

CAUSE NO. 11-13467

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| CARLOTTA HOWARD, | § | IN THE DISTRICT COURT |
| | § | |
| Plaintiff, | § | |
| | § | |
| v. | § | 160th JUDICIAL DISTRICT |
| | § | |
| STATE OF TEXAS, TEXAS | § | |
| DEPARTMENT OF FAMILY AND | § | |
| PROTECTIVE SERVICES | § | DALLAS COUNTY, TEXAS |
| | | |
| Defendant. | | |

PLAINTIFF'S OBJECTIONS TO DEFENDANT'S SUMMARY JUDGMENT
EVIDENCE AND MOTION TO STRIKE

TO THE HONORABLE DISTRICT COURT JUDGE:

NOW COMES Plaintiff, Carlotta Howard, and files this, her Objections to Defendant's Summary Judgment Evidence and Motion to Strike, and respectfully shows the following:

I.
OBJECTIONS TO EVIDENCE

Plaintiff objects to and respectfully requests that this Court strike the following evidence found in Defendant's appendix to its Response to Plaintiff's Motion for Summary Judgment:

1) Exhibit L

- a. Exhibit L is a document from Methodist Charlton Medical Center listing all of the medications that Carlotta Howard took before her

accident occurred. It also lists the medications she was prescribed on the day she was first treated for her injuries.

- b. Exhibit L is privileged under physician-patient privilege and confidentiality of mental health information found in Tex. R. Evid. 509 and 510, respectively.
- c. Exhibit L is also inadmissible as hearsay without exception under Tex. R. Evid. 802 and 805.

2) Exhibit M

- a. Exhibit M consists of 78 pages of doctors' reports, evaluations, diagnoses, and requests for medical procedures for Ms. Howard after the car accident in December 2008. All but one of these reports comes after the Department terminated Ms. Howard in October 2009. It is cited for the proposition that Plaintiff has engaged in "malingering, doctor-shopping, faking bad, and exaggerating her injuries in order to obtain pain medication." (Def. Resp. at 6).
- b. Exhibit M is privileged under physician-patient privilege and confidentiality of mental health information found in Tex. R. Evid. 509 and 510, respectively because they were made in connection with professional services rendered by a physician or mental health professional and are records of treatment.

- c. Exhibit M is inadmissible as hearsay without exception under Tex. R. Evid. 802 and 805.
- d. Exhibit M is impermissible character evidence under Tex. R. Evid. 404 because Defendant attempts to use the medical reports for the purpose of proving Plaintiff acted in conformity with other alleged incidents of “malingering, doctor-shopping, faking bad, and exaggerating her injuries in order to obtain pain medication.” (Def. Resp. at 6).
- e. Exhibit M is irrelevant under Tex. R. Evid. 401 and 402. The matter at hand is a failure to accommodate claim regarding events that occurred between December 2008 and October 2009. Exhibit M contains numerous medical reports concerning requests for medical treatment and procedures, all of which, save one, are dated between November 2009 and April 2011. Plaintiff is not claiming that Defendant discriminated against her by refusing to allow certain medical procedures after she was terminated and Defendant has not asserted any such affirmative defense. Therefore, whether or not Plaintiff was allowed to have medical procedures after she was terminated has no bearing on whether or not the Department failed to accommodate her by terminating her on October 16, 2009. The one document from the time period at issue in this case is found at Howard 352-353. That document is also a request for

medical treatment that was withdrawn because “the services requested do not require precertification.” (Def. Appx at Howard 352). Again, nothing in this failure to accommodate case concerns whether or not various medical procedures required precertification. Therefore, the entirety of Exhibit M is irrelevant.

3) Exhibit N

- a. Exhibit N is a letter signed by Terence Floyd, D.C. regarding Ms. Howard’s inability to return to work until January 19th, 2009.
- b. Exhibit N is inadmissible as hearsay without exception under Tex. R. Evid. 802 because it is being offered for the truth of the statement that Plaintiff could return to work on January 19, 2009.

4) Exhibit P

- a. Exhibit P is a handwritten note with no name, date or letterhead on it.
- b. Exhibit P is inadmissible hearsay under Tex. R. Evid. 802 and 805.
- c. Exhibit P is also inadmissible because it has not been authenticated under Tex. R. Evid. 901 or 902.

5) Exhibit Q

- a. Exhibit Q consists of 185 pages of doctors’ reports, parking receipts, and prescriptions. Exhibit Q is cited to for the proposition that Ms. Howard never communicated to Nicole Ogle or Lisa Black that Plaintiff was attending school. It is also cited in support of the

allegation that the Department would have created an unnecessary risk to children if they had allowed Ms. Howard to drive while she was on her prescribed medication. (Def. Resp. at 6, 15).

- b. The Doctors' reports are inadmissible hearsay without exception under Tex. R. Evid. 802 and 805.
- c. The doctors' reports are also privileged under Tex. R. Evid. 509 and 510 because they were made in connection with professional services rendered by a physician or mental health professional and are records of treatment.
- d. The Doctors' reports are also inadmissible character evidence because Defendant is attempting to use them to show Plaintiff acted in conformity with conduct that may have occurred at other times while on medication.
- e. The parking receipts for UT Southwestern Medical Center are irrelevant to whether or not Plaintiff told Ms. Black about her attendance at school under Tex. R. Evid. 401 and 402.
- f. The parking receipts are also irrelevant as to whether or not Plaintiff was an unnecessary risk to children under Tex. R. Evid. 401 and 402.
- g. The prescriptions are inadmissible as privileged under Tex. R. Evid. 509 and 510 because they were made in connection with

professional services rendered by a physician or mental health professional and are records of treatment.

