IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
WESTERN DIVISION

MARK OLSON,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**Case No. 04 C 50474**
	)	
KURT CUTLER, CHAD POTENZIANI, and the CITY OF LOVES PARK, an Illinois municipal corporation,	)	**Magistrate Judge P. Michael Mahoney**
	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

This matter is before the court on Plaintiff's December 2, 2005 Rule 35 and 37 Motions compelling mental health records and a mental health exam of Defendant Kurt Cutler. For the reasons stated below, Plaintiff's December 2, 2005 Rule 35 and 37 Motions are denied.

I. History

Plaintiff Mark Olson's ("Olson") First Amended Complaint, filed July 20, 2005, alleges three counts of battery, three counts of false arrest, three counts of excessive force under 42 U.S.C. § 1983, and four counts of malicious prosecution; making this is a federal-question lawsuit with pendent state law claims. Generally, Olson's Complaint alleges that Defendants Kurt Cutler ("Cutler") and Chad Potenziani ("Potenziani"), police officers working for the City of Loves Park ("the City"), used excessive force when arresting him on "failure to appear" and "bad check" warrants.

The arrest took place at Plaintiff's place of employment on December 16, 2003. Olson's Complaint states that, during the arrest, Cutler unnecessarily lunged for Olson, grabbed his

throat, bent him backwards over a food counter, wrestled him to the ground, placed him in a choke hold, and struck him in the back, and that Potenziani failed to intervene or protect him. Olson also alleges that Cutler and Potenziani lifted him in a manner unnecessarily causing pain to his shoulders when he was placed, handcuffed, into the squad car. In addition to excessive force allegations, Olson alleges that Cutler and Potenziani wrongfully charged him with resisting arrest in a conspiracy to conceal their excessive force. Finally, Olson alleges § 1983 liability against the City, stating the conduct of Cutler and Potenziani was authorized by formal or informal municipal policy adopted and promulgated by the City.

In the course of the parties' discovery exchange, employment records of Defendant Cutler have been produced to Olson (and also to the court under seal as exhibits). Based on the information contained in Cutler's employment file, Olson now moves the court to compel Defendant Cutler to produce his mental health records and to submit to a mental health examination. Olson states the court should compel Cutler's mental health records and order an exam because such discovery is reasonably calculated to lead to the discovery of admissible evidence. According to Plaintiff, Cutler's file references mental health care and details a history of Cutler "dealing with his anger management problems and his history of dealing with the public and other members of the department." (Pl.'s Rule 37 Mtn., at 1). Olson also urges court ordered production because the failure of the City to determine whether Cutler was mentally fit to continue to serve as an officer after becoming aware of Cutler's "anger management problems" is relevant to his cause of action. (*Id*. at 2.)

Defendants' Response (also filed with exhibits under seal), argues that Olson's Motions to Compel should be denied because Cutler's mental health records are not "reasonably

calculated to lead to the discovery of admissible evidence" and because federal and Illinois law protect the confidentiality of mental health records, citing the Health Insurance Portability and Accountability Act of 1996, 42 U.S.C. § 201 *et seq*.[1] and the Mental Health and Developmental Disabilities Act ("the Illinois Mental Health Act"), 740 ILL. COMP. STAT. 110/1 *et seq*.

In reply, Olson maintains that Cutler's mental health information is relevant given Cutler's documented "violent and dangerous propensities." (Pl.'s Reply, at 1). Further, Olson argues that any asserted statutory privilege of privacy in Cutler's mental health records has either been waived or must give way to Olson's constitutional rights of confrontation and due process.

Cutler's mental health records are not currently before the court for its review.

II. Choice of Law

Federal Rule of Civil Procedure 26 allows parties "discovery regarding any matter, *not privileged*, which is relevant to the subject matter involved in the pending action." Fed. R. Civ. P. 26(b)(1)(emphasis added). To determine if a matter is privileged, the court turns to Federal Rule of Evidence 501. Under Rule 501, evidentiary privileges

> shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

Fed. R. Evid. 501. Thus, under Rule 501, courts have held that the federal common law of privileges applies to federal question cases, while state privilege law applies in diversity cases.

