

Wachtel, PLLC (Oct. 14, 2009).) Plaintiff brings this claim under Federal Rule of Civil Procedure 37(c), which reads:

If a party fails to provide information or identify a witness as required by Rule 26(a) or 26(e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless.

Rule 26(a)(2)(B)(ii) reads, in relevant part:

Unless otherwise stipulated or ordered by the court, [formal disclosure of an expert witness] must be accompanied by a written report. The report must contain . . . the data or other information considered by the witness in forming [the witnesses' opinion].

Defendants dispute they were required to provide a taped recording to plaintiff, citing cases supporting their position. (Defs.' Opp'n to Pl.'s Mot. to Strike the Test. Of Defs.' Expert Witness [57].) The persuasive precedent cited therein substantiates defendants' claim; however, such precedent does not permit defendants to circumvent their agreement with plaintiff. Defendants agreed to provide a recording of plaintiff's sessions with Dr. Morote and are bound to the terms of the agreement by Rule 35(b)(6). (Letter [53-2] from Joseph E. Schuler, attorney for defendants, Jackson Lewis LLP, to Lynne Bernabei, attorney for plaintiff, Bernabei & Wachtel, PLLC (Oct. 14, 2009).)

Rule 35 governs procedure for court-ordered physical and mental examinations. Rule 35(b)(2) specifies what the examiner must produce, requiring that "[t]he examiner's report must be in writing and must set out in detail the examiner's findings, including diagnoses, conclusions, and the results of any tests." When the parties agree to submit to an examination without a court order, as counsel for plaintiff and defendants elected, Rule 35(b)(2) also may apply. Specifically, Rule 35(b)(6) addresses the scope of the

disclosure of the examiner's report. It states that when parties agree to examination without a court order, "subdivision (b)[2] applies to an examination . . . unless the agreement states otherwise." The agreement between plaintiff's and defendants' counsel includes defendants' acquiescence to provide recorded tapes of Dr. Morote's session with plaintiff. (Letter [53-2] from Joseph E. Schuler, attorney for defendants, Jackson Lewis LLP, to Lynne Bernabei, attorney for plaintiff, Bernabei & Wachtel, PLLC (Oct. 14, 2009).) The agreement, therefore, "states otherwise" that additional disclosures were required beyond those enumerated in Rule 35(b)(2).

Defendants neglected their obligation, pursuant to their agreement with plaintiff, to provide the examination recordings. Rule 35(5) dictates, in relevant part, "[i]f the report is not provided, the court may exclude the examiner's testimony at trial." Defendants did not satisfy their responsibility to provide a recording of plaintiff's session with Dr. Morote; consequently, Dr. Morote's testimony is excluded.

Defendants cite to *Abdulwali v. WAMATA* to support that they should not be required to record the proceedings. 193 F.R.D. 10, 14 (D.D.C. 2000). The dispute in *Abdulwali* arose over whether plaintiffs could request a recording of a psychological examination. *Id.* The court deferred to the psychologist's opinion that the examination would be detrimentally impacted by the presence of a recording device. *Id.* In the present case, however, Dr. Morote never disputed the existence of the recording device or stated that it would taint the results of her examination. Therefore, *Abdulwali* does not apply.

II. DEFENDANTS FAIL TO SUBSTANTIALLY JUSTIFY OR DEMONSTRATE THAT NO HARM RESULTED FROM THE LOST RECORDINGS

Rule 37(c) states that expert testimony may be excluded if the examining party fails to provide a report, “unless the failure was substantially justified or is harmless.” Thus, the court considers whether: (A) a technical malfunction prohibiting defendants from providing plaintiff with a recording substantially justifies failure to adhere to their agreement, and; (B) not having the recording harms plaintiff. Defendants demonstrate neither and plaintiff’s motion to strike defendants’ expert testimony is granted.

A. Defendants Fail to Substantially Justify the Loss of the Recording

Defendants claim that a technical malfunction caused by third-party negligence led to their failure to provide plaintiff with the recording. (Defs.’ Opp’n to Pl.’s Mot. to Strike the Test. Of Defs.’ Expert Witness [57].) The third party contractor clearly accepts responsibility for the mishap and no question exists concerning defendants’ direct involvement with the breakdown. (*Id.*) Defendants, however, hired the contractor to accomplish an object with which defendants, not the recording company, were charged. Defendants alone bore the responsibility of delivering the recording. Attorneys who sponsor colleagues to appear before their bars *pro hac vice* face repercussions as guarantors for any inappropriate behavior. Defendants, accordingly, should have asserted greater diligence to assure the recording processed. The third-party’s responsibility for the technical malfunction does not excuse defendants’ lack of oversight. They do not substantially justify their failure to provide the recording.

B. Failure To Provide Plaintiff With A Recording Harms Her

Failing to provide plaintiff with a recording of her session with Dr. Morote harms her because she disputes Dr. Morote's testimony. Plaintiff states:

I have read Dr. Morote's Report of Forensic Psychological Evaluation and believe that it is not consistent with the information with which I provided her during the examination. For example, I did tell her that I have trouble sleeping, flashbacks, and intrusive thoughts. Another discrepancy is that my doctor told me that there was a possibility my child had Down's Syndrome, and that I should take a medical test to know for sure. I took that test, and it showed that my baby would not have the disorder. In addition, Dr. Morote's report said that my former boyfriend wanted me to terminate my pregnancy, which is not true. Prior to obtaining the test results, my former boyfriend suggested that I consider terminating my pregnancy if the results showed my baby did have Down's Syndrome. He did not pressure me either way. Dr. Morote asked me if his suggestion caused me stress, and I told her that it did not because I knew that I would not terminate the pregnancy."

(Zelaya Aff. [53-2] ¶¶ 9-11.)

Dr. Morote states definitively that plaintiff "had been told she was carrying a child who was going to have Down's Syndrome . . . [and that her boyfriend] wanted her to terminate the pregnancy." (G. Morote Report of Forensic Psychological Evaluation [53-2].) Dr. Morote also writes that "[plaintiff] denied flashbacks, intrusive thoughts, derealization or dissasociative [*sic*] experiences." (*Id.*) Dr. Morote incorporates these statements directly into her medical opinion of plaintiff, referring to one of the "stressors" plaintiff endured during her time with defendant UNICCO as "the pressure from her partner to terminate her pregnancy when she learned that her unborn child would have Downs' [*sic*] Syndrome." (*Id.*) She claims, "[I]t is impossible to parcel or tease out the relative contribution of each or any combination of the known stressors to any emotional distress [plaintiff] may have experienced during or

soon after the time of her alleged sexual harassment.” (*Id.*) The exact wording plaintiff used during her psychological examination thus is essential to determine whether an additional stressor exists; therefore, she is harmed by not having the recording and defendants’ expert’s testimony is excluded.

ORDER

Upon consideration of the motion [53], the defendant’s opposition [57] thereto, the plaintiff’s reply [61], and the entire record herein, the Court concludes that plaintiff’s motion is GRANTED. Defendants failed in their obligation to provide plaintiff a recording of Dr. Gloria Morote’s psychological examination of plaintiff. It is therefore:

ORDERED that plaintiff’s Motion [53] to Strike the Testimony of Defendants’ Expert Witness, Dr. Gloria Morote, is GRANTED. Dr. Morote’s report is STRICKEN and she shall not be allowed to testify at trial.

SO ORDERED.

Signed by Royce C. Lamberth, Chief Judge, on August 20, 2010.