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

ROBERT CREELY	:	CIVIL ACTION
	:	
	:	
v.	:	
	:	NO. 04-CV-0679
	:	
GENESIS HEALTH VENTURES, INC., ET AL.	:	

SURRICK, J. **DECEMBER 17, 2004**

MEMORANDUM & ORDER

Presently before the Court is Defendant Genesis Health Ventures, Inc.'s Motion for Protective Order (Doc. No. 15). For the following reasons, Defendant's Motion will be denied.

I. Factual Background

This lawsuit arises as a result of a job interview when Plaintiff applied for employment with Defendant. (Doc. No. 1 ¶¶ 17-21.) Marvin Kirkland ("Kirkland"), Defendant's then-Director of Nursing, conducted the interview. (*Id*.) Plaintiff alleges that Kirkland told him that he was on a "do-not-hire" list. (*Id*. ¶ 20.) Plaintiff also claims that he complained to Defendant's corporate office. (Doc. No. 17 at 3.) Thereafter, Plaintiff received a letter from Scott Burk, Defendant's agent, explaining that he was eligible for rehire. (*Id*.; Doc. No.1 ¶ 25.) Plaintiff alleges that Kirkland, who is African-American, discriminated against Plaintiff because of his race (Caucasian). (Doc. No. 1 ¶ 1.)

Plaintiff alleges that Kirkland's employment was terminated by Defendant after Kirkland purportedly falsified a now-deceased patient's record in order to protect an African-American employee. (Doc. No. 17 at 3.) Plaintiff seeks to examine the aforementioned record and depose

witnesses who may have information regarding the alleged falsification. Defendant requests this Protective Order because it claims that the patient record which Plaintiff seeks to examine, and the line of inquiry that Plaintiff wishes to pursue at deposition, violates the federal Health Insurance Portability and Accountability Act ("HIPAA") of 1996 and Pennsylvania law protecting the confidentiality of medical records.

II. Legal Standard

Federal Rule of Civil Procedure 26(c) provides the standard for protective orders. Rule 26(c) states:

> Upon motion by a party or by the person from whom discovery is sought, accompanied by a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action, and for good cause shown, the court . . . may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression or undue burden or expense, including one or more of the following:
>
> (1) that the disclosure or discovery not be had;
>
> (2) that the disclosure or discovery may be had only on specified times and conditions, including a designation of time or place;
>
> (3) that the discovery be had only by a method of discovery other than that selected by the party seeking discovery;
>
> (4) that certain matters not be inquired into, or that the scope of the disclosure or discovery be limited to certain matters;
>
> (5) that discovery be conducted with no one present except persons designated by the court;
>
> (6) that a deposition, after being sealed, be opened only by order of the court;
>
> (7) that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a designated way; and
>
> (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

Fed. R. Civ. P. 26(c).

"A party seeking a protective order over discovery materials must demonstrate that 'good cause exists' for the protection of that material." *Glenmede Trust Co. v. Thompson*, 56 F.3d 476, 483 (3d Cir. 1995) (citing Fed. R. Civ. P. 26(c); *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 786 (3d Cir. 1994)). "'Good cause' is established when it is specifically demonstrated that disclosure will cause a clearly defined and serious injury." *Id.* The Third Circuit recognizes "several factors, which are neither mandatory nor exhaustive, that may be considered in evaluating whether 'good cause exists.'" *Id.* Those factors are:

> 1) whether disclosure will violate any privacy interests;
> 2) whether the information is being sought for a legitimate purpose or for an improper purpose;
> 3) whether disclosure of the information will cause a party embarrassment;
> 4) whether confidentiality is being sought over information important to public health and safety;
> 5) whether the sharing of information among litigants will promote fairness and efficiency;
> 6) whether a party benefitting from the order of confidentiality is a public entity or official; and
> 7) whether the case involves issues important to the public.

Id.