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[1]Defendants cite, but do not discuss, the applicability of HIPAA. As will be seen below, the court finds that Fed. R. Evid. 501 and the federal psychotherapist-patient privilege is controlling, so privilege under HIPPA is not considered by the court.

Jaffee v. Redmond, 51 F.3d 1346, 1354 (7th Cir. 1995), *aff'd* 518 U.S. 1 (1996); *Beard v. City of Chicago*, 2005 WL 66074, at *6 (N.D. Ill. Jan. 10, 2005).

Here, where Plaintiff alleges excessive force under 42 U.S.C. § 1983 and various pendent state law claims, the question of which law to apply is more complicated. However, courts have consistently found that the "federal law of privilege controls even when pendent state law claims are asserted." *Hansen v. Allen Mem'l Hosp.*, 141 F.R.D. 115 (S.D. Iowa 1992); *see also Mem'l Hosp. v. Shadur*, 664 F.2d 1058, 1061, n.3 (7th Cir. 1981); *Perez v. City of Chicago*, 2004 WL 1151570, at *1-2 (N.D. Ill. Apr. 29, 2004); *Fittano v. Children's Advocacy Ctr.*, 1992 WL 350710 (N.D. Ill. Nov. 23, 1992). This application avoids inconsistent findings of privilege in one case due to variances in federal and state law. For example, **it would be pointless to hold Cutler's mental health records privileged for the principal § 1983 claim, but not the supplemental state law claims.** Accordingly, this court will apply the federal law of privilege to Olson's federal question and pendent state law claims.

III. The Federal Common Law on Psychotherapist-Patient Privilege

The United States Supreme Court first recognized a federal psychotherapist-patient privilege in *Jaffee v. Redmond*, affirming the Seventh Circuit's holding that confidential communications between a licensed psychotherapist and his or her patients in the course of diagnosis or treatment are protected from compelled disclosure. 518 U.S. 1, 16 (1996). The Court noted that the psychotherapist-patient privilege is "rooted in the imperative need for confidence and trust" in counseling relationships, and that the psychotherapist-patient privilege "serves the public interest by facilitating the provision of appropriate treatment for individuals suffering the effects of a mental or emotional problem." *Id.* at 10-11. In affirming the Seventh

Circuit's adoption of a federal psychotherapist-patient privilege, the Supreme Court also rejected the "balancing component of the privilege implemented" by the Seventh Circuit. *Id.* at 17; *see also Scott v. Edinburg*, 101 F. Supp. 2d 1017, 1019 (N.D. Ill. 2000)(finding that the Supreme Court "strengthened" the psychotherapist-patient privilege by holding it "not subject to a balancing test based on the need for the protected information"). The Court stated that "[m]aking the promise of confidentiality contingent upon a trial judge's later evaluation of the relative importance of the patient's interest in privacy and the evidentiary need for disclosure would eviscerate the effectiveness of the privilege." *Jaffee*, 518 U.S. at 17. The Court, however, declined to define the "full contours" of the psychotherapist-patient privilege, only noting that the privilege could be waived and could give way in the face of a serious threat of harm. *Id.* at 16, 18.

One of the first Seventh Circuit cases to apply the psychotherapist-patient privilege announced in *Jaffee* was ***Vann v. Lone Star Steakhouse & Saloon, Inc.*, 967 F. Supp. 346 (C.D. Ill. 1997).** In that case, the court held that the Illinois Mental Health Act, 740 ILL. COMP. STAT. 110/1 *et seq*., which also protects psychotherapist-patient communications, was not controlling in federal question cases, stating, "[w]hile the Court may look to state law for guidance, the ultimate scope of the privilege is governed by federal law." *Id.* at 349. While the Illinois state statute details when the psychotherapist-patient privilege is waived,[2] the *Vann* court interpreted

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[2]

> Records and communications may be disclosed in a civil . . . proceeding in which the recipient introduces his mental condition or any aspect of his services received for such condition as an element of his claim or defense, if and only to the extent the court . . . finds, after in camera examination of testimony or other evidence, that it is relevant, probative, not unduly prejudicial or inflammatory, and otherwise clearly admissible; that other

the federal privilege more generally, stating only that waiver of the psychotherapist-patient privilege could occur when a patient-litigant has placed otherwise privileged matters in controversy. *Id.*

Other courts have found waiver when a patient-litigant knows the communication with a psychotherapist will be shared with a third-party (*Poulos v. Village of Lindenhurst*, 2002 WL 485384 (N.D. Ill. Mar. 29, 2002)), or when a patient-litigant discloses his or her psychotherapist as a trial witness. *Santelli v. Electro-Motive*, 188 F.R.D. 306 (N.D. Ill. 1999).

