

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

ADAPT OF PHILADELPHIA, et al. : CIVIL ACTION
: :
v. : :
: :
PHILADELPHIA HOUSING AUTHORITY, :
et al. : NO. 98-4609

MEMORANDUM

Bartle, J.

November 24, 2004

This current discovery dispute centers on the efforts of plaintiffs¹ to obtain certain medical information about residents of accessible scattered-site public housing for the mobility impaired in the City of Philadelphia.

Plaintiffs have served four interrogatories and six requests for production on defendants, the Philadelphia Housing Authority and Carl Greene (collectively "PHA"). Defendants have served timely objections which are based on a number of grounds including privacy concerns. Before the court is the motion for a protective order by intervenor Resident Advisory Board Inc. ("RAB") under Rule 26(c) of the Federal Rules of Civil

1. Plaintiffs are ADAPT of Philadelphia ("ADAPT"), Liberty Resources, Inc. ("LRI"), Marie Watson, Marshall Watson, and Diane Hughes. As described in the settlement agreement reached among the parties, LRI "is a federally funded social service and advocacy non-profit corporation that is mandated, pursuant to the Rehabilitation Act of 1973, 29 U.S.C. § 796f-4, to provide services and 'systems advocacy' for people with disabilities," and ADAPT "is an organization that advocates on behalf of individuals with disabilities." Settlement Agreement and Release at 1-2.

Procedure.² The gravamen of the motion seeks to prevent the disclosure sought by plaintiffs of the medical information in question, again on privacy grounds. Plaintiffs, on the other hand, have moved under Rule 37 of the Federal Rules of Civil Procedure³ to compel defendants to answer the interrogatories and produce certain documents in response to the requests for production. While the discovery dispute covers subjects beyond the medical information of these public housing residents, defendants' objections and the motion for a protective order focus on this issue.

This lawsuit has had a long and contentious history. Plaintiffs instituted this action some six years ago against PHA and its director Carl Greene for violation of federal law for failure to provide a sufficient number of public scattered-site housing units accessible to persons with mobility impairments. Plaintiffs sought declaratory and injunctive relief. After a trial and while the matter was on appeal, the parties were finally able to reach a settlement which was approved by the Department of Housing and Urban Development ("HUD") and then by this court in May, 2002.

2. Rule 26(c) provides in relevant part: "Upon motion by a party or by the person from whom discovery is sought, ... the court may make an order which justice requires to protect a party or person from annoyance, embarrassment, oppression or undue burden or expense"

3. Rule 37(a) provides in relevant part, "A party ... may apply for an order compelling disclosure or discovery"

Under the settlement agreement, PHA was required to create a certain number of accessible units to be dispersed throughout the City of Philadelphia and made available in phases - half by December 31, 2003, and half by December 31, 2005. These units were required "in addition to units PHA is otherwise required to make accessible in accordance with 24 C.F.R. Part 8 (including its 5% accessibility requirements)." Settlement Agreement and Release § B. The settlement agreement provides that "PHA shall take reasonable non-discriminatory steps to maximize the utilization of such units by eligible households that include an individual whose disability requires the accessibility features of the particular unit, in accordance with 24 C.F.R. § 8.27."⁴ Id. at § C. The parties agreed to the

4. 24 C.F.R. § 8.27 provides:

(a) Owners and managers of multifamily housing projects having accessible units shall adopt suitable means to assure that information regarding the availability of accessible units reaches eligible individuals with handicaps, and shall take reasonable nondiscriminatory steps to maximize the utilization of such units by eligible individuals whose disability requires the accessibility features of the particular unit. To this end, when an accessible unit becomes vacant, the owner or manager before offering such units to a non-handicapped applicant shall offer such unit:

(1) First, to a current occupant of another unit of the same project, or comparable projects under common control, having handicaps requiring the accessibility features of the vacant unit and occupying a unit not having such features, or, if no such occupant exists, then

(2) Second, to an eligible qualified applicant on the waiting list having a handicap requiring the accessibility features of the vacant unit.

(b) When offering an accessible unit to an applicant not having handicaps requiring the accessibility

(continued...)

following dispute resolution mechanism: "[i]f the parties are not able to resolve any dispute, either party may seek judicial relief by motion submitted to the Court." Id. at § G.

There is presently no dispute concerning the number or location of scattered-site housing units which are suitable for the mobility impaired. Instead, plaintiffs contend that the defendants have violated the settlement agreement by leasing at least some of these special units to households which do not have a mobility impaired member and by allowing others to remain vacant.

Plaintiffs seek discovery from PHA concerning the medical and physical conditions of the disabled occupants of the 149 existing scattered-site units designed for the mobility impaired which are provided for in the settlement agreement. Specifically, plaintiffs have requested copies of the verifications of mobility impairment which are completed and signed by a physician. PHA, we are told, requires these verifications before such persons and their families may live in the accessible units. The verification form consists of a series of "yes" or "no" questions asking whether the individual seeking public housing needs certain accessibility features for the mobility impaired, such as wider doors, lowered sinks and

4. (...continued)

features of the unit, the owner or manager may require the applicant to agree (and may incorporate this agreement in the lease) to move to a non-accessible unit when available.

countertops, and grab bars. Question No. 5 of the verification form also asks the physician the following:

Please provide further information that would assist us to determine the accessible housing features and/or accommodations in housing required by the applicant (i.e., features to accommodate devices and equipment used by the applicant, particular needs not addressed by the features listed above, etc.). We do not require details or information about the nature or extent of the disability.

