

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

JEFFREY L. CROOM,	:
Plaintiff,	:
	:
-vs-	: Civ. No. 3:00cv1805 (PCD)
	:
WESTERN CONNECTICUT STATE	:
UNIVERSITY,	:
Defendant.	:

RULINGS ON MOTION TO COMPEL, MOTION FOR PROTECTIVE ORDER, MOTION TO PRECLUDE EXPERT TESTIMONY AND MOTION FOR SANCTIONS

The following motions are pending: plaintiff's motion for a protective order prohibiting defendant from contacting plaintiff's subsequent employers, defendant's motion to compel responses to certain interrogatories, defendant's motion to exclude plaintiff's expert witness and plaintiff's motion for sanctions. For the reasons set forth herein, plaintiff's motion for a protective order is denied, defendant's motion to compel production is granted in part, defendant's motion to preclude expert testimony is granted and plaintiff's motion for sanctions is denied.

I. BACKGROUND

Plaintiff is an African-American male employed by defendant from January 1992 through July 20, 1999 as the Assistant Housing Director. He alleges that he was subjected to a pattern of racial discrimination while employed by defendant causing him to resign from his position. Plaintiff alleges that defendant's conduct violates Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* and CONN. GEN. STAT. § 46a-60 *et seq.*

II. MOTION FOR A PROTECTIVE ORDER

Plaintiff moves for a protective order prohibiting defendant from contacting his employers subsequent to defendant as defendant's motivation in doing so is to harass him. Defendant argues that subsequent employers may provide discoverable evidence as to mitigation of damages, thus a protective order precluding such an inquiry is improper.

A. Standard

“Where . . . the [discovery is] relevant, the burden is upon the party seeking . . . a protective order to show good cause.” *Penthouse Int’l, Ltd. v. Playboy Enters.*, 663 F.2d 371, 391 (2d Cir. 1981) (citation omitted); *see also* FED. R. CIV. P. 26(c); *Dove v. Atl. Capital Corp.*, 963 F.2d 15, 19 (2d Cir. 1992) (burden is on moving party to show good cause). FED. R. CIV. P. 26(c), however, “is not a blanket authorization for the court to prohibit disclosure of information whenever it deems it advisable to do so, but is rather a grant of power to impose conditions on discovery in order to prevent injury, harassment, or abuse of the court’s processes.” *Bridge C.A.T. Scan Assocs. v. Technicare Corp.*, 710 F.2d 940, 944-45 (2d Cir. 1983).

B. Analysis

Defendant has not alleged failure to mitigate damages as a defense. Having failed to so plead, it has waived that defense. *See Travellers Int’l, A.G. v. Trans World Airlines, Inc.*, 41 F.3d 1570 (2d Cir. 1994). Although defendant may not seek discovery of this affirmative defense, plaintiff has alleged that “his present and future employment prospects” have been impaired and that he “has thereby suffered economic loss,” seeking compensatory damages therefor. In so alleging, plaintiff has placed his subsequent employment at issue.

Plaintiff must do more than allege that defendant’s motivation for contacting plaintiff’s

employers is to harass him to justify issuance of a protective order. “The burden is upon the movant to show the necessity of its issuance, which contemplates a particular and specific demonstration of fact as distinguished from stereotyped and conclusory statements.” *In re Terra Int’l, Inc.*, 134 F.3d 302, 306 (5th Cir. 1998) (internal quotation marks omitted). Plaintiff has not made such a showing that the discovery sought is impermissible. The motion for a protective order is denied.

III. MOTION TO COMPEL

Defendant moves to compel responses to certain requests for production of medical records and tax records. Plaintiff responds that he has substantially complied with the requests.

A. Standard

The scope of permissible discovery is broad. “Parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.” FED. R. CIV. P. 26(b)(1). However, “[s]ome threshold showing of relevance must be made before parties are required to open wide the doors of discovery and to produce a variety of information which does not reasonably bear upon the issues in the case.” *Hofer v. Mack Trucks, Inc.*, 981 F.2d 377, 380 (8th Cir. 1992). Furthermore, discovery may not be had where the discovery sought is “unreasonably cumulative or duplicative,” overly “burdensome . . . [or] expensive” or “the burden or expense of the proposed discovery outweighs its likely benefit.” FED. R. CIV. P. 26(b)(2). An order compelling discovery may be tailored to the circumstances of the case. *See Gile v. United Airlines, Inc.*, 95 F.3d 492, 496 (7th Cir. 1996).

