plaintiff’s evidence or undermining the plaintiff’s truthfulness.¹⁰¹ That would be like arguing to a court that the plaintiff’s communications with his attorney may have relevant information to help the defense or contain evidence helpful to impeaching the plaintiff and thus should be turned over.

Privileged communications are not discoverable unless there has been a waiver of the privilege.¹⁰² A party can waive the psychotherapist-patient and physician-patient privileges either by express or implied waiver.¹⁰³ For example, a plaintiff expressly waives the privilege when she signs and produces a medical

and other factors that potentially contributed to her alleged emotional distress).

98. *Stark v. Hartt Transp. Sys., Inc.*, 937 F. Supp. 2d 88, 91–92 (D. Me. 2013) (recognizing split and citing cases; concluding that the privilege does shield such information).

99. *Id.* (citing *United States v. Ghane*, 673 F.3d 771, 783 (8th Cir. 2012); *EEOC v. Nichols Gas & Oil, Inc.*, 256 F.R.D. 114, 120 (W.D.N.Y. 2009)).

100. *Kronenberg v. Baker & McKenzie LLP*, 747 F. Supp. 2d 983, 985 (N.D. Ill. 2010).

101. *Id.* (“Parties . . . do not forfeit [a privilege] merely by taking a position that the evidence might contradict.” (quoting *United States v. Salerno*, 505 U.S. 317, 323 (1992))).

102. *In re Sims*, 534 F.3d 117, 131 (2d Cir. 2008) (extending Federal Rule of Evidence 501 to psychotherapist-patient privilege, which may be waived “[l]ike other testimonial privileges” (citing *Jaffee v. Redmond*, 518 U.S. 1, 15 n.4 (1996))).

103. *Id.* (citing *John Doe Co. v. United States*, 350 F.3d 299, 302 (2d Cir. 2003)).

authorization for the defendant to obtain her medical records.¹⁰⁴ “[W]aiver may be implied in circumstances where it is called for in the interests of fairness,” including “when the party attempts to use the privilege both as ‘a shield and a sword.’”¹⁰⁵ Testimonial privileges, like constitutional privileges, are personal and cannot be waived vicariously;¹⁰⁶ therefore, “waiver can only result from action of the plaintiff, not from that of the defendant.”¹⁰⁷ In other words, “a plaintiff does not put his mental state in issue merely by acknowledging he suffers from [a mental health issue] for which he is not seeking recompense; nor may a defendant overcome the privilege by putting the plaintiff’s mental state in issue.”¹⁰⁸ Certain plaintiffs strategically decide not to pursue emotional distress damages to try to circumvent any argument that there has been a waiver of the privilege.¹⁰⁹

When a plaintiff pursues emotional distress damages in an employment law case, the discoverability of his medical records often hinges largely on how the particular judge or jurisdiction views the issue of waiver. Since *Jaffee*, federal courts have grappled

104. *Tavares v. Lawrence & Mem’l Hosp.*, No. 3:11-CV-770 (CSH), 2012 WL 4321961, at *7 (D. Conn. Sept. 20, 2012) (concluding that when a plaintiff named her marital therapist in her interrogatory response, and signed and provided a blank medical authorization to release to defendant’s counsel information relating to treatment, plaintiff expressly waived any privilege to marital therapy records for the stated time period).

105. *Jacobs v. Conn. Cmty. Technical Colls.*, 258 F.R.D. 192, 195 (D. Conn. 2009) (quoting *Sims v. Blot*, 534 F.3d 117, 132 (2d. Cir. 2008)).

106. *Kronenberg*, 747 F. Supp. 2d at 995 (citing, inter alia, *United States v. Hatcher*, 323 F.3d 666, 674 (8th Cir. 2003)).

107. *United States v. Hatcher*, 323 F.3d 666, 674 (8th Cir. 2003) (attorney-client privilege); *Kevlik v. Goldstein*, 724 F.2d 844, 850 (1st Cir. 1984) (attorney-client privilege); *Kronenberg*, 747 F. Supp. 2d at 995 (citing *In re Sims*, 534 F.3d at 134) (psychotherapist-patient privilege).

108. *In re Sims*, 534 F.3d at 134; *Koch v. Cox*, 489 F.3d 384, 391 (D.C. Cir. 2007).