Verification at 3.

In United States v. Westinghouse Electric Corporation, 638 F.2d 570 (3d Cir. 1980), our Court of Appeals had occasion to consider the balance between privacy interests of individuals in their medical history and medical records against the public interest in access to such information. There, toxic working conditions were thought to have exposed certain workers to dangerous chemicals. Agents of the National Institute for Occupational Safety and Health ("NIOSH") requested of Westinghouse the medical records of the potentially affected employees, in accordance with the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651, et seq. Westinghouse refused to provide the records without the employees' written consent and a confidentiality agreement. NIOSH filed suit in federal court to enforce a subpoena duces tecum to Westinghouse's custodian of records. In response, Westinghouse challenged the authority of NIOSH to seek its employees' medical records and the relevance of the documents requested.

The court considered a number of factors in weighing the societal interest against the employees' privacy concerns:

- (1) the type of record requested;
- (2) the information it does or might contain;
- (3) the potential for harm in any subsequent nonconsensual disclosure;
- (4) the injury from disclosure to the relationship in which the record was generated;
- (5) the adequacy of safeguards to prevent unauthorized disclosure;
- (6) the degree of need for access; and
- (7) whether there is an express statutory mandate, articulated public policy, or other recognizable public interest militating toward access.

Id. at 578. It granted NIOSH the right to obtain the records subject to notice to the individual employees and an opportunity to be heard.

PHA opposes the production of the medical verifications and related information as does the intervenor which represents a large number of the residents whose records are being sought. Defendants and the intervenor contend that any relevancy is outweighed by the privacy concerns of those currently occupying the scattered-site housing. The intervenor has filed identical "objections" from occupants of forty of these scattered-site units to "the release of any of my medical records, disability verification[] reports from my physicians and any other personal and private records by PHA to plaintiff or counsel[] for plaintiff My records contain information that is highly sensitive to me and I do not waive my rights of privacy or confidentiality of my medical records." Objection to Release of

Private Medical Records Assertion of Privacy Claim, Ex. A to Decl. of Arlene O. Freiman, Nov. 8, 2004. We will assume for present purposes that the remaining residents who have not filed declarations have similar objections.

We have considered the seven factors set forth in Westinghouse. Discovery of the medical or physical condition of the occupants of all 149 existing scattered-site housing units described in the settlement agreement is clearly relevant to the claims of plaintiffs in this enforcement action. See Fed. R. Civ. P. 26(b)(1). Indeed, it is critical to the question whether defendants are violating the settlement agreement over which the court has maintained jurisdiction. Without this information, there is no way for the plaintiffs or the court to determine whether the mobility impaired are receiving that to which they are entitled. Constructing or making available scattered-site units for the mobility handicapped and then not placing such handicapped applicants in the units would clearly violate the settlement agreement. PHA is not only to provide scattered-site units but "shall take reasonable non-discriminatory steps to maximize the utilization of such units by eligible households ... in accordance with 24 C.F.R. § 8.27." (Emphasis added). See also Settlement agreement § C. Without the production of the information plaintiffs seek, PHA could fill all these units with able-bodied individuals in violation of the agreement, and the plaintiffs would be helpless in calling PHA to account. There can be no doubt that there is a strong societal interest in the

enforcement of this agreement, especially when it has the imprimatur not only of HUD but also of the court.

Of course, we also recognize the privacy interests of those who reside in the housing units in question. Medical information, as the residents argue, can be highly sensitive and is generally worthy of protection from public dissemination. Nonetheless, privacy must yield in this instance. The persons leasing these units, supplied at taxpayer expense, may do so only because there is a disabled individual in the household. As a condition precedent to residing in these units, the occupants had first to provide qualifying medical information to the PHA, their landlord. If no member of a household has a disability or the disability ceases, the household has no legitimate claim to such housing.⁵ If the residents or their physicians have dissembled about their disabilities, they should be moved elsewhere or evicted. Those living in the units simply cannot reasonably expect to avoid any and all scrutiny of their health information once they have gained occupancy.

The PHA lease every tenant signs recognizes this reality. It provides for an annual recertification of eligibility to occupy public housing. It states in relevant part:

5. While it is true that able-bodied households may live in these special units if there are no mobility-impaired applicants, the evidence in the record in this case would seem to make such a scenario highly unlikely.

Annual Re-certifications: Once a year, the Tenant shall report to the Management office for the Annual Recertification Interview. Upon request, Tenant will furnish information and certifications necessary for Management to determine eligibility, Rent, and appropriations of dwelling size in accordance with the "Policy Governing Admissions and Continued Occupancy" ("Occupancy Policy") posted in the Management Office. The Admissions and Continued Occupancy Policy contains the eligibility requirements for admission to public housing and the requirements for continued occupancy. The Occupancy Policy is incorporated herein by reference.

