

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF OHIO  
WESTERN DIVISION

VICKI KAPP,	:	
	:	
	:	NO. 1:09-CV-949
Plaintiff,	:	
	:	
v.	:	<b>OPINION AND ORDER</b>
	:	
JEWISH HOSPITAL, INC.,	:	
et al.,	:	
	:	
Defendants.	:	

This matter is before the Court on the Magistrate Judge's January 10, 2011 Order (doc. 34) denying Plaintiff Vicki Kapp's Motion to Compel. For the reasons indicated herein, the Court AFFIRMS the Magistrate Judge's Order and REJECTS this matter as indicated below.

**I. Background**

Plaintiff, nurse Vicki Kapp, filed this employment-based discrimination case on December 31, 2009 (doc. 1). Defendant, The Jewish Hospital, contends that Plaintiff was terminated because she disregarded an order not to administer a diabetic medication, specifically D50, to a diabetic patient or did so in the absence of Dr. Carpenter's order (Id.). Plaintiff asserts that Defendant had alternative motives for Plaintiff's termination, including Plaintiff's age, perceived disability, and Plaintiff's request for FMLA leave (Id.). Accordingly, Plaintiff wishes to ascertain, through the discovery process, whether other similarly situated

nurses, were treated in a like manner (doc. 27). Specifically, Plaintiff seeks access to non-party patient records in an attempt to discern if other nurses participated in essentially the same conduct for which Defendant terminated Plaintiff, but were not themselves terminated (Id.).

On September 16, 2010, in reply to Plaintiff's request for such non-party patient records, Magistrate Judge Hogan, who was presiding over this matter at the time, ordered Plaintiff to depose Dr. Carpenter before Plaintiff make or complete any attempt to discover non-party patient records in order to efficiently reduce the number of records that would be necessary (doc. 23). At that time, the Court viewed the information that may be gathered from the non-party patient records as relevant and not unduly burdensome, if for a reasonable time period (Id.). However, the Court did not decide whether the records were privileged, thus not discoverable (Id.). Additionally, the Court ordered that the matter was to be fully briefed if the parties could not come to an agreement on the privilege question (Id.).

Approximately two months later, on November 9, 2010, Plaintiff's counsel deposed Dr. Carpenter (doc. 30), during which counsel failed to narrow down the number of non-party patient records that would be necessary to effectively conduct Plaintiff's claim (doc. 34). Subsequently, Plaintiff filed a Motion to Compel (doc. 27), asking the Court to require Defendant to provide the

non-party patient records of Dr. Carpenter for the preceding two years prior to Plaintiff's termination.

In such motion, Plaintiff asserted that the non-party patient records are not privileged and thus are discoverable pursuant to Richards v. Kerlakian, 162 Ohio. App. 3d 823 (Ohio Ct. App., 2005). In reply, Defendants filed a Memorandum in Opposition to Plaintiff's Motion to Compel (doc. 29), opposing Plaintiff's requested disclosure of non-party patient records arguing that the records are privileged and thus not discoverable according to Roe v. Planned Parenthood, 122 Ohio St. 3d 399 (2009).

## **II. The Magistrate Judge's Order (doc. 34)**

The Magistrate Judge denied Plaintiff's Motion to Compel, basing her decision on Ohio state law and public policy (doc. 34). The Magistrate Judge stated that generally patients' medical records are confidential and not subject to disclosure. Hageman v. Southwest Gen. Health Ctr., 119 Ohio St. 185, 893 N.E.2d 153 (2008).

Moreover, the Judge noted that the Ohio legislature has provided that non-party patient records fall under the physician-patient privilege. Ohio Rev. Code § 2317.02(B)(1). The physician-patient privilege is located in the same statute as attorney-client privilege which protects physician-patient communications and attorney-client communications from disclosure in discovery during litigation (Id.). With respect to physician-patient

communications, the Magistrate Judge noted the term "communication," as it is used in the statute, is sufficiently broad to include hospital records and any confidential information gathered during treatment at a hospital. Turk v. Oiler, Case No. 09-CV-381, 2010 WL 3211689, \*16-17 (N.D. Ohio 2010).