109. For example, in *Kronenberg*, 747 F. Supp. 2d at 994, the plaintiff filed a stipulation stating, among other things, that he was “not claiming emotional distress damages because he did not suffer any emotional distress from or as a result of [defendant’s] actions” and he represented “that he waives now and forever any claims for emotional distress damages however described and whether of the garden variety or any other.” See also *In re Sims*, 534 F.3d at 134 (agreeing with *Koch*, 489 F.3d at 391, in that, among other things, “a plaintiff may withdraw or formally abandon all claims for emotional distress in order to avoid forfeiting his psychotherapist-patient privilege”).

with when the psychotherapist-patient privilege can be waived.¹¹⁰ Certain courts take a broad approach and conclude that a waiver occurs any time a plaintiff seeks emotional distress damages.¹¹¹ Some courts take a narrow approach that waiver only exists when a plaintiff chooses to affirmatively rely on the substance of the privileged communications, such as by introducing a portion of the privileged material or putting the treating provider on the stand.¹¹² Still other courts take a middle-ground approach, finding that a plaintiff does not waive the privilege if she merely asserts “garden-variety” emotional distress.¹¹³ To complicate matters even further, courts taking the middle-ground approach have different views on what constitutes “garden-variety” emotional distress.¹¹⁴ Some courts apply the same or similar factors in assessing whether a plaintiff’s claims for emotional distress are “garden-variety” to both waiver of privilege and in the Rule 35 context.¹¹⁵

Likewise, virtually every state recognizes some sort of implied waiver of the psychotherapist-patient privilege, but they vary on their approach to it.¹¹⁶ The vast majority of states have some variant of a patient-litigant exception, which is often statutory.¹¹⁷

110. See Anderson, *supra* note 91, at 118; Robert H. Aronson, *The Mental Health Provider Privilege in the Wake of Jaffee v. Redmond*, 54 OKLA. L. REV. 591, 598–99 (2001); Ryan M. Gott, Note, *The Evolving Treatment of “Garden-Variety” Claims Under the Psychotherapist-Patient Privilege*, 6 SUFFOLK J. TRIAL & APP. ADVOC. 91, 101 (2001); Ellen E. McDonnell, Note, *Certainty Thwarted: Broad Waiver Versus Narrow Waiver of the Psychotherapist-Patient Privilege After Jaffee v. Redmond*, 52 HASTINGS L.J. 1369, 1369 (2001).

111. See, e.g., *Sarko v. Penn-Del Directory Co.*, 170 F.R.D. 127 (E.D. Penn. 1997). See generally JAMES WILLIAM MOORE, 6-26 MOORE’S FEDERAL PRACTICE § 26.50[5] (3d ed. 2014).

112. See, e.g., *Vanderbilt v. Town of Chilmark*, 174 F.R.D. 225 (D. Mass. 1997). See generally MOORE, *supra* note 111, § 26.50[5].

113. See, e.g., *Stevenson v. Stanley Bostitch, Inc.*, 201 F.R.D. 551, 556 (N.D. Ga. 2001) (citing *Ruhlmann v. Ulster Cnty. Dep’t of Soc. Servs.*, 194 F.R.D. 445, 449 (N.D.N.Y. 2000)).

114. See *Flowers v. Owens*, 274 F.R.D. 218, 220, 225–26 (N.D. Ill. 2011) (noting that “as so often occurs in these cases, it became apparent that the parties had very different notions of what could grow in the garden” and discussing various iterations of “garden-variety” emotional damages).

115. See *Porter v. Pinkerton Gov’t Servs., Inc.*, No. 13–1141 (GK), 2014 WL 2156974, at *6 (D.D.C. May 23, 2014) (applying five factors to waiver); *St. John v. Napolitano*, 274 F.R.D. 12, 19–20 (D.D.C. 2011) (same); *supra* note 47 and accompanying text (applying factors in Rule 35 context).

116. Anderson, *supra* note 91, at 148.

117. *Id.*

Similarly, the scope and applicability of the physician-patient privilege is subject to exceptions, which are often enumerated by statute.¹¹⁸

VI. PRIVACY CONCERNS

The notion of privacy is separate and distinct from the issue of privilege. Although it is well established that federal courts recognize that plaintiffs have an interest in the privacy of their medical records, it is not an absolute right, nor is it dispositive in all cases where a defendant seeks medical records.¹¹⁹

Federal courts have held that “the privacy of any individual and the confidentiality of the files may be protected by an appropriate protective order.”¹²⁰ Thus, in response to plaintiffs’ objections on privacy grounds, courts often note that protective orders ameliorate plaintiffs’ privacy concerns.¹²¹ Medical records are often subject to disclosure only to opposing counsel and experts unless there is a compelling reason for the opposing party to view them.¹²² In other words, they may be designated as “Attorneys’ Eyes Only” under the terms of the protective order governing the case. Likewise, courts may direct parties to file medical records under seal.¹²³

118. 98 C.J.S. *Witnesses* § 378 (2014).

119. *EEOC v. Sheffield Fin. LLC*, No. 1:06CV00889, 2007 WL 1726560, at *6 (M.D.N.C. June 13, 2007) (citing *In re Grand Jury Subpoena John Doe No. A01-209*, 197 F. Supp. 2d 512, 514 (E.D. Va. 2002)).

