IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SANDRA H. TENNEY	:	
	:	CIVIL ACTION
	:	
v.	:	NO. 03-3471
	:	
CITY OF ALLENTOWN	:	

MEMORANDUM AND ORDER

Juan R. Sánchez, J. **November 30, 2004**

In this employment discrimination case, the City of Allentown seeks to exclude eight areas of evidence from next week's trial. For the reasons that follow, the Motion *in limine* will be granted in part and denied in part.

FACTS

Sandra Tenney claims she was fired from her employment as an Intergovernmental Relations Officer for the City of Allentown in retaliation for asserting her federal employment rights. Tenney took medical leave, suffering from vertigo, stress, anxiety disorder and clinical depression, in March 2000. On June 13, 2000 and July 7, 2000 Tenney's counsel advised Allentown that Tenney was covered by the Americans with Disabilities Act (ADA). Tenney returned to work in April, 2001. On October 5, 2001 Tenney claims she was fired in retaliation for exercising her rights under the Family Medical Leave Act (FMLA)[1] and the the Fair Labor Standards Act (FLSA)[2]. Tenney says her discharge also violated the Americans with Disabilities Act (ADA)[3]and the Age Discrimination

[1] 29 U.S.C. § 2601 *et seq.*

[2] 29 U.S.C. § 201 *et seq.*

[3] 28 U.S.C. §§ 1351.

in Employment Act (ADEA).[4] The City claims Tenney's position was eliminated as part of a budget reduction and she was laid off as of October 19, 2001. Trial is scheduled to begin December 6, 2004.

DISCUSSION

The City seeks in its first two parts to its motion to exclude a report by Tenney's treating psychologist, Frederick J. Evans, Ph.D., and treatment records of Tenney's health care providers. Tenney has failed to qualify Evans or any other health care provider as an expert under Fed.R.Civ.P. 26(a)(2)(A).[5] The motion will be denied as to parts one and two and the reports of Evans and other health care providers will be admitted under Fed.R.Evid. 803(6), the business records exception to the rule excluding hearsay with the limitation that any opinion or diagnosis will be redacted.

A plaintiff cannot avoid the requirements of Rule 26 by offering the opinion of plaintiff's treating physicians; Rule 26 focuses not on the status of the witness, but rather on the substance of the testimony. *Patel v. Gayes*, 984 F.2d 214, 218 (7th Cir.1993); *see also Bucher v. Gainey Transp. Service of Indiana, Inc.*, 167 F.R.D. 387, 390 (M.D. Pa. 1996).

Medical records of treating health care providers are admissible under the business records exception to the rule against hearsay. Fed.R.Evid. 803(6); *Clemmons v. Delo*, 177 F.3d 680, 685 (8th Cir. 1999) (*en banc).* The justification for the business records exception rests on the assumption that business records are reliable because they are created on a day-to-day basis and "[t]he very regularity and continuity of the records are calculated to train the recordkeeper in habits of

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[4] 29 U.S.C. §§ 621-34.

[5] All witnesses who are to give expert testimony must be disclosed under Rule 26(a)(2)(A). The commentary to Rule 26 states "treating physician[s], for example, can be deposed or called to testify at trial without any requirement for a written report." Fed.R.Civ.P. 26, cmt. 1993 Amendments, subdivision (a), para (2); *see also Musser v. Gentiva Health Services*, 356 F.3d 751, 756 -57 (7th Cir. 2004).

precision." *McCormick on Evidence* § 286 5th ed.). This assumption of reliability, accuracy and trustworthiness, however, collapses when "any person in the process is not acting in the regular course of the business." *Id.* § 290. The business records exception to the hearsay rule applies only if the person who makes the statement "is himself acting in the regular course of business." *Florida Canal Industries, Inc. v. Rambo*, 537 F.2d 200, 202 (5th Cir. 1976).

The medical records are admissible to the extent they record symptoms, observations and treatment under the business records exception. Excluded are any statements in the records by Tenney as to the cause of her ailments, under *Rambo*, because the statement by a patient to her physician does not have the requisite indicia of reliability to satisfy the business record exception, although some statements may be admissible under Fed.R.Evid. 803(4), statements for the purposes of medical diagnosis or treatment. Also excluded are opinions and diagnoses within the records of the health care providers who have not been offered as experts under Fed.R.Civ.P. 26(a)(2)(A).

