

**IN THE SUPREME COURT OF MISSOURI**

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**SUPREME COURT NO. 086695**

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**STATE ex rel. LAURIE DEAN,**

**Relator/Plaintiff,**

**vs.**

**THE HONORABLE JON A. CUNNINGHAM, CIRCUIT COURT,  
SAINT CHARLES COUNTY**

**Respondent.**

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**BRIEF OF AMICUS CURIAE  
ST. LOUIS CHAPTER OF THE  
NATIONAL EMPLOYMENT LAWYERS ASSOCIATION  
ON BEHALF OF RELATOR/PLAINTIFF**

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**Respectfully submitted,**

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## **STATEMENT OF INTEREST**

Amicus Curiae the St. Louis Chapter of the National Employment Lawyers Association is a voluntary membership organization of approximately 45 lawyers who represent employees in labor, employment and civil rights disputes in the St. Louis area. It is an affiliate of the National Employment Lawyers Association (NELA) which consists of over 3,000 attorneys who specialize in representing individuals in controversies arising out of the workplace. As part of its advocacy efforts, NELA has filed numerous amicus curiae briefs in state and federal courts across the country regarding the proper interpretation and application of employment discrimination laws to ensure that such laws are fully enforced and that the rights of workers are fully protected. Members of the St. Louis Chapter of NELA regularly represent victims of discrimination and retaliation in cases brought under the MHRA and Missouri common law.

This brief is filed with the consent of all parties.

## **SUMMARY OF ARGUMENT**

A sexual harassment plaintiff's entire mental health history is not put at issue in a case where the plaintiff has prayed for emotional distress damages, but has made no claim that she has suffered a diagnosable mental illness as a result of the harassment alleged. Such a broad intrusion into confidential communication between doctor and patient and between psychotherapist and patient is unwarranted where the plaintiff claims the kind ordinary distress that any person subjected to harassment at work might feel, and makes no claim of severe trauma or diagnosable mental illness.

## ARGUMENT

In Missouri, medical records containing confidential communication between doctor and patient and between psychotherapist and patient are ordinarily privileged. VAMS § 491.060 R.S. Mo. 2000. While the patient may waive the privilege by placing her physical or mental condition in controversy in litigation, this Court and others have recognized the important public policy which supports the privilege by limiting the production of such records to those “which reasonably relate to the injuries . . . claimed by the plaintiff” in her suit. State ex rel. McNutt v. Keet, 432 S.W.2d 597, 602 (Mo. banc 1968).

In this sexual harassment case, Dean has prayed for damages for emotional distress but makes no claim that she suffered a diagnosable mental illness as a result of the harassment. She had no treatment for the emotional distress she suffered during the time she was being harassed and her counsel has no plans to put on expert testimony on the issue.

Nonetheless the trial court has ordered her to produce medical records for any mental health treatment she has had at any time during her life. It is defendant’s position, implicitly accepted by the trial court, that a plaintiff’s entire mental health history is placed at issue any time he or she seeks

compensation for emotional distress.<sup>1</sup> The logical extension of this position is that Dean has opened her whole life to scrutiny by the Defendant because she seeks compensation for emotional distress.

The trial court's order fails to recognize the important public policy underlying the privilege generally and wholly fails to consider the particular importance of protecting the privilege in the case of mental health records. The purpose of the privilege is to allow patients to obtain complete and appropriate medical treatment "by encouraging candid communication between the patient and the physician, free of fear of the possible embarrassment and invasion of privacy. . . ." State ex rel. Brown v. Dickerson, 136 S.W.3d 539, 544 -545 (Mo.App. 2004). The encouragement of candid communication becomes even more important in the context of treatment for mental health problems:

Treatment by a physician for physical ailments can often proceed successfully on the basis of a physical

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<sup>1</sup> This would arguably include records related to childhood emotional traumas, marriage counseling, family counseling for plaintiff and her children - any mental health treatment for any mental health problem at any time.

examination, objective information supplied by the patient, and the results of diagnostic tests. 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 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.

Jaffee v. Redmond, 518 U.S. 1, 9-11(1996).

