UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

- x

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, :

Plaintiff, :

v. : **CIVIL ACTION NO. 07-6045 (KSH)**

CONOCOPHILLIPS COMPANY :

:

Defendant.

- x

BRIEF SUPPORTINGPLAINTIFF EEOC'S APPEAL OF THE MAGISTRATE JUDGE'S ORDER ALLOWING DEFENDANT TO QUESTION CLAIMANT AT DEPOSITION ABOUT WHETHER OR NOT HE RECEIVED PRIVILEGED PSYCHOLOGICAL COUNSELING UNRELATED TO THE CLAIMS IN THIS CASE

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I. PRELIMINARY STATEMENT

This is an action under Title VII of the Civil Rights Act of 1964 to correct unlawful employment practices on the basis of religion and to provide appropriate relief to Clarence Taylor, who was adversely affected by such practices. Plaintiff Equal Employment Opportunity Commission ("EEOC") alleges that Defendant ConocoPhillips Company ("Defendant") refused to reasonably accommodate the religious practices of a long-term employee at Defendant's Bayway Refinery, Clarence Taylor, who had filed a religious discrimination charge with EEOC, despite the availability of accommodations that would not unduly burden Defendant. While EEOC seeks damages both for out-of-pocket losses incurred by the Mr. Taylor and for his emotional distress, and in particular the embarrassment, suffering, inconvenience, loss of enjoyment of life, and humiliation caused by the discrimination, EEOC has made clear that it will not be presenting any psychological or medical records or testimony; and that there is no assertion that Mr. Taylor suffers from any psychological condition as a result of the alleged discrimination. Despite this, in a January 21, 2009 oral ruling upon application by Defendant during Mr. Taylor's deposition where Plaintiff asserted privilege in response to questions by Defendant's counsel about any counseling Mr. Taylor may have received that was unrelated to the allegations of this case, Magistrate Judge Patty Shwartz permitted such questioning and overruled EEOC's objections. The Magistrate Judge subsequently issued an Order dated January 21, 2009 codifying this ruling, from which EEOC now appeals. EEOC respectfully submits that not only are the cases relied upon by the Magistrate Judge, *Jackson v. Chubb Corporation*, 193 F.R.D. 216 (D.N.J. 2000), and *Bowen v. Parking Auth.*, 214 F.R.D. 188 (D.N.J. 2003), plainly distinguishable from the setting here, these and other cases make clear that the type of emotional distress damages sought in this matter for embarrassment, suffering, inconvenience, loss of

enjoyment of life, and humiliation do not serve to waive well-recognized privileges regarding any psychological counseling Mr. Taylor may have received during periods of time that have no bearing on the claims made in this case. EEOC respectfully submits that its objections to the questioning of Mr. Taylor about any alleged treatment unrelated to the allegations of this case were fully appropriate, and that the Magistrate Judge's Order should be reversed, and a protective order should be entered to prohibit Defendant from inquiring into matters that involve issues of privilege and that are not relevant to the claims in this case.

II. STATEMENT OF FACTS AND PROCEDURAL HISTORY

On December 20, 2007, EEOC filed a complaint alleging that Defendant violated Title VII and unlawfully discriminated against Mr. Taylor on the basis of his religion, Protestant, when it denied his request for a religious accommodation to attend Sunday morning services. *See Complaint, ECF Document No. 1, Filed 12/20/2007*. In this complaint, EEOC alleged that Mr. Taylor, a practicing Protestant Christian, regularly attends Church services on Sundays at Grace Bible Church in Howell, New Jersey, where he additionally performs various tasks needed for Sunday worship service to its Church members. *Id.* at ¶ 10. In or around early May 2006, Defendant told Mr. Taylor that he would have to work from 6:00 am to 6:00 pm every Sunday for 12 weeks. *Id.* at ¶ 12a. Mr. Taylor requested a reasonable accommodation to allow him to attend his weekly church services, but Defendant denied his request, even though various accommodations could have been granted by Defendant that would not have resulted in an undue burden (such as starting work after Church services and making up the lost time, shift swapping, etc.). *Id.* at ¶ ¶ 12c-f.