120. *Id.* (quoting *Willis v. Golden Rule Ins. Co.*, No. CIV-3-89-0189, 1991 WL 350038, at *3 (E.D. Tenn. Aug. 5, 1991)).

121. *Id.* (finding that the individual’s privacy would be adequately protected because a consent protective order had been entered for all documents and things produced in discovery, thus rejecting EEOC’s contention that former employee’s privacy would be invaded).

122. *Hawkins v. Anheuser-Busch, Inc.*, No. 2:05-CV-688, 2006 WL 2422596, at *2-3 (S.D. Ohio Aug. 22, 2006) (ordering medical records to be produced for counsel’s and experts’ eyes only where there was no protective order in place but noting that defendant would be permitted to seek a lower level of protection if it believed it was warranted); *see, e.g., Wetzel v. Brown*, No. 1:09-cv-053, 2014 WL 684693, at *5 (D.N.D. Feb. 21, 2014) (concluding that because plaintiffs have legitimate concerns over the confidentiality of their medical and psychological records, attorneys’ eyes only provisions in protective order were warranted).

123. *See, e.g., Wetzel*, 2014 WL 684693, at *5 (requiring defense counsel to file any medical records with the court under seal); *EEOC v. Cal. Psychiatric Transitions*, 258 F.R.D. 391, 400 (E.D. Cal. 2009) (“A protective order, and a direction that any of the disclosed material filed with the court must be done

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In cases where medical records are deemed to be discoverable, there are often disputes about how those records should be obtained by the defendant, especially considering their often highly sensitive and private nature. Some courts permit plaintiff's counsel the opportunity to obtain the records first and then produce them to the defendant.¹²⁴ This allows plaintiff's counsel the opportunity to withhold or redact documents on the basis of lack of relevance, privilege, privacy concerns, or as counsel deems to be appropriate.¹²⁵ Where a plaintiff refuses to voluntarily produce medical records, or a defendant is not satisfied with the plaintiff's production of medical records, the defendant may take more aggressive steps to get the records it desires.¹²⁶ Sometimes a defendant insists that a plaintiff must sign authorizations consenting to release of her medical records directly to defendant through defense counsel. If a plaintiff refuses to sign the

under seal, will protect [plaintiff's] privacy rights.”).

124. See, e.g., *Washam v. Evans*, No. 2:10CV00150 JHL, 2011 WL 2559850, at *3 (E.D. Ark. June 29, 2011) (granting defendant's motion to compel medical records and giving plaintiffs the option to either sign unconditional authorizations for the records or obtain the records themselves and produce them to the defendants).

125. *Kersten v. Old Dominion Freight Line, Inc.*, CIV. No. 11-1036 (DSD/JSM), 2011 WL 5373777, at *3-4 (D. Minn. Nov. 1, 2011) (permitting plaintiff's counsel to examine and produce to defendant the relevant medical records); *J.J.C. v. Fridell*, 165 F.R.D. 513, 517 (D. Minn. 1995) (permitting plaintiff's counsel, in sexual harassment and retaliatory discharge case, to obtain the medical and psychological records first to make a determination as to their confidential nature before producing them, but warning that the court may impose sanctions if it determines that records have been improperly withheld).

126. As one court noted:

There is no absolute rule prohibiting a party from seeking to obtain the same documents from a non-party as can be obtained from a party, nor is there an absolute rule providing that the party must first seek those documents from an opposing party before seeking them from a non-party. In many cases, it is important to obtain what should be the same documents from two different sources because tell-tale differences may appear between them; and in many cases when a party obtains what should be the same set of documents from two different sources a critical fact in the litigation turns out to be that one set omitted a document that was in the other set.

EEOC v. Premier Well Servs., LLC, No. 4:10cv1419 SWW, 2011 WL 2198285, at *1 (E.D. Ark. June 3, 2011) (citations omitted) (quoting *Cofeyville Res. Ref. & Mktg., LLC v. Liberty Surplus Ins. Corp.*, No. 4:08MC00017 JLH, 2008 WL 4853620, at *2 (E.D. Ark. Nov. 6, 2008)) (internal quotation marks omitted).

authorizations, a defendant may bring a motion to compel her to do so.¹²⁷ Most courts agree that Rule 34, along with Rule 37, empower a court to order a plaintiff to execute written authorizations consenting to the production of her medical records.¹²⁸ Often in the court's view, signing an authorization "represents the least expensive and most efficient means of procuring information from medical or counseling providers."¹²⁹ However, there are certain courts that have concluded that the Federal Rules of Civil Procedure do not give courts the authority to compel a plaintiff to execute a medical authorization.¹³⁰ These courts reason that the medical care providers, not the patient, maintain "possession, custody, and control" of the medical records.¹³¹ Further, there is an argument that defendants can just as easily obtain copies of medical records from the medical provider's custodian of records as from the plaintiff.¹³² Thus, these courts