- h. The prescriptions are inadmissible hearsay under Tex. R. Evid. 802 and 805.
- i. The prescriptions are also irrelevant under Tex. R. Evid. 401 and 402 because none of the prescriptions indicate that Plaintiff was an unnecessary risk to children or prevent Plaintiff from driving, except for the prescription for vicodin issued on December 16, 2008, the date of her accident. (*See* Def. Appx at Howard 643).
- j. The prescriptions are also irrelevant because almost all of them occurred outside the timeframe at issue in this case, which is from December 2008 until October 2009.

6) Exhibit U

- a. Exhibit U is a letter from David B. Vaughan, MD, dated December 29th, 2008, which states that Ms. Howard could return to work on January 5th, 2009. The doctor explained that Ms. Howard could not drive due to the physical limitations she suffered as a result of her accident. The Department cited to this letter in support of the proposition that Ms. Howard could drive as soon as she returned to work. The letter does not state this.
- b. This exhibit is inadmissible hearsay without exception under Tex. R. Evid. 802 and 805 because it is offered for the truth of the

statement that Ms. Howard would be able to drive in early January.

- c. Exhibit U is inadmissible as irrelevant under Tex. R. Evid. 401 and 402. Exhibit U is cited for the proposition that Plaintiff could drive on January 1, 2009. (Def. Resp. at 4). However, Exhibit U states only that Plaintiff may be able to return to work on January 5, 2009, not that Plaintiff could drive on January 1, 2009. (See Def. Appx at Ex. U).

7) Exhibit V

- a. Exhibit V is the initial report made by Dr. Zegarelli after his first evaluation of Ms. Howard. It contains information about her prior medical history, including Ms. Howard's surgical history, past conditions, and social and family history. It also lists the medications prescribed to Plaintiff by her doctor. The Department cited this document in support of the proposition that Ms. Howard could return to work after six to eight weeks of treatment.
- b. This exhibit is privileged under physician-patient privilege and confidentiality of mental health information found in Tex. R. Evid. 509 and 510, respectively because it was made in connection with professional services rendered by a physician or mental health professional and is a record of treatment.

- c. Exhibit V is also inadmissible as hearsay without exception under Tex. R. Evid. 802 and 805.

8) Exhibit W

- a. Exhibit W is an evaluation of Ms. Howard that took place over a year after she was terminated by the Department. It is cited for the proposition that Ms. Howard engaged in “malingering, doctor-shopping, faking bad, and exaggerating her injuries in order to obtain pain medication” in December 2010. (Def. Resp. at 6).
- b. Exhibit W is privileged under physician-patient privilege and confidentiality of mental health information found in Tex. R. Evid. 509 and 510, respectively because it was made in connection with professional services rendered by a physician or mental health professional and is a record of treatment.
- c. Exhibit W is also inadmissible as hearsay without exception under Tex. R. Evid. 802 and 805.
- d. Exhibit W is also impermissible character evidence under Tex. R. Evid. 404 because Defendant attempts to use this medical report for the purpose of proving Plaintiff acted in conformity with other alleged incidents of “malingering, doctor-shopping, faking bad, and exaggerating her injuries in order to obtain pain medication.” (Def. Resp. at 6).

- e. Exhibit W is also irrelevant under Tex. R. Evid. 401 and 402 because this is a failure to accommodate case regarding events that occurred between December 2008 and October 2009. Exhibit W is a medical report written in December 2010, over a year after Defendant terminated Plaintiff.

9) Exhibit X

- a. Exhibit X is a blank report of medical status.
- b. Exhibit X is inadmissible because it has not been authenticated under Tex. R. Evid. 901 and is not self-authenticating under 902.
- c. Exhibit X is inadmissible because no other foundation has been laid for its admission under the Texas Rules of Evidence.
- d. Exhibit X is inadmissible because as a blank form it does not tend to make any fact of consequence more or less likely to have occurred under Tex. R. Evid. 401 and 402.

10) Exhibit Y

- a. Exhibit Y is a doctor's note written 11 months after Plaintiff was terminated, to Plaintiff's college notifying the school of Plaintiff's medical condition.
- b. Exhibit Y is inadmissible as hearsay without exception under Tex. R. Evid. 802 and 805.
- c. Exhibit Y is also irrelevant under Tex. R. Evid. 401 and 402 because this is a failure to accommodate case regarding events that

occurred between December 2008 and October 2009. Whether or not Plaintiff's college knew of Ms. Howard's disability is not at issue in this case.

II.
PRAYER

For the foregoing reasons, Plaintiff respectfully requests this Court to strike the above named exhibits submitted by Defendant in response to Plaintiff's Motion for Summary Judgment.

Respectfully submitted,
ROB WILEY, P.C.

By: /s/ Colin Walsh
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CERTIFICATE OF SERVICE

I certify that on December 31, 2012, I sent a true and correct copy of the foregoing to counsel for State of Texas, Texas Department of Family and Protective Services, Madeleine Connor, PO Box 12548, Austin, TX 78711 via e-service.

/s/ Colin Walsh
Colin Walsh