As part of its demand for relief for the alleged Title VII violation in this matter, EEOC is seeking compensation for non-pecuniary losses resulting from Defendant's actions, including for

emotional pain and suffering resulting from the failure to accommodate Mr. Taylor's religious practices, and in particular for embarrassment, suffering, inconvenience, loss of enjoyment of life, and humiliation. However, EEOC has made it clear that it does not intend to seek to introduce medical/ psychiatric/psychological/counseling, hospital or other healthcare evidence to support its claims for compensatory damages on behalf of Mr. Taylor. *See, Jung Declaration,* ¶ 5.

On January 21, 2009, Defendant's counsel deposed Mr. Taylor. Defendant asked Mr. Taylor, without any objection by EEOC, about any whether he spoke to his company doctor about issues regarding the accommodation treatment, and Mr. Taylor responded "no." *Jung Decl. Ex. A, Deposition Transcript of Clarence Taylor* at 196:15 – 21.[1] Moreover, EEOC's counsel made clear that EEOC had no objection to Defendant questioning Mr. Taylor about whether he otherwise sought counseling or other treatment as a result of the allegations in this case. *Jung Decl. Ex. B Deposition Transcript of Clarence Taylor* at 17:16-21. The dispute at issue arose because during the deposition, Defendant's counsel also attempted to ask Mr. Taylor questions regarding whether he sought counseling treatment because of his divorce with his second wife, a divorce that took place over a year before the Defendant's discriminatory conduct in this matter. *Jung Decl. Ex. B* at 16:17–17: 9. EEOC objected to this questioning and instructed Mr. Taylor not answer questions concerning any counseling he received unrelated to the allegations of this case. *Jung Decl. Ex. B* at 17:9.

Defendant insisted that the parties contact the Magistrate Judge about EEOC's objections. During a telephone conference with all parties present, Defendant argued to the Magistrate Judge that EEOC has placed Mr. Taylor's medical counseling at issue and should be able to question

[1] Exhibit A is a redacted copy from the Confidential Portion of the *Deposition Transcript of Clarence Taylor*. The portion presented is not considered confidential. By disclosing Exhibit A for purposes of this appeal, EEOC is not in any way waiving confidentiality for the Confidential Portion of this transcript.

him about any and all counseling he received, at any time, including times for which damages are not sought in this lawsuit. *Jung Decl. Ex. C at 103:1-5*. EEOC objected to this line of questioning, arguing that since it is seeking to recover damages for emotional distress resulting from the discrimination without using any medical evidence as support, either through testimonial or documentary evidence, any counseling evidence unrelated to the allegations of discrimination is privileged. *Jung Decl. Ex. C Deposition Transcript of Clarence Taylor* at 104:13-19.

The Magistrate Judge overruled EEOC's objections to Defendant's questioning about any counseling Mr. Taylor may have received related to his divorce (which, as noted above, preceded the allegations in this matter by over a year). The Magistrate Judge based her ruling on *Jackson v. Chubb Corporation*, 193 F.R.D. 216 (D.N.J. 2000) and *Bowen v. Parking Auth., 214 F.R.D. 188 (D.N.J. 2003).* EEOC stated on the record that it intended to appeal the Court's decision. Later that day, the Magistrate Judge issued a written ordered holding that the "Plaintiff's objections to questions about whether or not the complainant sought counseling are overruled" and that because the "Plaintiff intends to file an appeal, the obligation to respond to questions on this topic is stayed until the appeal is resolved." *Jung Decl. Ex. D, January 21, 2008 Order on Informal Application.* After consultation and agreement with Defendant's counsel concerning a briefing schedule for this appeal, on January 26, 2009, EEOC submitted a letter to this Court stating that EEOC intends to appeal the Magistrate Judge's decision. On January 26, 2009, this Court signed an Order approving the briefing schedule for this appeal of the Magistrate Judge's ruling.[2] *Jung Decl. Ex. E, January 26, 2009 Letter from EEOC and Order.*

[2] The Order was signed on January 26, 2009 and filed by the Court on January 28, 2009.

III. STANDARD OF REVIEW

This application involves an appeal of a non-dispositive Order by a Magistrate Judge. The standard of review of such rulings is whether the Magistrate Judge's ruling was "clearly erroneous or contrary to law." Fed. R. Civ. P. 72(a); Local Rule 72.1(c)(1)(A). As detailed in this brief, the decision of the Magistrate Judge involves purely an issue of law. It is undisputed that Plaintiff EEOC has no intention of presenting psychiatric or other medical evidence to support its claim for relief to Mr. Taylor relating to his emotional suffering and distress caused by the alleged discrimination; and that EEOC is not objecting to questioning about treatment that resulted from the alleged discrimination. The only question before this Court is purely a question of law: namely, whether in this setting, Defendant is allowed to ask questions in a deposition about psychological or other counseling unrelated to the allegations in this case.