127. See FED. R. CIV. P. 34, 37.

128. See, e.g., *Washam*, 2011 WL 2559850, at *2 ("Requests for authorizations for the release of . . . records can be properly ordered pursuant to Rule 34" (citing *Fridell*, 165 F.R.D. at 517)); *Arnold v. ADT Sec. Servs., Inc.*, No. 05-0607-CV-W-GAF, 2009 WL 1086949, at *3-4 (W.D. Mo. Apr. 22, 2009) (denying plaintiffs' motion for reconsideration of order compelling them to provide authorizations on the basis of Rule 37(a)(5)(A)); *Lischka v. Tidewater Servs., Inc.*, Civ. A. No. 96-296, 1997 WL 27066, at *2 (E.D. La. Jan. 22, 1997) ("The cases almost universally hold, explicitly or implicitly, that Rule 34, along with Rule 37, empowers federal courts to compel parties to sign written authorizations consenting to the production of various documents . . .").

129. *EEOC v. Sheffield Fin. LLC*, No. 1:06CV00889, 2007 WL 1726560, at *6 (M.D.N.C. June 13, 2007) ("[G]ranting defendant's motion to compel execution of medical release in Title VII case where plaintiff sought compensatory damages for emotional distress." (quoting *Smith v. Logansport Cmty. Sch. Corp.*, 139 F.R.D. 637, 649 (N.D. Ind. 1991))). Although "[i]t is common practice for a party who obtains records with the authorization of the opposing party to provide copies of those records to opposing counsel within a reasonable period of time," there is "nothing in the Federal Rules that *requires* the defendants to provide these records absent a discovery request." *Washam*, 2011 WL 2559850, at *3 (citations omitted).

130. See *Fields v. W. Va. State Police*, 264 F.R.D. 260, 263 (S.D. W.Va. 2010) (finding no basis in the Federal Rules of Civil Procedure that empowers a court to require a party to execute a release of medical records); *Klugel v. Clough*, 252 F.R.D. 53, 55 (D.D.C. 2008) ("[A] request for production of documents pursuant to Rule 34 . . . cannot be utilized as a vehicle by which to compel a party to sign an authorization for the release of medical records." (citing *Becker v. Securitas Sec. Servs. USA, Inc.*, Civil Action No. 06-2226-KHV-DJW, 2007 WL 677711, at *3 (D. Kan. Mar. 2, 2007))).

131. See, e.g., *Clark v. Vega Wholesale Inc.*, 181 F.R.D. 470, 472 (D. Nev. 1998).

132. See *id.*

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sometimes insist or imply that defendant should secure copies of the medical records pursuant to a Rule 45 subpoena *duces tecum* to the custodian of records of the medical provider.¹³³

The Health Insurance Portability and Accountability Act (HIPAA), which covers disclosures of medical records for judicial proceedings,¹³⁴ provides a means for defendants to obtain medical records without the plaintiff's signed authorization.¹³⁵ Specifically, HIPAA permits a health care provider to release documents containing protected health information in discovery in response to a court order,¹³⁶ or even in response to a subpoena or discovery request, if the patient has been given notice in accordance with the regulation¹³⁷ or the discovering party has made reasonable efforts to obtain "a qualified protective order."¹³⁸ A qualified protective order is a court order or a stipulation by the parties to the litigation that allows protected health information to be used only for purposes of litigation and mandates its return or destruction at the conclusion of the litigation.¹³⁹

133. *Fields*, 264 F.R.D. at 263–64 (“If a party refuses to sign releases and makes sworn statements that the party lacks all records of health treatment, then an opposing party has little option but to use Rule 45 and the HIPAA regulations to obtain the records.”); *Klugel*, 252 F.R.D. at 55 n.2 (denying defendants’ motion to compel plaintiff to produce signed medical records and suggesting alternative means for defendants to obtain discovery of medical records, including a subpoena).

134. 45 C.F.R. § 164.512(e) (2014). HIPAA governs the use and disclosure of protected health information. 45 C.F.R. §§ 160, 164. It creates a monetary remedy for the wrongful disclosure of medical information. 42 U.S.C. § 1320d-6 (2012). However, there is no private cause of action under HIPAA. *Runkle v. Gonzales*, 391 F. Supp. 2d 210, 237 (D.D.C. 2005).

135. *Lopez v. Cardenas Mkts., Inc.*, No. 2:11-cv-00323-ECR-CWH, 2011 WL 4738111, at *3 (D. Nev. Oct. 5, 2011).

136. 45 C.F.R. § 164.512(e)(1)(i).

137. *Id.* § 164.512(e)(1)(ii)(A). This includes proof that the patient has been given time to object to the court and “(1) [n]o objections were filed; or (2) [a]ll objections filed . . . have been resolved by the court . . . and the disclosures being sought are consistent with subject resolution.” *Id.* § 164.512(e)(1)(iii)(C)(1)–(2).

