



Issue Date: 12 September 2005

CASE NO: 2005-TSC-00001, 2005-ERA-00015

In the Matter of:

Maurice Rosen,
Complainant,

v.

Fluor Hanford, Inc.,
Respondents.

Order Denying Motion to Quash Subpoenas for Medical Records and for Protective Order

The Complainant moved to quash subpoenas the Employer prepared but has not yet served that require health care providers to disclose records of Complainant's medical treatment. Both parties filed written arguments. At the oral argument of the motion to quash, the Employer limited the request to Complainant's treatment records from Jan. 1, 2004 forward. Without abandoning his relevance and privilege objections, the Complainant acknowledged the narrowed time frame is reasonable.

The Employer also served a request to produce on the Complainant under 29 C.F.R. § 18.19 (2004) for the same records. The Complainant orally raised the same objections to the production request as he had to the subpoenas. I treat the motion to quash also as an objection and an application for a protective order under 29 C.F.R. § 18.15. The discoverability of the records can be resolved without involving the third-party health care providers.

The Complainant enjoys substantial influence over the release of his medical records under regulations the Department of Health and Human Services published to implement the Health Insurance Portability and Accountability Act of 1996, commonly known as HIPAA. The regulation at 45 CFR § 164.512(e)(1)(ii) and (iii) (2004) permits the disclosure of private health information in administrative proceedings "in response to a subpoena, discovery request, or other lawful process" when the patient "has been given notice of the request" and the opportunity to "raise an objection to the court or administrative tribunal." The records are subject to a measure of "control" by the Complainant, even if they are not in his possession. *See* 29 C.F.R. § 18.19(a)(1).

The statutes that create these whistleblower employment discrimination claims authorize compensatory damages for an employee's emotional pain and suffering, mental anguish, embarrassment, and humiliation. *See*, the Toxic Substances Control Act, 15 U.S.C.A.

§ 2622(b)(2)(B)(iii) (West 1998) and the Energy Reorganization Act, 42 U.S.C.A. § 5851(b)(2)(B)(ii) (West 2003); *Gutierrez v. Regents of the University of California*, ARB No. 99-116, ALJ No. 1998-ERA-19, electronic slip op. at 9 (ARB Nov. 13, 2002). Medical records are relevant to the claims if they have any tendency to make the existence of any fact that is of consequence in the proceeding more or less probable than it would be without the records. *Cf.*, 29 C.F.R. § 18.402 (describing “relevant evidence” in this manner). The records might show a range of things, for example that the Complainant:

- a) suffered significant emotional distress that has required extensive and expensive care that justifies substantial damages,
- b) suffered mild distress that has required little if any cognitive therapy or medication and merits little recompense,
- c) had a diagnosis of emotional pathology that pre-dated the events at work and never worsened, which would cast doubt on whether Employer caused any emotional damages, or
- d) never complained of significant emotional distress, or received treatment for it.

Individual record entries may not bear on the damage claim, but it may well be necessary to review the all the records to assess the significance of the constituent parts. The records are discoverable unless some legal impediment to their disclosure exists.

Privilege is a bar to discovery. Discovery extends to “any matter, *not privileged*, which is relevant to the subject matter involved in the proceeding,” 29 C.F.R. § 18.14(a) (emphasis supplied). Well-established privileges, such as the attorney-client privilege or litigation work-product privilege routinely are honored. The federal Rules of Decisions Act [28 U.S.C.A. § 1652 (West 1994)], Rule 501 of the Federal Rules of Evidence and 29 C.F.R. § 18.501 (2004) apply state evidentiary privileges whenever state law sets the rule of decision in a proceeding. These employment protection claims arise under federal statutes, not the laws of any state,¹ so the federal law of privilege controls. *In re Sealed Case*, 381 F.3d 1205, 1212 (D.C. Cir. 2004); *Northwestern Memorial Hosp. v Ashcroft*, 362 F.3d 923, 926 (7th Cir. 2004) (“[E]videntiary privileges that are applicable to federal question suits are given not by state law but by federal law. . .”).

Procedural regulations of the Secretary of Labor eschew the application of “formal rules of evidence” to this adjudication. 29 C.F.R. § 24.6(e)(1). Neither the Federal Rules of Evidence nor the similar (though not identical) rules of evidence published at 29 C.F.R. Part 18 subpart B² may serve as yardsticks to determine what will become part of the “exclusive record for decision” in this case under the applicable portions of the Administrative Procedures Act, 5

¹ The Secretary of Labor has no jurisdiction to adjudicate state statutory or common law claims that arise from the same facts that make out a federal cause of action, but a federal district court does.

² Those rules may guide situations they do not control, but the creation of privileges is more than guidance.

U.S.C.A. § 556(e) and § 557.³ The inapplicability of evidence codes affects the privilege analysis, for the same rules of privilege generally apply to discovery as apply at the trial. 8 Charles Alan Wright et al., FEDERAL PRACTICE AND PROCEDURE § 2016 at 221.

Federal common law recognizes no doctor-patient privilege. *Whalen v. Roe*, 429 U.S. 589, 602 & n. 28 (1977); *Northwestern Memorial Hosp.*, *supra*, 362 F.3d at 926. Many states (including the State of Washington, where the events giving rise to this claim took place) have adopted some statutory formulation of that privilege, but Congress has not. The scope of discovery and admissibility of trial evidence are nationally uniform in whistleblower adjudications. The location of the underlying events makes no difference to the discoverability or admissibility of proof. Without the protection of any federal privilege, the medical records must be produced.

The federal courts do recognize a psychotherapist-patient privilege that encompasses disclosures patients make in the course of treatment to licensed social workers, psychiatrists and psychologists. *Jaffee v. Redmond*, 518 U.S. 1, 17 (1996). The Supreme Court accepted the psychotherapy privilege as an interpretation of common law principles “in the light of reason and experience,” as Rule 501 of the Federal Rules of Evidence authorized the courts to do. *Jaffee*, 518 U.S. at 8. Similar principles would bear on this decision had the Secretary made the rules at 29 C.F.R. Part 18 subpart B applicable. *See*, the Reporter’s Note to 29 C.F.R. § 18.501; *but see*, *Northwestern Memorial Hosp. v Ashcroft*, *supra*, 362 F.3d at 926-927 (declining to create a physician-patient privilege under Rule 501 of the Evidence Code in the context of a motion to quash subpoenas the federal government had issued for the production of records of hospital patients in Chicago, for use at a trial pending in the Southern District of New York).

Complainant must produce his medical records for the period from January 1, 2004 to date to the Employer within 30 days from the date this order is entered. The subpoenas the Employer requested need not be served on the third-party health care providers, as it will receive the records under its production request.

So Ordered.

A

William Dorsey
Administrative Law Judge

³ Both statutes require that the Secretary’s final order “shall be made on the record after notice and opportunity for . . . hearing. 15 U.S.C.A. § 2622(b)(2)(A) & 42 U.S.C.A. § 5851(b)(2)(A).