In such a setting involving a pure issue of law, the District Court should conduct a *de novo* review of a Magistrate Judge's legal conclusions. *See Re: John Doe v. Hartford Life and Acc. Ins. Co.*, 237 F.R.D. 545, 548 (D.N.J. 2006) ("A magistrate's legal conclusions on a non-dispositive motion will be reviewed de novo."); *see also Haines v. Liggett Group, Inc.*, 975 F.2d 81 (3d Cir. 1992) ("the phrase 'contrary to law' indicates plenary review as to matters of law"); A ruling will be "contrary to law" when the magistrate judge has misinterpreted or misapplied the applicable law. *Pharmaceutical Sales & Consulting Corp. v. J.W.S. Delavau Co., Inc.*, 106 F. Supp., 2d 761, 764 (D.N.J. 2000). *See also Thomas v. Ford Motor Company*, 137 F. Supp. 2d 575, 579 (D.N.J. 2001) (while motions for leave to amend are usually reviewed under the "clear error" standard, because the motion at issue involved the legal issue of the litigation privilege, the District Court's review of the Magistrate's ruling was *de novo*).

IV. ARGUMENT

ANY PSYCHOLOGICAL/MEDICAL INFORMATION UNRELATED TO THE CLAIMS IN THIS CASE IS NOT DISCOVERABLE BECAUSE PLAINTIFF HAS NOT WAIVED THE PRIVILEGE MERELY BY SEEKING DAMAGES FOR EMOTIONAL DISTRESS, EMBARRASSMENT, SUFFERING, INCONVENIENCE, LOSS OF ENJOYMENT OF LIFE AND HUMILIATION

The Supreme Court, in the case of *Jaffe v. Redmond*, recognized an important interest in protecting the psychotherapist-patient privilege, holding that disclosure of claimants' medical information must be limited to situations where an individual has waived the privilege. *Jaffee v. Redmond*, 518 U.S. 1, 9-10 (1996). The Court cited several important reasons for the privilege, emphasizing "the imperative need for confidence and trust" in the psychotherapist-patient relationship. *Id.* at 10.

> Effective psychotherapy, by contrast, depends upon an atmosphere of confidence and trust in which the patient is willing to make a frank and complete disclosure of the facts, emotions, memories, and fears. Because of the sensitive nature of the problems for which individuals consult psychotherapists, disclosure of confidential communications made during counseling sessions may cause embarrassment or disgrace. For this reason, the mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment. *Id*. at 10.

The court in *Greenberg v. Smolka*, 2006 U.S. Dist. LEXIS 24319, 9-11 (S.D.N.Y. Apr. 25, 2006) explained the importance of the *Jaffee* decision as follows:

> A psychiatrist's ability to help her patients "is completely dependent upon [the patients'] willingness and ability to talk freely. This makes it difficult if not impossible for [a psychiatrist] to function without being able to assure . . . patients of confidentiality and, indeed, privileged communication. Where there may be exceptions to this general rule . . ., there is wide agreement that confidentiality is a sine qua non for successful psychiatric treatment."
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> *Greenberg v. Smolka,* 2006 U.S. Dist. LEXIS 24319, 9-11 (S.D.N.Y. Apr. 25, 2006) *citing, Jaffee v. Redmond*, at 10-11 (quoting Advisory Committee Notes to Proposed Rules, 56 F.R.D. 183, 242 (1972)

The Supreme Court adopted the psychotherapy-patient privilege in recognition that it protected "important private interests," as described, and that it also "served public ends." *Jaffee*, 518 U.S. at 11. The public policy embodied in the privilege was grounded in the recognition that "the psychotherapist privilege serves the public interest by facilitating the provision of appropriate treatment for individuals suffering the effects of a mental or emotional problem. The mental health of our citizenry, no less than its physical health, is a public good of transcendent importance." *Id.* at 12. Because of these important interests, the Supreme Court ultimately ruled that the privilege protecting confidential communications between a psychotherapist and her patient, "promotes sufficiently important interests to outweigh the need for probative evidence." *Id.*