138. *Id.* § 164.512(e)(1)(ii)(B); *see also* *Carpenter v. Res-Care Health Servs., Inc.*, 3:12-CV-08047, 2013 WL 1750464, at *3 (S.D. W. Va. Apr. 23, 2013) (noting that defendant can attach the protective order, as well as the court’s current order, to obtain the records directly from plaintiff’s medical providers).

139. 45 C.F.R. § 164.512(e)(1)(v).

VII. RECOMMENDED APPROACH

There is no cookie-cutter approach as to how parties and courts should handle the discoverability of medical records in employment law cases where the plaintiff has alleged emotional distress damages. The appropriate approach will depend on the type of motion, the jurisdiction, and the unique facts of each case. That said, the following general approach may be used as a guidepost for parties faced with such disputes and for courts tackling these issues.

A. *Parties*

In employment law cases involving emotional distress, from the Rule 26(f) conference forward, the parties should meet early and regularly to discuss issues regarding the scope of discoverable medical records, if any, and the manner of their production. The parties should cooperate in getting a stipulation for a protective order with an “Attorneys’ Eyes Only” provision filed promptly so that the court may issue a protective order. In undertaking efforts to obtain medical records, the parties must be mindful of their obligations under HIPAA, the federal rules, the local rules, and any medical-provider-specific requirements.

Defendants should draft narrowly-tailored discovery requesting information about plaintiffs’ emotional distress damages. The time frame and the substance of the records sought should be justifiable based on the facts of the case. In other words, it is not appropriate to ask the plaintiff to sign unlimited authorizations, to subpoena a lifetime of plaintiff’s medical records, or even to seek medical records and medical provider information for an arbitrary number of years.

In turn, plaintiffs should be accurate and detailed in their objections and responses. The responses should provide basic information about whether the plaintiff is seeking emotional distress damages, whether the emotional distress is allegedly ongoing (or the date certain by which it ceased), and how the emotional distress manifested itself.¹⁴⁰ A generic response that the

140. In *John Doe I v. Mulcahy, Inc.*, Civil No. 08-306 (DWF/SRN), 2008 WL 4572515, at *6 n.4 (D. Minn. Oct. 14, 2008), the court could not evaluate defendant’s need for discovery or plaintiffs’ right to privacy because no discovery had taken place and the plaintiffs had not offered any stipulations. The court indicated, “Plaintiffs could offer stipulations representing what is contained in the

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plaintiff is seeking “garden-variety” emotional distress may not provide sufficient information for the defense or the court.¹⁴¹ All objections should be clear. For example, it is helpful for a plaintiff to indicate whether any of the objections (e.g., on relevancy grounds) pertain specifically to a certain time frame. Additionally, plaintiffs should specify whether they are objecting on the basis of the psychotherapist-patient privilege, the physician-patient privilege, or both.

Defendants should provide plaintiffs the opportunity to produce the medical records voluntarily in lieu of demanding that plaintiff execute authorizations for the release of records to defense counsel or subpoenaing the medical providers. In turn, a plaintiff should promptly obtain and produce his relevant, non-privileged medical records (absent any other valid objections). Plaintiff’s counsel should mark medical records “Attorneys’ Eyes Only” where appropriate.

If a plaintiff withholds documents on the basis of privilege, an accompanying privilege log should be provided.¹⁴² Rule 26(b)(5)(A) of the Federal Rules of Civil Procedure states that

[w]hen a party withholds information otherwise discoverable by claiming that the information is privileged . . . the party must: (i) expressly make the claim; and (ii) describe the nature of the documents, communications, or tangible things not produced or disclosed . . . in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.¹⁴³

In cases involving privileged medical records, courts have permitted plaintiffs to provide a categorical privilege log instead of a document-by-document privilege log.¹⁴⁴ A plaintiff should specify the following information with respect to each professional whose communications with the plaintiff are allegedly privileged: “(1)

medical records, whether there are any pre-existing conditions, whether any physical manifestations are claimed beyond life’s normal stressors, or whether the Plaintiffs have sought counseling prior to, during, or after the alleged incidents.”
Id.

141. *Id.* at *4.

142. *See* FED. R. CIV. P. 26(b)(5)(A).

143. *Id.*

144. *See, e.g.,* *St. John v. Napolitano*, 274 F.R.D. 12, 21 (D.D.C. 2011) (holding that categorical privilege log satisfies Rule 26(b)(5)).