B. Analysis

Defendant moves to compel production of all documents relating to treatment, examination and consultation received over the past ten years for illness and production of plaintiff's federal and state income tax returns from 1997 to date. Plaintiff claims that he redacted twenty-two pages from his medical record and submitted the same to this court for ex parte examination. There is no record of such a submission. Plaintiff has alleged that he suffered extreme emotional distress as a result of defendant's acts and seeks compensation therefor, placing his health at issue. Plaintiff is therefore ordered to provide this Court the twenty-two pages omitted from its submission to defendant for in camera review by March 8, 2002, at which time an independent review will be conducted and relevant materials will be forwarded to defendant.

Defendant also argues that it has not received certain tax returns in response to its request for production. Plaintiff responds that he has provided defendant with his federal and state tax returns for the years 1997 through 1999. Having produced the contested documents on one occasion, there is presently no dispute as to whether the tax returns constitute appropriate discovery. Plaintiff is ordered to provide defendant with additional copies of his federal and state tax returns for the years 1997 through 1999.

IV. MOTION TO PRECLUDE EXPERT TESTIMONY AND MOTION FOR SANCTIONS

Defendant argues that plaintiff's failure to provide an expert report requires the preclusion of expert testimony at trial. Plaintiff responds that he does not intend to introduce an expert witness at trial but does intend to call his treating physicians and psychologists. Plaintiff also moves for sanctions pursuant to FED. R. CIV. P. 11 for defendant's failure to state that good faith efforts were undertaken to resolve the dispute and because the motion is frivolous.

The following additional information is relevant to disposition of these motions. The parties were required by pretrial order to disclose expert witnesses by December 31, 2001. Plaintiff served a designation of expert witnesses on defendant on January 2, 2002 and a revised designation of expert witnesses on January 3, 2002. No expert report was served on defendant.

Parties are required to “disclose to other parties the identity of any person who may be used at trial to present evidence under Rules 702, 703, or 705 of the Federal Rules of Evidence.” FED. R. CIV. P. 26(a)(2)(A). The substance of the disclosure must meet the requirements of FED. R. CIV. P. 26(a)(2)(B),(C). A party who fails to disclose its expert witness in accordance with FED. R. CIV. P. 26(a) will not be permitted to call that witness at trial. FED. R. CIV. P. 37(c)(1). Plaintiff will thus not be permitted to call an expert witness at trial, having failed to disclose the substance of any testimony an expert may provide in accordance with FED. R. CIV. P. 26(a).¹ *See LeBarron v. Haverhill Co-op. Sch. Dist.*, 127 F.R.D. 38, 40 (D.N.H. 1989). The motion to preclude expert testimony is granted.

Plaintiff moves to sanction defendant pursuant to FED. R. CIV. P. 11 for filing its motion to preclude expert testimony. “A motion for sanctions under this rule shall be made separately from other motions or requests.” FED. R. CIV. P. 11(c)(1)(A). Having incorporated his motion for sanctions into his memorandum in opposition to defendant’s motion to preclude expert testimony it is improper and so denied.

¹ Provided the substance of her testimony is confined to matters within her personal knowledge, plaintiff’s treating physician most likely would not be considered an expert witness triggering the FED. R. CIV. P. 26 disclosure requirements. *See Patel v. Gayes*, 984 F.2d 214, 217 (7th Cir. 1993). It would be another matter if the physician testifies to matters not within her personal knowledge or to knowledge acquired in anticipation of litigation. *Id.*

V. CONCLUSION

Plaintiff's motion for a protective order (Doc. 35) is **denied**, defendant's motion to compel production (Doc. 48) is **granted in part**, defendant's motion to preclude expert testimony (Doc. 61) is **granted** and plaintiff's motion for sanctions (Doc. 63) is **denied**.

SO ORDERED.

Dated at New Haven, Connecticut, March ____, 2002.

Peter C. Dorsey
United States District Judge