EEOC recognizes that this privilege may be waived in limited circumstances, including circumstances where the plaintiff uses privileged information to support claims of emotional distress; in other words, a plaintiff cannot use the privileged information as both a sword and as a shield. *Jackson v. Chubb Corporation*, 193 F.R.D. 216, 218 (D.N.J. 2000); *Sims v. Blot,* Civ. No. 06-0644, 2008 U.S. App. LEXIS 15398 (2d Cir. July 18, 2008); *Kunstler v. City of New York*, 2006 U.S. Dist. LEXIS 61747, at *33-34 (S.D.N.Y. Aug. 29, 2006).

But critically, the mere fact that a discrimination claimant seeks emotional distress damages does <u>not</u> by itself "trigger[ ] a waiver of the privilege…" *Kunstler*, *supra*, at *33-34. As stated in *Rulmann v. Ulster County Dep't of Social Servs.*, 194 F.R.D. 445, 449-51, and 449, n.6 (N.D.N.Y. 2000):

> "…a party does not put his or her emotional condition in issue by merely seeking incidental, "garden-variety", emotional distress damages, without more…To condition recovery for emotional distress incidental to the violation of federal…statutory rights upon the surrender of the protection of the psychotherapist privilege is also antithetical to the purpose of the laws that provide redress for such violations."

This recognition by the *Ruhlmann* court that a civil rights claimant should not be forced to choose between exposing their otherwise privileged, highly personal medical/psychological information on the one had, and his/her right to be free from discriminatory practices on the other, is echoed in other decisions as well. Recently, the Second Circuit Court of Appeals in *Sims v. Blot*, 2008 U.S. App. LEXIS 15398 (2d Cir. July 18, 2008), reversed a lower court decision compelling the production of medical records, finding that the civil rights plaintiff had not waived the privilege merely by asserting what the Second Circuit characterized as "garden variety"[3] emotional distress claims. The Second Circuit reasoned that defendant's argument that the mere demand for emotional distress damages by a civil rights plaintiff opens the door to his/her psychological records would mean that "[d]isclosure, rather than protection of confidentiality, would become the norm." *Id.* at *63.

Numerous other decisions recognize that a mere assertion of a claim for damages for emotional distress damages on behalf of a civil rights claimant does not waive the otherwise existing privilege against disclosure of medical/psychological information. *See Santos v. Boeing Co.,* 2003 U.S. Dist. LEXIS 18736 at *4-5 (N.D. Ill. Oct. 21, 2003) (plaintiff does not open the door to producing medical and psychological records simply by making a claim for emotional distress); *Krocka v. City of Chicago*, 193 F.R.D. 542, 544 (N.D. Ill. 2000) (privilege remains

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[3] Although a number of courts have used the term "garden variety" to describe claims for emotional distress where the plaintiff is not introducing evidence of medical or psychological treatment to support the claim, the term "garden variety" is not used in the Civil Rights Act of 1991, 42 U.S.C. §1981(a). EEOC believes that the term "garden variety" is pejorative, and inappropriately diminishes the very real harm caused to people who have been discriminated against. Under the Civil Rights Act of 1991, 42 U.S.C. § 1981a, compensatory damages are available for mental or physical injuries such as emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, or other harm resulting from discriminatory conduct. 42 U.S.C. § 1981a(b)(3). In adopting the Civil Rights Act of 1991, Congress found that "additional remedies under Federal law are needed to deter unlawful harassment and intentional discrimination in the workplace." 42 U.S.C. §1981a [Note]. Medical or psychological evidence is not necessary to support an award for compensatory damages, and the Third Circuit has upheld significant awards without evidence of medical or psychological treatment. *See, e.g., Gagliardo v. Connaught Labs.*, 311 F.3d 565, 573-574 (3d Cir. Pa. 2002); *Ridley v. Costco Wholesale Corp.*, 217 Fed. Appx. 130, 137, 2007 U.S. App. LEXIS 2493 (3d Cir. Pa. 2007); *see also*, *Johnston v. Sch. Dist.*, 2006 U.S. Dist. LEXIS 18791 (E.D. Pa. Apr. 12, 2006).