[t]he name, address, and relevant qualifications of the mental health professional; (2) [t]he approximate time period of the privileged communications; [and] (3) [t]he general nature of the communications”¹⁴⁵ Moreover, a party should certainly not raise an objection to discovery requests on the basis of privilege where the plaintiff did not actually communicate with a provider to whom that privilege is applicable.¹⁴⁶

While there may be circumstances where a defendant may legitimately question the adequacy of the plaintiff’s production of medical records, defendants should refrain from issuing subpoenas or bringing motions where plaintiff has, in good faith, represented that she has already provided all of her non-privileged, relevant medical records or that no such records exist.¹⁴⁷

The parties should meet and confer over any disputes relating to medical records to try to resolve them without the court’s involvement. If the parties cannot work together on the production of medical records, this will inevitably lead to additional costs and delays for subpoenas and/or motions. When motions are necessary, it is beneficial to separate and provide the appropriate analytical framework for the issues of relevancy (including scope), privilege-waiver, and independent medical examinations (IMEs), to the extent they are in dispute. Likewise, it is crucial for the parties to differentiate between the psychotherapist-patient privilege and the physician-patient privilege.¹⁴⁸ Ideally, disputes about medical

145. *Id.*

146. *Merrill v. Waffle House, Inc.*, 227 F.R.D. 467, 475 n.5 (N.D. Tex. 2005) (expressing frustration that the plaintiff asserted psychotherapist-patient privilege for documents that did not exist and requesting a ruling on the matter).

147. *See, e.g., Sherif v. AstraZeneca, L.P.*, No. CIV. A. 00-3285, 2001 WL 527807, at *3-4 (E.D. Pa. May 16) (granting plaintiff’s motion for a protective order concerning any other medical records where it appeared that all relevant medical and psychiatric records had already been turned over by plaintiff), *order clarified*, No. CIV. A. 00-CV-3285, 2001 WL 695038 (E.D. Pa. June 18, 2001); *Broderick v. Shad*, 117 F.R.D. 306, 309 (D.D.C. 1987) (“Since Broderick has offered a sworn statement that she has not sought or received medical treatment for the conditions alleged in . . . her complaint and that no relevant medical records exist, we deny as irrelevant and intrusive defendant’s motion to compel a wholesale investigation of plaintiff’s medical history over the past [eleven] years.”).

148. *Hannah v. Wal-Mart Stores, Inc.*, Civ. No. 3:12CV1361, 2014 WL 2515221, at *4 (D. Conn. June 4, 2014) (scolding both parties’ counsel where they failed to distinguish between the doctor-patient privilege and the psychoanalyst-patient privilege for “miss[ing] the mark with respect to their arguments”); *Michelman v. Ricoh Ams. Corp.*, No. 11-CV-3633, 2013 WL 664893, at *3 (E.D.N.Y. Feb. 22,

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records should be resolved prior to taking the plaintiff's deposition so as to avoid potential future disputes about whether the deposition should be re-opened for further questioning on additional medical records.

B. Courts

As an initial matter, the court should determine whether emotional distress damages are actually sought by the plaintiff. If they are, the court must make a determination whether to analyze the production of medical records under Rule 26 and/or Rule 35. *St. John v. Napolitano* articulates and demonstrates a well-reasoned approach to using both Rules.¹⁴⁹ In that case, the court began its analysis with the “threshold question of relevance” under Rule 26.¹⁵⁰ It next addressed whether the plaintiff had waived the psychotherapist-patient privilege.¹⁵¹ It noted that “the condition precedent to a Rule 35 order—that the party’s mental condition be ‘in controversy’—raises essentially the same question as whether a party has sufficiently put his or her mental condition at issue to justify a finding that privilege has been waived.”¹⁵² Including a preliminary Rule 26 analysis is well-founded because it puts the onus on the defendant to “make a strong and clear showing of . . . relevance” as opposed to permitting them to “rummage through all aspects of the plaintiff’s life in search of a possible source of stress or distress.”¹⁵³ It also avoids the tendency to conflate the issue of relevancy with the issue of waiver of privilege.

Even though relevancy under Rule 26 is construed broadly, this does not mean that medical records will be relevant in every employment law case where a person seeks emotional distress damages.¹⁵⁴ On the other hand, when the discovery sought appears

2013) (noting that plaintiff mistakenly relied heavily on the law governing psychotherapist-patient privilege where the communications at issue were with her cardiologist and that “[n]o physician-patient privilege exists under federal common law” (alteration in original) (internal citation omitted)).

149. 274 F.R.D. at 16–19.

150. *Id.* at 15–17, 20 n.6.

151. *Id.* at 17–21.

152. *Id.* at 20 n.6.

153. *Evanko v. Elec. Sys. Assocs., Inc.*, No. 91 CIV. 2851, 1993 WL 14458, at *2 (S.D.N.Y. Jan. 8, 1993).