Beyond this, the Magistrate Judge recognized that the Ohio Supreme Court has held that "[i]n the absence of prior authorization, a physician . . . is privileged to disclose otherwise confidential medical information in those special situations where disclosure is made in accordance with a statutory mandate or common-law duty, or where disclosure is necessary to protect or further a countervailing interest which outweighs the patient's interest in confidentiality." Biddle v. Warren General Hosp., 86 Ohio St. 2d 395, 1999 Ohio 115, 715 N.E.2d 518 (Ohio 1999). In Biddle, the Court reasoned that "there may be special situations where the interests of the patient will justify the creation of a privilege to disclose," but generally "it is for the patient - not some medical practitioner, lawyer, or court - to determine what the patient's interest are with regard to personal confidential medical information." Id. The Biddle Court held that a "third party can be held liable for inducing the unauthorized, unprivileged disclosure of non-public medical information that a physician or hospital has learned within a physician-patient relationship." Id.

The Magistrate Judge further found that Plaintiff erroneously relied upon Richards by asserting that some Ohio courts, in following Biddle, have permitted the discovery of otherwise confidential information to further a countervailing interest where the non-party patient's identity is sufficiently protected by redaction. See Richards, 162 Ohio App. 3d 823, 2005 Ohio 44124. However, where a non-party patient's anonymity and privacy cannot be preserved, courts have found that disclosure of that person's medical information is inappropriate. See Grove, 844 N.E.2d.

The Magistrate Judge agreed with Defendant's assertion that Plaintiff's reliance on Richards is misplaced because the Richards holding was recently invalidated by Roe (doc. 34). In Roe, the Supreme Court of Ohio determined that the balancing test in Biddle "did not create a litigant's right to discover the confidential medical records of non-parties in a private lawsuit. Roe at 408-409. Rather, any such exception to the physician-patient privilege is a matter for the General Assembly to address." Id. The Roe Court held that regardless of the reason for the discovery request or the need for information, the physician-patient privilege protects non-party confidential medical information from discovery in litigation. Id. The Northern District of Ohio agreed and recognized, citing Roe, that "Ohio courts have declined to create public policy exceptions to

privilege statutes." Turk at 16-17.

In addition to basing her decision on Ohio state law, the Magistrate Judge utilized public policy when denying Plaintiff's Motion to Compel. Defendant asserted, and the Court agreed, that hospital patients expect their records to remain confidential; such patient expectations are not only reasonable, but are the law (doc. 34). The need for a fair trial and the need for confidentiality in medical records are both important interests to protect (Id.). In fact, it is widely recognized that "individuals should be encouraged to seek treatment for medical or psychological conditions, and privacy is often essential to effective treatment." Hageman, 893 N.E.2d at 157. Maintaining confidentiality with respect to medical treatment is a significant interest and "[I]f the right to confidentiality is to mean anything, an individual must be able to direct the disclosure of his or her own private information." Id. The Judge adopted the Biddle Court's ruling that it is generally for the patient to decide what his interests are - not a physician, lawyer, or the court. 715 N.E.2d at 528.

In this case, the Magistrate Judge found if the Court were to allow Plaintiff to examine non-party patient records, the Court would be doing so without giving such patients proper notice of Plaintiff's request (doc. 34). As such, the Magistrate Judge opined such patients would not have a chance to file a motion to quash Plaintiff's request based on physician-patient privilege

(Id.). The Magistrate Judge noted that while it may be more efficient for Plaintiff to be allowed to obtain non-party patient medical records to determine whether other patients of Dr. Carpenter have been given D50 by other nurses without a specific order, Plaintiff's interests do not outweigh the non-patient parties' right to confidentiality (Id.).

In summary, the Magistrate Judge held that in light of Roe, Plaintiff cannot rely on Richards to obtain the non-party patients' medical records, even with redactions, because such documents remain privileged communications between Dr. Carpenter and his patients and, according to Ohio law, shall not be disclosed (Id.). The Judge further found that the Court cannot rewrite unambiguous statutory scheme on policy grounds; if the legislature wants to create such an exception to the physician-patient privilege, the legislature, and not the courts, can do so (Id.). The Judge refused to extend the "countervailing interest" doctrine to a case involving the broad disclosure of medical records for a two-year time period without any attempt by Plaintiff to narrow the request for confidential information to the scope of her employment-based discrimination claim (Id.). Thus, relying on state law and public policy, the Magistrate Judge denied Plaintiff's Motion to Compel.