It is axiomatic that confidentiality is crucial to effective mental health treatment and this proposition has long been recognized by mental health professionals. As the American Psychiatric Association pointed out in its amicus brief in the Jaffee case,

People enter into therapy when something is troubling them and, in the course of the therapy, commonly talk



about a wide range of matters . . . . Patients may talk about a "relationship problem," about spouses or other family members, about sexual orientation or relations, about employers or co-workers or friends or teachers. In doing so, patients often discuss not only themselves and their intimate feelings and private actions, but also those of other people with whom their lives are intertwined. The reverberations from disclosure of such information-- for the patients and for third parties-- obviously can be severe, indeed life-altering, whether in the form of divorce, impairment of relations with parents, siblings, or friends, loss of employment, or any number of other adverse consequences that flow readily from the breach of privacy.

1995 WL 767892.

It is no accident that women who bring sexual harassment claims are the particular target of efforts by defense counsel to open up their entire life histories to scrutiny. As one commentator has observed in discussing the practice of ordering mental examinations in sexual harassment cases, permitting inquiry into plaintiffs' entire psychological and sexual history

intimidates sexual harassment victims into silence and discourages the filing of valid claims. Note, 80 Cornell Law Review 1268, 1272-73 (1995). As this commentator notes, sexual harassment plaintiffs are now routinely subjected to the same time of personal scrutiny once focused on rape victims, but now firmly rejected by both federal and state jurisprudence. Id.

Because of these important policy considerations, it is critical that this Court provide clear standards for tailoring appropriate discovery when a plaintiff seeks emotional distress damages in an employment case. In applying the holding in State ex rel. Stecher v. Dowd, 912 S.W.2d 462 (1996) to these cases, some kind of bright line rule is important in order to assure that defendants are not permitted to engage in the kind of wholesale examination of the plaintiff's entire life history that the Defendant in this case has embarked upon.

Existing case law, coupled with a recognition of the sensitive nature of the records at issue, provides the key to the appropriate standard. The McNutt case says only those medical records “reasonably relate[d] to the injuries . . . claimed by the plaintiff” in her suit are discoverable. 432 S.W.2d 602. Records of mental health treatment for other problems at other times in a plaintiff's life should not be discoverable absent a claim of diagnosable mental

illness or her use of expert mental health testimony to support her claims.

Employment law cases are David and Goliath litigation. The plaintiffs in these cases often face defendants with unlimited resources and a willingness to use every tool at their disposal to get a favorable result. The potential for abuse in the use of discovery tools to invade the privacy and deter the willingness to litigate these cases has been widely recognized. See e.g., Turner v. Imperial Stores, 161 F.R.D. 89 (S.D.Cal. 1995). Here the plaintiff claims the kind ordinary distress that any person subjected to harassment at work might feel, and makes no claim of severe trauma or diagnosable mental illness. Under these circumstances she should not be required to open her entire life to scrutiny in order to pursue her claim.

Association

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## CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing was served via U.S. mail, postage prepaid on D. Eric Sowers, Sowers & Wolf, LLC, 1401 S. Brentwood Blvd., Suite 575, St. Louis, MO 63144, Attorney for Relator/Plaintiff, Daniel K. O'Toole, Armstrong Teasdale, LLP, One Metropolitan Square, Suite 2600, St. Louis, MO 63102-2740, Attorney for Defendants, and The Honorable Jon A. Cunningham, Circuit Court, St. Charles County, County Courthouse, 300 N. 2nd Street, St. Charles, MO 63301 this 24<sup>th</sup> day of June, 2005.

**CERTIFICATION PURSUANT TO RULE 84.06(b)**

Pursuant to Mo. R. Civ. P. 84.06 (c) the undersigned hereby certifies that: (1) this brief includes the information required by Rule 55.03; (2) this brief complies with the limitations contained in Rule 84.06(b); and (3) this brief contains 1,645 words, as calculated by the Word Perfect software used to prepare this brief.

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**CERTIFICATE OF COMPLIANCE WITH RULE 84.06(a)**

This is to certify that in compliance with Rule 84.06(a), the diskette filed in this matter was scanned and is virus-free.

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