154. *See, e.g., Womack v. Wells Fargo Bank*, 275 F.R.D. 571, 573 (D. Minn. 2011) (finding the relevance of plaintiff’s medical records to the stated claim to be

relevant, the court should consider arguments by the plaintiff, if any, that the requested discovery is of such marginal relevance that the potential harm occasioned by discovery would outweigh the ordinary presumption in favor of broad disclosure, and/or that “good cause” exists to demonstrate that the discovery would result in unwarranted annoyance, embarrassment, oppression, or undue burden or expense.¹⁵⁵ The Federal Rules of Evidence may be helpful in guiding the court’s analysis, or, at the very least, should be kept in mind for potential later motions to exclude such evidence at trial.¹⁵⁶

In determining the scope of medical records, the court should examine the appropriate time frame for discovery of such records. Simply because “latent medical conditions can manifest themselves in different ways over a period of time . . . this is a weak basis for seeking records over . . . a broad time period,” especially where the records pre-date the events alleged to give rise to the unlawful conduct alleged in the complaint.¹⁵⁷ Usually, the relevant time period should not be dependent on the onset of the person’s mental health issue, which for some individuals may be in their childhood or adolescence. Likewise, the relevant period for medical records does not necessarily correspond with the start of a plaintiff’s employment with the defendant. For example, if two plaintiffs were both sexually harassed by the same boss starting on January 1, 2014, it does not follow that the time frame for their medical records should be dependent on their tenure with the company. Instead, the start date of the time period for medical records should be justified in relation to the time frame of the unlawful conduct alleged and, in certain cases, may pre-date it.¹⁵⁸ Although the time frame will vary based on the facts of the case, courts typically permit between one to five years pre-dating the unlawful conduct.¹⁵⁹ If the plaintiff is seeking damages related to

de minimis).

155. See *supra* notes 32–33 and accompanying text.

156. See *supra* notes 58–62 and accompanying text.

157. *St. John*, 274 F.R.D. at 16–17 (citation omitted) (internal quotation marks omitted).

158. See, e.g., *Kirchner v. Mitsui & Co.*, 184 F.R.D. 124, 124 (M.D. Tenn. 1998) (requiring plaintiff to produce mental health records from the year plaintiff began working at the office where the alleged harassment occurred, instead of the year when plaintiff’s employment with the company began, and leaving the door open to future motions to establish need for further records).

159. See *supra* note 69 and accompanying text.

ongoing emotional distress, the time frame would likely be to the present.¹⁶⁰ However, if the plaintiff avers that her emotional distress caused by the defendant's conduct ceased at a certain point in time, then that should typically be the cut-off date for the discoverability of medical records.¹⁶¹

After the court has set the relevant time frame, it should then focus on which specific providers have medical records likely to lead to the discovery of admissible evidence. It is important for courts ruling on motions involving medical records to distinguish between mental health and psychological records, as opposed to "pure" medical records.¹⁶² Records from mental health providers often go right to the heart of a plaintiff's claim of emotional distress. Thus, defendants have persuasive arguments as to why a plaintiff's mental health records are relevant. Moreover, health care providers who do not practice in a psychiatric specialty still often include notes in their medical records about "consultation, diagnosis and treatment of psychological" disorders.¹⁶³ On the other hand, a defendant may not have any valid bases to assert that all or any of a plaintiff's "pure" medical records are relevant. Certain types of medical records (e.g., optometry, dentistry, dermatology, or radiology) may have no bearing whatsoever on a plaintiff's claim of emotional distress.¹⁶⁴ In certain cases, records relating to physical manifestations of emotional distress may be

160. See *supra* note 75 and accompanying text.

161. See *supra* note 76 and accompanying text.

162. *John Doe I v. Mulcahy, Inc.*, No. 08-306 (DWF/SRN), 2008 WL 4572515, at *5 (D. Minn. Oct. 14, 2008) ("A defendant must initially establish a need for medical records through narrowly-tailored interrogatories, requests for admissions, or deposition testimony that seek information related to psychological or mental-health records, as opposed to 'pure' medical records or broad boilerplate requests." (citing *Fitzgerald v. Cassil*, 216 F.R.D. 632, 634 (N.D. Cal. 2003))); see, e.g., *Manassis v. N.Y.C. Dep't of Transp.*, No. 02 Civ. 359SASDF, 2002 WL 31115032, at *2 (S.D.N.Y. Sept. 24, 2002) (permitting discovery of plaintiff's mental health treatment records, but concluding that general medical records are not discoverable unless physical harm was a cause of emotional distress).

163. *Carpenter v. Res-Care Health Servs., Inc.*, No. 3:12-CV-08047, 2013 WL 1750464, at *3 (S.D.W. Va. Apr. 23, 2013) ("[F]amily practitioners and internists routinely address the signs and symptoms of depression and anxiety that arise in their patient populations.")