III. Discussion

A. Release of Patient Records under HIPAA

Defendant seeks to prevent disclosure to Plaintiff of the record of a deceased patient. Defendant argues that it cannot produce the record because HIPAA renders the information confidential. (Doc. No. 15 at 7.) Recognizing "'the importance of the privacy of medical records,' Congress addressed the issue when it enacted HIPAA in 1996." *Nat'l Abortion Fed'n v. Ashcroft*, Civ. A. No. 04-55, 2004 WL 292079, at *3 (N.D. Ill.) (quoting *United States v.*

Sutherland, 143 F. Supp. 2d 609, 612 (W.D. Va. 2001)), *aff'd*, 362 F.3d 923 (7th Cir. 2004).[1] The statute establishes standards of privacy for covered entities with regard to disclosure of medical records. *Id.*

Plaintiff argues that HIPAA does not apply to deceased individuals. Defendant responds that HIPAA's regulations specifically provide "Standard: deceased individuals. A covered entity must comply with the requirements of this subpart with respect to the protected health information of a deceased individual." 45 C.F.R. § 164.502(f) (2004). Defendant is correct. The plain language of the regulation protects the privacy interests of deceased persons.

Nevertheless, HIPAA's regulations also permit the disclosure of non-party medical information "in the course of any judicial or administrative proceeding . . . in response to an order of the court." *Id*. § 164.512(e)(1)(i). The regulations limit the disclosure by requiring that the court order:

> [p]rohibit . . . the parties from using or disclosing the protected health information for any purpose other than the litigation and proceeding for which such information was requested [and] requires the return . . . or destruction of the protected health information (including all copies made) at the end of the litigation or proceeding.

Id. § 164.412(e)(1)(v). "In other words, HIPAA's regulations clearly allow [Defendant] to disclos[e] patient medical records, when ordered in judicial proceedings, subject to the above limitations." *Nat'l Abortion Fed'n*, 2004 WL 292079, at *2. This is true even if no notice is or can be provided to the nonparty patient. *United States ex rel. Stewart v. Louisiana Clinic*, Civ. A. No. 99-1767, 2002 WL 31819130, at *3 (E.D. La. Dec. 12, 2002). 45 C.F.R. § 164.512

[1]While HIPAA's regulations became effective on April 14, 2001, *see Nat'l Abortion Fed'n*, 2004 WL 292079, at *2 (citing 66 Fed. Reg. 12,434 (Feb. 26, 2001)), compliance by hospitals was not required until April 14, 2003. 45 C.F.R. § 164.534(a) (2004).

"allow a health care provider to disclose protected health information during judicial proceedings under certain circumstances without the written authorization of the patient or an opportunity for the patient to agree or object to the disclosure." *Id.* at *4. Section 164.512(e) provides:

> (1) Permitted disclosures: A covered entity may disclose protected health information in the course of any judicial or administrative proceeding:
> (i) in response to an order of a court or administrative tribunal, provided that the covered entity discloses only the protected health information expressly authorized by such order; or
> (ii) in response to a subpoena, discovery request, or other lawful process, that is not accompanied by an order of a court or administrative tribunal, if:
> (A) The covered entity receives satisfactory assurance . . . from the party seeking the information that reasonable efforts have been made by such party to ensure that the individual who is the subject of the protected health information that has been requested has ben given notice of the request; or
> (B) The covered entity receives satisfactory assurances as described in paragraph (e)(1)(iv) of this section, from the party seeking the information that reasonable efforts have been made by such party to seek a qualified protective order that meets the requirements of paragraph (e)(1)(v) of this section.

45 C.F.R. § 164.512(e)(1) (2004). Accordingly, we conclude that HIPAA does not prevent Defendant from disclosing the patient record in question after being provided with an appropriate court order.

B. Release of Records Under Pennsylvania Law

Defendant also asserts that Pennsylvania law prevents it from providing the patient record. Defendant argues that while HIPAA would arguably allow disclosure without non-party patient notice, Pennsylvania law requires such notice. (Doc. No. 15 at 8.) HIPAA's preemption provision provides that the regulations promulgated by the Secretary expressly "supersede any contrary provision of State law." 42 U.S.C. § 1320d-7(a)(1) (2000) (implemented by 45 C.F.R. §

160.203 (2004)). However, HIPAA does not preempt contrary state law if the state law is "more stringent" than the HIPAA requirements. 45 C.F.R. § 160.203(b) (2004). A state privacy law is "more stringent" than a HIPAA requirement if the state law "prohibits or restricts a use or disclosure in circumstances under which such use or disclosure otherwise would be permitted" under HIPAA. *Id.* § 160.202.