intact so long as plaintiff limits testimony to humiliation and embarrassment and not any psychological symptoms or conditions); *Booker v. City of Boston*, 1999 U.S. Dist. LEXIS 14402, at *3 (D. Mass. Sept. 10, 1999) (privilege is not waived unless plaintiff makes affirmative use of the privileged material in connection with her prosecution of the case); *Vanderbilt v. Town of Chilmark*, 174 F.R.D. 225, 230 (D. Mass. 1997) (limiting waiver to instances where the plaintiffs makes "use of the substance of her communications by calling her psychotherapist as a witness, for example, or by testifying to the substance of the communication herself"); *Santelli v. Electro-Motive*, 188 F.R.D. 306, 307-10 (N.D. Ill. 1999) (mere existence of an emotional distress claim not held to constitute waiver of psychotherapist-privilege). *Id.* at 634; s*ee also Ricks v. Abbott Laboratories*, 198 F.R.D. 647, 649 (D. Md. 2001) ("[T]here is a difference between more serious emotional distress that might be diagnosed and treated as a disorder by a psychiatrist and the less serious grief, anxiety, anger, and frustration that everyone experiences when bad things happen.…Most triers of facts are already experts in that."); *Shreck v. North American Van Lines*, 2006 U.S. Dist. LEXIS 40827, at *4-5 (N.D. Ok. June 16, 2006) ("Where a Plaintiff claims 'garden variety' or 'generic' mental distress of the sort that would be suffered by an ordinary person in similar circumstances, courts have held there is no waiver of the privilege."); *Burrell v. Crown Central Petroleum Inc.*, 177 F.R.D. 376, 383-84 (E.D. Tex. 1997) (noting the "tremendous potential for abuse that exists when a defendant has unfettered access to a plaintiff's medical records" and declining to order plaintiffs to sign medical or psychological authorizations for the release of their medical records where plaintiff represented that it would not present medical evidence or rely on medical providers to prove the claim of emotional distress).

In the decision below, the Magistrate Judge ruled that the mere fact that EEOC is seeking emotional distress damages for Mr. Taylor by itself allows Defendant to ask questions of Mr.

Taylor at deposition about whether he had past counseling wholly unrelated to the allegations of this case, even though EEOC does not intend to use any medical/psychological evidence as a "sword" to support his damage claim. Indeed, EEOC allowed Mr. Taylor to be questioned as to whether he sought treatment from the company doctor as a result of the allegations in this case, and Mr. Taylor testified that he has not. Nevertheless, the Magistrate Judge overruled EEOC's objections to Defendant's questioning about counseling unrelated to the claims in this matter, relying on two District of New Jersey decisions, *Jackson v. Chubb Corporation*, 193 F.R.D. 216 (D.N.J. 2000), and *Bowen v. Parking Auth.*, 214 F.R.D. 188 (D.N.J. 2003). However, an examination of these cases demonstrates that they involve plainly distinguishable settings from the present case. Indeed, *Jackson* makes clear that the privilege is not waived in settings where, as here, plaintiff is not seeking to introduce evidence of medical or psychological treatment or counseling to support the claim for compensatory damages for the type of emotional distress damages sought in this matter for embarrassment, suffering, inconvenience, loss of enjoyment of life, and humiliation.

Specifically, *Jackson v. Chubb Corporation*, *supra,* pertained to a discrimination plaintiff who, as Judge Wolfson described, "is alleging more than 'garden variety' emotional distress…." *Id.*, 193 F.R.D. at 226, fn. 8. Plaintiff's legal claims included a claim for "intentional and negligent infliction of emotional distress," *Id.* at 218, fn. 2; and plaintiff was asserting that she suffered from "specific psychiatric injuries and disorders," *Id.* Indeed, plaintiff intended to affirmatively utilize a psychiatric expert to support such claims (while at the same time seeking to insulate certain psychological records). *Id.* at 226-227. The *Jackson* court took pains to distinguish the setting in which a waiver was found with one where a plaintiff is asserting what the court called "a 'garden variety' anxiety claim." *Id.* at 227. The court explained that "…a

'garden variety' claim of emotional distress, without more, does not place a plaintiff's mental condition at issue or 'in controversy'…." *Id.* at 226, fn. 8. The situation that the *Jackson* court explained would not constitute a waiver is the precise one here. The emotional distress claim in this matter will not be supported by psychological testimony or any other medical evidence; there is no assertion of any psychological disorder resulting from the alleged discrimination; and the nature of the damages alleged otherwise fits what the *Jackson* court called "garden variety" emotional distress. Thus, under *Jackson*, Plaintiff here has not waived any privilege.