164. *Evanko v. Elec. Sys. Assocs., Inc.*, No. 91 Civ. 2851 (LMM), 1993 WL 14458, at *2 (S.D.N.Y. Jan. 8, 1993) (noting that defendant's "argument, not surprisingly, is devoid of any specific justification for their demand, for example, for records of plaintiff's dermatologist and radiologist").

relevant, and should be identified with as much specificity as possible (e.g., records relating to headaches, ulcers, or hair loss) as being within the scope of the permissible discovery.¹⁶⁵ Likewise, in some cases, records relating to other physical maladies during the relevant time period that caused significant emotional distress (e.g., a major car accident) may also be deemed relevant.¹⁶⁶ Relatedly, the court should also drill down further to analyze whether certain categories of medical records (e.g., “[l]aboratory reports, x-rays, pathology reports, physical therapy records, and information concerning physical examinations,” etc.) from each of the providers may be excluded as irrelevant.¹⁶⁷ Similarly, a court should consider whether any medical records relating to certain medical issues, especially highly personal or sensitive matters, should be deemed to fall outside the scope of discovery.¹⁶⁸

To the extent that a court finds that medical records are relevant and provides the parameters of their scope, the next issue will be whether the plaintiff may withhold records on the basis of any privilege assertions. As previously noted, the names of providers and dates of treatment are not privileged.¹⁶⁹ With respect to the actual medical records, the court should decide whether the physician-patient privilege (if available in that case under the law) or the psychotherapist-patient privilege has been established by plaintiff for communications with each medical provider. Finally, the court should analyze whether there has been a waiver of privilege and the scope of such waiver. This may depend on whether the court follows the narrow, broad, or middle-ground

165. See *supra* note 80 and accompanying text.

166. See *supra* note 82 and accompanying text.

167. Walker v. Nw. Airlines Corp., No. Civ.00-2604 MJD/JGL, 2002 WL 32539635, at *5 (D. Minn. Oct. 28, 2002); see also *supra* note 81 and accompanying text.

168. See, e.g., Bruno v. CSX Transp., Inc., 262 F.R.D. 131, 133 n.2 (N.D.N.Y. 2009) (ordering production of unabridged medical records, but ordering HIV-related records to be redacted, given that they were not relevant); Doe v. City of Chula Vista, 196 F.R.D. 562, 570 (S.D. Cal. 1999) (“This court agrees that the scope of discovery into this sensitive area should be limited and confined to that information that is essential to a fair trial. Absent some extraordinary showing, for example, defendants have no need to access records relating to the birth of Doe’s child. The magistrate correctly concluded that the interrogatories and subpoenas as originally framed by the defendants were over broad. Doe’s claim for emotional distress damages does not entitle defendants to invade the whole of Doe’s medical history.”).

169. See *supra* note 97 and accompanying text.

approach to waiver.¹⁷⁰ Rule 35 may appropriately come into play in the court's assessment of waiver, particularly if the court takes the middle-ground approach.¹⁷¹

If the court determines that the defendant is entitled to certain medical records, the court should give the plaintiff the opportunity to obtain and provide those medical records to the defendant in a timely manner.¹⁷² This allows the plaintiff's counsel the opportunity to withhold and/or redact documents in a manner that is consistent with the court's order. If there are concerns about the plaintiff's production, one option is for the plaintiff's counsel to provide the records to the court for an *in camera* review of any disputed documents.¹⁷³ Courts are within their discretion to issue sanctions for noncompliance with court orders, including limiting or barring plaintiff's claim for emotional distress damages.¹⁷⁴

VIII. CONCLUSION

In sum, when faced with issues relating to medical records in employment law cases involving emotional distress damages, parties should try to avoid taking unjustified extreme positions, confusing and conflating legal issues, or bringing premature motions. In addition, when courts are faced with a motion involving the discoverability of medical records in these cases, it is incumbent upon them to use the proper analytical framework. A defendant should not be entitled to go on a fishing expedition through a lifetime of medical records when a plaintiff alleges emotional distress in an employment law case.

170. See *supra* notes 111–13 and accompanying text. As noted, there has been significant debate and legal scholarship on the best approach to waiver. See *supra* note 110. Proposing a solution to that issue is beyond the scope of this Article.

171. See *supra* notes 115, 152 and accompanying text.

172. See *supra* notes 124–25 and accompanying text.

173. See *Acquarola v. Boeing Co.*, No. Civ.A. 03-CV-2486, 2004 WL 540487, at *5 (E.D. Pa. Feb. 26, 2004) (concluding that the “[c]ourt will conduct an *in camera* review of [plaintiff’s] records” for relevancy and may determine that certain records should be protected from disclosure under FED. R. CIV. P. 26(c)).

174. See *Sunegova v. Vill. of Rye Brook*, No. 09-CV-4956 (KMK), 2011 WL 6640424, at *11 (S.D.N.Y. Dec. 22, 2011) (barring plaintiff from seeking damages for any emotional injury “beyond garden variety emotional distress” where plaintiff, who alleged severe emotional distress, failed to comply with magistrate’s prior order to make her medical records available and insisted that she would not sign the authorizations for release of her records).