Defendant argues that Pennsylvania law governing disclosures of clinical records provides that "[i]nformation contained in the resident's records shall be privileged and confidential. Written consent of the resident, or of a designated responsible agent acting on the resident's behalf, is required for the release of information." (Doc. No. 15 at 8-9 (citing 28 Pa. Code § 211.5(b) (2004))). However, the Pennsylvania statute states:

> Disclosure may be made for purposes unrelated to such treatment or benefits only upon an order of a court of common pleas after application showing good cause therefor. In determining whether there is good cause for disclosure, the court shall weigh the need for the information sought to be disclosed against the possible harm of disclosure to the person to whom such information pertains, the physician-patient relationship, and to the treatment services, and may condition disclosure of the information upon any appropriate safeguards.

71 Pa. Cons. Stat. Ann. § 1690.108(b) (West 1990).[2] In determining whether good cause exists, we must "weigh the public interest and the need for disclosure against the injury to the patient, to physician-patient relationship, and to the treatment services." *O'Boyle v. Jensen*, 150 F.R.D. 519, 521 (M.D. Pa. 1993).

In the instant case, the patient is deceased. There will be little, if any, injury to the

[2]Although this statute "provides for disclosure only upon issuance of an order by a court of common pleas of Pennsylvania, that provision is not a bar to issuance of a valid order by this court. While this court is obviously not a Pennsylvania court, federal courts have been held, in other contexts, to have an equal right in matters properly before them to grant relief which state courts are authorized to provide." *O'Boyle v. Jensen*, 150 F.R.D. 519, 523 (M.D. Pa. 1993).

patient, the physician-patient relationship, or the treatment services. When weighed against the need for disclosure of a record with any references to identifying patient information redacted, we conclude that good cause does, in fact, exist for the disclosure by Defendant of the record in question.

C. Witness Depositions

Defendant argues that the depositions of Cindy Wilcox, Dana Kruzcyk, Dawn Ranochak, and Ann Sine should not be allowed because the subject of those depositions will be Kirkland's alleged falsification, which will require the release of confidential medical information. (Doc. No. 15 at 10.) Plaintiff argues that neither HIPAA nor Pennsylvania privacy law bars these witnesses from testifying about their observations of Kirkland and their reports to Carol McQuillan. (Doc. No. 17 at 12.) Plaintiff asserts that he will not seek any identifiable patient information and stresses that he seeks this testimony only to demonstrate that Kirkland allegedly was motivated by race in falsifying the record in question. (*Id*. at 13.) Clearly, Plaintiff should be permitted to depose these witnesses while keeping confidential the identity of the deceased patient.

IV. Conclusion

For these reasons, we conclude that Defendant shall provide Plaintiff with the medical record of the subject deceased patient. Plaintiff will also be permitted to depose Cindy Wilcox, Dana Kruzcyk, Dawn Ranochak, and Ann Sine.

An appropriate Order follows.

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

ROBERT CREELY	:	CIVIL ACTION
	:	
	:	
v.	:	
	:	NO. 04-CV-0679
	:	
GENESIS HEALTH VENTURES, INC., ET AL.	:	
	:	

ORDER

AND NOW, this 17th day of December, 2004, upon consideration of Defendant Genesis Health Ventures, Inc.'s Motion For Protective Order (Doc. No. 15, 04-CV-0679), and all papers filed in support thereof and in opposition thereto, it is ORDERED that Defendant's Motion is DENIED.

Plaintiff may obtain the medical record of the deceased patient at issue and may depose Cindy Wilcox, Dana Kruzcyk, Dawn Ranochak, and Ann Sine. All identifying information, such as the patient's name and social security number, shall be removed by Defendant. No mention of the patient's name may be made at any deposition or at trial in addressing the issue of the patient's redacted record.

All information produced must be kept confidential and used only for purposes of this litigation and must not be disclosed to anyone except parties to this litigation and the parties' counsel of record. The protected health information (including all copies made) shall be returned or destroyed at the end of the litigation in accordance with 45 C.F.R. § 164.412(e)(1)(v) (2004).

BY THE COURT:

_____
R. Barclay Surrick, Judge