

APPELLATE CASE NOTES

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PHYSICIAN-PATIENT PRIVILEGE PROTECTED IN GENDER DISCRIMINATION AND SEXUAL HARASSMENT CASE BECAUSE CLAIMANT DID NOT SEEK DAMAGES FOR A MEDICALLY DIAGNOSABLE INJURY, ONLY “GARDEN VARIETY” EMOTIONAL DISTRESS

STATE EX REL. DEAN, LAURIE V. CUNNINGHAM

A unanimous Missouri Supreme Court held that the medical and psychological records of a woman alleging gender discrimination and sexual harassment remained privileged because she sought damages for emotional distress of a generic kind – kind of distress or humiliation that an ordinary person would experience in such circumstances. Under these facts, evidence of the claimant’s past or present mental condition is not in controversy and the physician-patient privilege is not waived. The January 10, 2006 Missouri Supreme Court en banc ruling overturned a St. Charles Circuit Court production order, *State ex rel. Laurie Dean v. Cunningham*, 2006 WL 44357 (Mo. 2006).

RELEVANT FACTS

Laurie Dean sued her employer RARE Hospitality International, Inc., for sexual harassment and gender discrimination under the Missouri Human Rights Act. Dean sought damages for loss of income, emotional distress, humiliation, inconvenience and loss of enjoyment of life. Dean responded to discovery that she had not been treated at any hospitals, doctors, nurses, psychologists, counselors or others in the healing arts. In response to an interrogatory regarding damages claimed, Dean responded that she was claiming “Emotional Distress, Embarrassment, Humiliation – Plaintiff is at this time, seeking only ‘garden variety’ emotional distress damages.” Dean objected to another interrogatory that asked whether she ever consulted or treated with a psychiatrist, psychologist, counselor or other health care practitioner for mental distress, emotional suffering or any other mental or emotional condition. The objection was based in part on the physician-patient privilege and in part that the request was not limited in time.¹

The circuit court granted RARE’s Motion to Compel and ordered Dean to produce her mental health records and to execute medical authorizations. Dean petitioned the Court of Appeals for a writ of prohibition, which was denied. The Missouri Supreme Court accepted transfer.

SOURCES OF LAW

The Court began its analysis by reviewing generally three sources of law:

- The Missouri Human Rights Act, RSMo. § 213.010 *et seq.*;
- The physician-patient privilege in RSMo. § 491.065; and
- Case law regarding waiver of physician-patient privilege.

1. THE MISSOURI HUMAN RIGHTS ACT.

The MHRA protects important social interests in prohibiting discrimination in employment, public accommodations and other interests on the basis of sex, race, color, religion, national origin, ancestry and age as it relates to employment, disability or familial status as it relates to housing. RSMo. § 213.010(5). In addition to administrative remedies, the Act allows a claimant to seek damages for actual and punitive damages, court costs and reasonable attorney’s fees as well as injunctive relief. RSMo. § 213.111.2.²

2. THE PHYSICIAN-PATIENT PRIVILEGE.

The privilege statute, Section 491.060(5), provides that licensed physicians, chiropractors, psychologists and dentists are incompetent to testify "concerning any information which he or she may have acquired from any patient while attending the patient in a professional character, and which information was necessary to enable him or her to prescribe and provide treatment for such patients as a physician, chiropractor, psychologist or dentist." There is also a fiduciary duty of confidentiality owed to patients in connection with this privilege.³ The § 491.060(5) privilege applies to medical records and all aspects of discovery.

3. WAIVER OF THE PRIVILEGE.

The patient can waive the physician-patient statutory privilege either by express or implied waiver. Once the plaintiff's physical condition is at issue under the pleadings, the plaintiff will be considered to have waived the privilege under Section 491.060(5) for medical treatment related to the condition at issue. *State ex rel McNutt v. Keet*, 432 S.W.2d 597, 601 (Mo. banc 1968). Under this Rule, defendants are not entitled to all medical records, but only those that relate to the physical conditions at issue under the pleadings. *State ex rel Stecher v. Dowd*, 912 S.W.2d 462, 464 (Mo. banc 1995).