### **III. Parties' Arguments**

#### **A. Plaintiff's Objection (doc. 37)**

Plaintiff has objected to the Magistrate Judge's Order, (doc. 37), arguing that the Magistrate Judge made three errors when denying Plaintiff's motion (Id.). First, Plaintiff argues that the Magistrate Judge erred in finding, as a matter of fact, that Plaintiff failed to narrow down the number of patient records that would be needed to effectively pursue Plaintiff's claim (Id.). Rather, Plaintiff asserts that counsel cannot effectively narrow down the number of patient records through Dr. Carpenter's deposition or any other means, unless Plaintiff can review the patient records or obtain information from the hospital as to the number of patients that Dr. Carpenter saw that were diabetic and also reported to Plaintiff's supervisor (Id.). Plaintiff, however, does concede that she would shorten the time-period if the Court believed that two years was too long of a period and thus burdensome (Id.).

Plaintiff then argues that the Magistrate Judge further erred in finding that the non-party patients' right to confidentiality outweighs Plaintiff's interest in reviewing medical records (Id.). Plaintiff submits that the confidential nature of the medical records would not be publically disclosed; rather, the records would disclosed to a Court-appointed "person"<sup>1</sup> who would review the records to determine whether the records were relevant

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<sup>1</sup>Plaintiff appears to be moving for the appointment of a special master pursuant to Fed. R. Civ. P. 53(c).

(Id.). Plaintiff claims that because her request is limited, her request supersedes the privilege cited by the Ohio Supreme Court in Roe (Id.).

Last of all, Plaintiff asserts that the Magistrate Judge erred when she relied upon the Roe holding (Id.). Plaintiff maintains that Roe is distinguishable from this case because the Roe plaintiff requested ten years of medical records for juvenile patients who had sought counseling regarding pregnancy issues at Planned Parenthood (Id.). Plaintiff argues that she has confined her request to whether Dr. Carpenter gave other nurses specific orders that D-50 not be used on all other patients of Dr. Carpenter who were cared for by nurses and supervised by Plaintiff's supervisor (Id.). Thus, Plaintiff declares that her request does not fall under Roe, because her requests are limited to an in-camera document review and inspection by a Court-appointed person who would only inform the Court if there was relevant evidence regarding the Plaintiff's employment-discrimination claim (Id.).

**B. Defendant's Response to Plaintiff's Objection (doc. 38)**

In reply to Plaintiff's Objection, Defendant maintains that the Magistrate Judge's Order is correct and should be upheld (doc. 38). First, Defendant reiterates its argument that non-party patient medical records are privileged and confidential because (1) discovery rules prohibit the disclosure of non-party privileged, medical records of hospital patients; (2) the Ohio legislature has

specifically provided that patient records are privileged; (3) the Ohio Supreme Court, in Roe, held that even the redaction of privileged medical records does not allow the discovery of such documents (Id.). Defendant underscores the fact that nothing that the Ohio Supreme Court held in its Roe decision created, defined, or altered the physician-patient privilege (Id.).

Second, Defendant argues that Plaintiff has numerous opportunities to narrow the scope of her patient records request. (Id.). For example, Plaintiff deposed Dr. Carpenter and Plaintiff's supervisor and in doing so, had the opportunity to narrow the pool of patients' medical records (Id.). At the time, Dr. Carpenter testified that he was not aware of any time a nurse forged his signature on a physician's order (Id.). Plaintiff failed to depose any other nurses or supervisors in Plaintiff's unit who had also worked with Dr. Carpenter's patients (Id.). Defendant argues that through such depositions, Plaintiff could have discovered whether any comparator employees exist without requiring the disclosure of confidential patient records (Id.).

Defendant further argues that the Judge's Order must be upheld because the Plaintiff's request, even if the records were not privileged under the law, are too burdensome in nature and would thus require the Court, in any event, to overrule Plaintiff's Objections to the Magistrate Judge's Order (Id.).

**C. Plaintiff's Reply Memorandum (doc. 39)**

In Plaintiff's Reply Memorandum, Plaintiff argues that Defendant's position is misplaced (doc. 39). First, Plaintiff asserts that Plaintiff does not seek to violate the discovery rules which prohibit the disclosure of privileged medical records of all hospital patients (Id.). Rather, Plaintiff maintains that an in-camera inspection of documents by the Court does not violate discovery rules (Id.). The only information sought, Plaintiff argues, is not privileged information because it does not invade patients' medical information (Id.).