The Magistrate Judge also based her ruling on *Bowen v. Parking Auth.*, 214 F.R.D. 188 (D.N.J. 2003). The *Bowen* case also is readily distinguishable from this matter. *Bowen* involved an employment discrimination plaintiff who alleged that he "continues to suffer severe emotional distress" from defendant's conduct. *Id*. at 190. More critically, plaintiff fully intended to produce his treating physician as a witness at trial to offer testimony about his mental condition at work, including his work related stress. *Id.* at 190, 195. Given that setting, where plaintiff intended to use medical testimony as a "sword," defendant was allowed to engage in discovery (albeit limited) regarding plaintiff's psychological condition under Fed. R. Civ. P. Rule 26(c).[4] *Id.* at 195-196. This matter is plainly distinguishable. Unlike the plaintiff in *Bowen*, EEOC has not produced, nor does it plan to introduce, any experts or other evidence of medical or psychological treatment or counseling to support the claims for compensatory damages for Mr. Taylor. The type of emotional distress damages sought in this matter for embarrassment, suffering, inconvenience, loss of enjoyment of life, and humiliation are equivalent to what the

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[4] In this case, defendant moved to compel the psychiatric examination pursuant to Fed. R. Civ. P. Rule 35(a) of plaintiff who alleged a claim of emotional distress and represented that he intended to produce his treating physician as a fact witness at trial to testify about his mental condition. The court ruled that the plaintiff did not put his mental status in controversy under Rule 35(a), but ruled that discovery concerning his emotional distress was permissible under Fed. R. Civ. P. Rule 26(b).

court in *Chubb* court characterized as "garden variety" emotional distress resulting from the discrimination, which plainly does not waive the psychotherapist-patient privilege.

Moreover, the Third Circuit has recognized that there is a "stigma associated with receiving mental health services" and that such stigma "presents a considerable deterrent to litigation." *Pa. Psychiatric Soc'y v. Green Spring Health Servs.*, 280 F.3d 278, 290 (3d Cir. Pa. 2002), *certiorari denied*, *Green Spring Health Servs. v. Pa. Psychiatric Soc'y*, 537 U.S. 881 (2002); *see also Humphreys v. Drug Enforcement Admin.*, 96 F.3d 658, 662 (3d Cir. 1996) (noting "psychiatric patients suffer a stigma in society") (quotation and citation omitted). Thus, Defendant's inquiries about whether or not Mr. Taylor received counseling, particularly for periods of time and for incidents totally unrelated to the claims in this case, should be prohibited under Fed. R. Civ. P. 26(c), which authorizes a court to issue an order forbidding discovery in order to protect a party or person from "annoyance, embarrassment, oppression…" *See, e.g., Greenberg v. Smolka*, 2006 U.S. Dist. LEXIS 24319, *29-31 (in applying Rule 26(c) to discovery seeking therapy records, "the court said the courts are to give weight to legitimate privacy interests even if the information in question is not protected by an enforceable privilege."). Given the important nature of the psychotherapy privilege, and the stigma attached to receipt of mental health services, the discovery sought by Defendant should be forbidden.

V. CONCLUSION

Courts have routinely held that claims for emotional distress not supported by medical evidence or testimony do not result in waiver of the psychotherapist-patient privilege. In fact, one of the two New Jersey cases relied upon by the court below, *Jackson v. Chubb*, *supra*, expressly recognizes this principle. EEOC does not intend to offer any expert witnesses or treating medical providers during trial, and the Mr. Taylor will not testify as to treatment for any

psychological conditions. Accordingly, Plaintiff respectfully requests that this Court reverse the Magistrate Judge's ruling that Defendant is entitled to discovery of any counseling that Mr. Taylor may have received which is unrelated to the allegations of this case. EEOC also respectfully requests that the Court enter a protective order under Fed. R. Civ P. 26(c) to bar Defendant from asking questions at any subsequent deposition about whether or not Mr. Taylor sought counseling unrelated to the claims in this case and also to prevent any other discovery of privileged medical, psychological or counseling history or records.

Dated: February 4, 2009

Respectfully submitted,

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