In this case, the court finds Plaintiff has failed to establish a reason for the court to imply waiver. At this time, none of the arguments put forth by Plaintiff, discussed more fully below, surmounts the deference which the Supreme Court provided to psychotherapist-patient communications in *Jaffee*.

First, Olson maintains that any privilege that may have been asserted by Cutler has been waived to the extent that any records were disclosed to the City. However, at this time, Olson has presented no evidence that Cutler has divulged his confidential communications or records to his superiors or to the City.

Second, Olson argues that Cutler's asserted privilege should be waived by prior disclosure of confidential information in disciplinary proceedings against Cutler. Even if the court were to assume this act constitutes waiver, Olson has presented no evidence showing what

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> satisfactory evidence is demonstrably unsatisfactory as evidence of the facts sought to be established by such evidence; and that disclosure is more important to the interests of substantial justice than protection from injury to the therapist-recipient relationship or to the recipient or other whom disclosure is likely to harm.

740 ILL. COMP. STAT. 110/10(a).

confidential records (if any) were disclosed at Cutler's disciplinary proceedings.

Third, Olson cites several state law cases for the proposition that Cutler's privilege is overcome by Olson's constitutional rights to confront him as a witness. Although communications between Cutler and his psychotherapist may bear on the credibility of his testimony, that alone is not enough to deprive a party of the psychotherapist-patient privilege. "By definition, privileges exclude from a case otherwise relevant information." *Santelli v. Electro-Motive*, 188 F.R.D. 306 (N.D. Ill. 1999)(*citing Matter of Grand Jury Proceeding, Cherny*, 898 F.2d 565, 567 (7th Cir. 1990)).

Cutler's psychotherapist-patient privilege may indeed be waived if Cutler, himself, introduced his communications with a psychotherapist into evidence, but that is not currently the case. The court cannot allow Olson to bring the Defendant Cutler's mental state to the forefront of the lawsuit for him, and so imply waiver.[3] Accordingly, Plaintiff's Motion to Compel Cutler's mental health records under Rule 37 is denied.

IV. Olson's Rule 35 Motion

Olson also seeks a court order for Defendant Cutler to submit to a mental health exam. The court will not use its discretion to order such an exam in this case. Federal Rule of Civil Procedure 35 states that:

> When the mental or physical condition . . . of a party . . . is *in controversy*, the court in which the action is pending *may* order the

[3]The court notes that this tactic also did not work for the plaintiffs in *Jaffee*. In *Jaffe*, also a §1983 excessive force case, a police officer was involved in the fatal shooting of a suspect, and the deceased suspect's family sought records concerning counseling sessions the officer had after the shooting occurred. *Jaffee*, 518 U.S. at 4-6. The Supreme Court ultimately affirmed the Seventh Circuit finding that the counseling sessions records were protected from disclosure. *Id.* at 18.

> party 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* shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

Fed. R. Civ. P. 35(a)(emphasis added). Even when "good cause" and "in controversy" requirements are met under this rule, it is still within the sound discretion of the court to deny examination. *Hardy v. Riser*, 309 F.Supp. 1234 (N.D.Miss.1970)(Rule 35 says the court *may* order examination). Here, the court finds that Olson has failed to make any showing that Cutler's current mental state is at issue in this lawsuit. Finding Cutler's current mental state not "in controversy," Olson cannot establish "good cause" for the court to order Cutler to submit to mental examination. Olson's Rule 35 Motion is therefore denied.

V. Conclusion

For the foregoing reasons, December 2, 2005 Rule 35 and 37 Motions are denied.

ENTER:

P. MICHAEL MAHONEY, MAGISTRATE JUDGE
UNITED STATES DISTRICT COURT

DATE: January 9, 2006