Lease Agreement ¶ 7 (emphasis added), Ex. E to Response of defendants, the Philadelphia Housing Authority and Carl Greene, to plaintiffs' consolidated response opposing RAB's motion for protective order and motion to compel discovery from PHA.

A disabled tenant must also sign the following lease rider, which states:

2. The undersigned tenant requires a unit accessible to persons with a disability; and

3. If during the tenancy the tenant no longer needs the accessibility features of the premises described in the Dwelling Lease, the tenant understands that PHA will require the tenant to move to a non-accessible unit, at no cost to the tenant, when the following conditions arise:

a) A disabled person needs the accessibility features of the premises described in the Dwelling Lease; and

b) Another unit of appropriate size is available for the undersigned tenant's family.

Thus, the tenants residing in public housing units for the disabled must be prepared to make available to PHA on a regular

basis information concerning their eligibility for those units, including information about their medical and physical conditions. Although PHA has a privacy policy pertaining to the personal information of its tenants, it makes clear it yields where "otherwise provided by law." PHA Policy Governing Admissions and Continued Occupancy for the HUD-Aided Low Rent Public Housing Program, at 8.

We cannot forget that plaintiffs are seeking to enforce the rights of the mobility impaired. In determining where the truth lies, it will be necessary to obtain the medical verifications of the need for disability accommodation of residents of units made accessible under the settlement agreement. Thus, relevancy outweighs any annoyance, embarrassment, or oppression to the residents of PHA's scattered-site housing for the mobility impaired. See Fed. R. Civ. P. 26(c). Accordingly, we will compel PHA to produce to counsel for plaintiffs and for the intervenor the medical verifications in its possession for persons in all 149 scattered-site housing units. See Fed. R. Civ. P. 37. Consistent with the analysis in Westinghouse and our ability to enter a discovery order "on such terms and conditions as are just," we will protect as much as possible the privacy of the persons involved. See Fed. R. Civ. P. 26(c).

PHA must delete for the present the names of the individual residents and supply only their initials. The specific unit in which the person resides must be identified

together with the date the person began (and ended) his or her residency. We will also require for now that counsel for plaintiffs and counsel for the intervenor maintain the confidentiality of these records and not disclose them to anyone except their outside experts, who must agree in advance and in writing to keep the information in confidence pending further order of court. As mentioned above, as well as asking specific questions pertaining to what accommodations a resident would need, Question No. 5 of the verification form asks the physician for further information to assist PHA in determining the appropriate housing features and accommodations. See Verification, Question No. 5. PHA has advised us that some physicians' responses to Question 5 contain sensitive information, such as a person's HIV condition. See Decl. of Abbe F. Fletman, Nov. 20, 2004. For now, we will allow PHA to redact sensitive information concerning a person's medical diagnosis, history, or medication being taken. For further review of the court if need be, we will require the defendants to file under seal copies of both redacted and unredacted verifications.

Defendants also contend that certain documents are subject to the attorney-client privilege or attorney work product doctrine. None of the parties has focused on this issue in the briefs. Defendants may withhold such documents at this time but must identify them by author, recipient, persons receiving copies, date, number of pages, and the specific privilege or

privileges being claimed. Copies must be filed under seal with the court.

We have reviewed the remaining objections of the defendants and they are without merit.

Accordingly, we will grant in part and deny in part the motion of the intervenor RAB for a protective order and will grant in part and deny in part the motion of plaintiff to compel defendants to answer plaintiffs' Interrogatories, Nos. 1 through 4 and to produce for inspection the documents requested in its Requests, Nos. 1 through 6, as set forth herein and in the attached Order.

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ORDER

AND NOW, this 24th day of November, 2004, for the reasons set forth in the accompanying Memorandum, it is hereby ORDERED that:

(1) the motion of intervenor Resident Advisory Board, Inc. for protective order with respect to Interrogatory Nos. 1 through 4 and Requests for Production Nos. 1 through 6 of plaintiffs is GRANTED in part and DENIED in part;

(2) the motion of plaintiffs to compel discovery from defendants Philadelphia Housing Authority and Carl Greene (collectively "PHA") is GRANTED in part and DENIED in part;

(3) defendants must produce to counsel for plaintiffs and counsel for the intervenor the medical verifications for residents in the 149 existing scattered-site units designed for the mobility impaired which are provided for in the settlement agreement. The verifications produced shall have residents' names redacted and shall be identifiable by the resident's initials, unit address, and date residency commenced. PHA shall file under seal both original and redacted versions of what is

produced to counsel for plaintiffs and counsel for the intervenor. Additionally, PHA shall file under seal any documents not produced because they are subject to the attorney-client privilege or attorney work product doctrine;

(4) counsel for plaintiffs and counsel for the intervenor shall not disclose the information contained in the medical verifications to anyone other than their outside experts, who must agree in advance and in writing to keep the information in confidence pending further order of court; and

(5) defendants shall comply with this Order on or before December 3, 2004.

BY THE COURT:

/s/ Harvey Bartle III

J.