We deny in part the third part of the City's motion which seeks to exclude Tenney's testimony as to the "diagnosis, cause, duration or severity"of her mental ailments. Tenney may testify to her symptoms and her own belief as to their cause, duration and severity. Tenney is not an expert and no exception to the rule against hearsay would allow her to report a diagnosis by some one else; Tenney, therefore, may not testify to diagnosis.

We deny the fourth and fifth parts of the City's motion, seeking to exclude testimony about acts prior to the January 3, 2001, the time-bar to ADA and ADEA claims; and, prior to June 5, 2000, the time-bar to FMLA and FSLA claims. Fed.R.Evid. 402.

On the sixth request, we will admit a letter from the U.S. Department of Labor on December 21, 2000 with the *caveat* an instruction will be given at the time of its introduction that the letter is received solely as evidence Tenney made a complaint.

The City's seventh request is moot following the agreement of the parties to exclude evidence

regarding the termination of Tenney's medical benefits. Finally, the City's eighth part will be granted and evidence of subsequent remedial measures is excluded under Fed.R.Evid. 407.

We reserve ruling on the City's requested points for charge directing a verdict in its favor. To avoid a directed verdict, Tenney must show "(1) protected employee activity; (2) adverse action by the employer either after or contemporaneous with the employee's protected activity; and (3) a causal connection between the employee's protected activity and the employer's adverse action." *Williams v. Philadelphia Housing Authority Police Dept.*, 380 F.3d 751, 758-59 (3d Cir. 2004).

One of the factual questions is whether "temporal proximity between the protected activity and the termination [can be itself] sufficient to establish a causal link." *Woodson v. Scott Paper Co.*, 109 F.3d 913, 920 (3d Cir. 1997). The timing of the alleged retaliatory action must be "unusually suggestive of retaliatory motive before a causal link will be inferred." *Shellenberger v. Summit Bancorp, Inc.*, 318 F.3d 183, 189 n.9 (3d Cir. 2003). Two days between the protected activity and the alleged retaliation sufficed to support an inference of a causal connection. *Jalil v. Avdel Corp.*, 873 F.2d 701, 708 (3d Cir. 1989). In *Williams*, where the time lapse between protected activity and termination was more than two months, "the temporal proximity is not so close as to be unduly suggestive, [the Third Circuit has] recognized that timing plus other evidence may be an appropriate test . . . . " *Williams*, 380 F.3d at 760.

When a plaintiff fails to offer any other evidence of retaliation other than a tenuous temporal link, "no reasonable jury could conclude that the two events shared a causal link." *Williams*, 380 F.3d at 761. "It is important to emphasize that it is causation, not temporal proximity [or evidence of antagonism], that is an element of plaintiff's prima facie case, and temporal proximity [or antagonism] merely provides an evidentiary basis from which an inference can be drawn." *Farrell v. Planters Lifesavers Co.*, 206 F.3d 271, 281 (3d Cir. 2000).

The Third Circuit has also held the "mere passage of time is not legally conclusive proof

against retaliation." *Robinson v. Southeastern Pa. Transp. Auth.*, 982 F.2d 892, 894 (3d Cir. 1993). In *Robinson* the court found an "intervening pattern of antagonism" sufficient to support a claim of retaliation. *Id.* at 895 (internal citation omitted); *see also Krouse v. American Sterilizer Co.*,126 F.3d 494, 503-04 (3d Cir. 1997).

The amount of time between the protected activity and the alleged retaliation is a circumstance to be considered by a fact-finder in determining if the plaintiff has established the required causation. *Farrell v. Planters Lifesavers Co.*, 206 F.3d 271, 279 n. 5 (3d Cir. 2000).

Accordingly, we enter the following:

ORDER

AND NOW, this 30th day of November, 2004, Defendant's Motion in Limine (Document 26) is denied in part and granted in part. A ruling on Defendant's suggested points for charge is reserved.

BY THE COURT:

\s\ Juan R. Sánchez
Juan R. Sánchez, J.