LEGAL ANALYSIS

The Missouri Supreme Court analyzed whether Dean waived her privilege by placing her medical condition at issue. Dean's discovery responses showed that she sought no treatment for emotional distress, that she had no dollar amount for any item of emotional distress, and that she was "at this time, seeking only 'garden variety' emotional distress damages." The Court pointed out that injuries caused by deprivation of civil rights differ from most other tort claims: [Injuries caused by deprivations of civil rights] are not part of a claim based upon physical injury. Damages for humiliation and emotional distress in civil rights cases . . . may be "established by testimony or inferred from the circumstances." . . . [I]n the discovery context, if emotional distress damages are to be supported by expert testimony or evidence of medical or psychological treatment, the privilege is waived. If such damages are to be inferred from the circumstances, the privilege is not waived. *Dean* citing *Missouri Commission on Human Rights v. Red Dragon Restaurant, Inc.*, 991 S.W.2d 161 (Mo. App. 1999).

The Court concluded that by her discovery responses, Dean had precluded herself from offering any evidence that she sought treatment for emotional distress or any evidence that she had a diagnosable condition allegedly resulting from the acts of discrimination or harassment. The Court held, however, that she may seek damages for emotional distress of a generic kind without waiving the physician-patient privilege. The Court defined this as a kind of distress or humiliation that an ordinary person would feel in such circumstances. The Court reasoned that these damages are generally in the common experience of

jurors and do not depend on any expert evidence and any past or present mental condition is not in controversy:

"In these circumstances, evidence of Dean's medically or psychologically diagnosable mental or physical condition is irrelevant to the question of whether she suffered 'garden variety' emotional distress as a result of the incidents pleaded in her sex discrimination and sexual harassment claims. Her particular past or present mental condition, in that respect, is not in controversy."

In clarifying the issue of privilege, the Court noted that if emotional distress damages are to be supported by expert testimony of evidence of medical or psychological treatment, the physician-patient privilege is waived. By contrast, if emotional distress damages are to be inferred from the circumstances, the physician-patient privilege is not waived.⁴

CONCLUSION

A claimant in a gender discrimination and sexual harassment claim does not waive the physician-patient privilege when 1) she seeks damages for emotional distress and humiliation that an ordinary person would experience under the circumstances or that may be inferred from the circumstances; and 2) where the claim is not to be supported by any evidence of medical or psychological treatment for a diagnosable condition. By so holding, the Missouri Supreme Court recognizes that merely making a claim for emotional distress damages under the MHRA does not automatically place the claimant's mental or emotional condition at issue and make the claimant's mental health history discoverable.

It will be interesting to see if the Court's holding and analysis in *Dean* will be extended beyond claims brought under the Missouri Human Rights Act. ■

1. The Court did not address Dean's claim that the discovery was overbroad because it held that, regardless of the time frame, the physician-patient privilege was not waived.

2. In *State ex re. Diehl v. O'Malley*, 95 S.W.3d 82 (Mo. banc 2003), the Missouri Supreme Court held that there is a right to a jury trial in actions for damages under the Missouri Human Rights Act, § 231.055 RSMo., et seq.

3. Although the psychologist-patient relationship is included in Section 491.060(5), the psychologist-patient relationship is further protected in Section 337.055.

4. The Court cautioned that if Dean's position were to change with respect to the nature of the damages sought, she would be obligated to supplement her responses and may be required to disclose medical records and execute authorizations. The Court pointed out that the trial judge has discretion to ensure that the discovery responses are timely made and that he may preclude such evidence if Dean timed her discovery supplementation to a date close to trial that would be prejudicial to the defendants. The Court further noted that the fact that Dean denied that she had a medically diagnosable injury entitled the defense to highlight that fact to the jury by arguing that Dean's emotional distress and humiliation were not so severe as to require medical or physical consultation or treatment.