Plaintiff also argues that Defendant's argument that Plaintiff had other opportunities to narrow the scope of the patient records request is irrelevant and not probative (Id.). Plaintiff emphasizes that the best evidence is the information in patient files and that the litigation cost to depose the other nurses and supervisors would be prohibitive and not in either party's best interest (Id.). Plaintiff maintains that she is entitled to obtain information of similarly-situated employees who treated patients by looking at the medical records (Id.).

#### **IV. Discussion**

##### **A. Standard of Review**

When a Magistrate Judge issues an order regarding a non-dispositive pretrial matter, a party may issue an objection to the magistrate judge's order within fourteen days after being served with a copy of that order. Fed. R. Civ. P. 72(a). The district

judge to whom the case is assigned shall consider such objections and shall modify or set aside any portion of the magistrate's order that is found to be clearly erroneous or is contrary to law. Fed. R. Civ. P. 72(a).

**B. Analysis**

After carefully considering the arguments made by both sides, the Court concludes, as did the Magistrate Judge, that the Plaintiff's Motion to Compel should be denied. The Court finds that the Magistrate Judge's decision is correct and should be upheld despite the fact that the Magistrate relied on state law. Although state privilege law does not control this Court, there are abundant and adequate federal principals that protect patient confidentiality. In short, the non-party patients' right to confidentiality outweighs the Plaintiff's proffered justification for accessing the non-party patient medical records.

Plaintiff contends that an in-camera inspection of said records by a Court-appointee does not violate physician-patient confidentiality because Plaintiff does not seek the discovery of medical history and only requests information proving whether other nurses administered medication without Dr. Carpenter's orders, not the medication itself (doc. 39). Plaintiff further contends that the best evidence is in the information in the patients' files and the litigation cost to depose every nurse who worked with Dr. Carpenter, administers drugs, and reported to Plaintiff's

supervisor would be prohibitive and not in the best interest of either party (Id.).

The Court disagrees. First, the Federal Rules of Evidence provide one rule regarding privilege in the federal courts. Federal Rule of Evidence 501 provides in pertinent part:

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof 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 . . .

Fed. R. Evid. 501 (2011). Thus, in federal question cases, state privilege law does not apply. Lemasters v. The Christ Hospital, 791 F. Supp 188; 1991 U.S. Dist. LEXIS 19195 (1991). However, because Rule 501 refers to "reason and experience," courts in federal question cases may choose to apply state privilege law by analogy or as a matter of comity (Id.). The presence of pendent state claims is irrelevant in determining whether the court should adopt the state privilege law (Id.). The determination with respect to the federal claims controls discovery for the entire action. Memorial Hospital for McHenry County v. Shadur, 664 F.2d 1058 (7<sup>th</sup> Cir. 1981).

The Court also recognizes the general federal policy towards patients' right to confidentiality as found in the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"). P.L.104-101. The Privacy Rules found in HIPAA grant federal

protections for one's personal health information held by entities covered by the Act and gives patients numerous rights regarding that information. Additionally, HIPAA includes rules that specify a series of administrative, physical, and technical safeguards for covered entities to utilize to ensure the confidentiality, integrity, and availability of electronic protected health information.

Additionally, Plaintiff does indeed have other less invasive options to discover whether similarly-situated nurses administered drugs without an order from Dr. Carpenter and were not terminated. For example, Plaintiff can narrow the scope through less intrusive means by deposing any of the nurses in her unit who have worked with Dr. Carpenter's patients, the hospital's Human Resources Director, and other nurse supervisors or through a review of personnel files.

## **V. Conclusion**

For the reasons set forth above, the Magistrate Judge's Order denying Plaintiff's Motion to Compel is hereby affirmed. The Court concludes that the Magistrate Judge came to the right conclusion regarding Plaintiff's Motion to Compel notwithstanding her reliance on state law. Accordingly, the Court DENIES Plaintiff's Objection and AFFIRMS the Magistrate Judge's Order denying Plaintiff's Motion to Compel.

The Court further extends discovery in this matter until

October 1, 2011 and the dispositive motion deadline to November 1, 2011. The Court will reset the dates for the final pre-trial conference and trial if necessary, in its forthcoming order on any dispositive motions.

SO ORDERED.

Date: July 7, 2011

/s/ S. Arthur Spiegel  
S. Arthur Spiegel  
United States Senior District Judge